Environmental Hearing Board

Adjudications and Opinions

1998

Volume III

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

1998

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1998.

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

ADJUDICATIONS

OPINIONS

1998 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

F.R.&S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 3, 1998

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants the Department's motion for summary judgment dismissing the permittee's claim of discriminatory enforcement in the assessment of a civil penalty. The permittee adduced no evidence to show that the Department intentionally discriminated against the permittee to defeat the Department's motion.

OPINION

This motion arises from an appeal filed by F.R.&S. d/b/a/ Pioneer Crossing Landfill (Permittee) filed on November 13, 1997, challenging an assessment of civil penalties by the Department of Environmental Protection. These penalties emanate from the operation of Pioneer Crossing Landfill, located in Exeter Township, Berks County. One issue raised in the Permittee's notice of appeal is that the penalty for failing to meet a deadline on a capping project at the privately

owned landfill is excessive because the Department has not assessed such large penalties on municipally owned landfills that have also missed capping deadlines.[1] (Notice of Appeal ¶ 4.R) In a motion for summary judgment the Department urges the Board to dismiss this charge of discriminatory enforcement because the Permittee has failed to adduce sufficient evidence to support this claim. We agree.

Our review of a motion for summary judgment is governed by the Pennsylvania Rules of Civil Procedure Nos. 1035.1-1035.5. 25 Pa. Code § 1021.73(b). We may grant summary judgment in favor of the moving party if the pleadings, depositions, answers to interrogatories, admissions, affidavits and expert reports, if any, show (1) that there is no genuine issue of material fact, or (2) the party who will bear the burden of proof at trial has not produced evidence to support facts essential to the cause of action or a defense. Pa. R.C.P. No. 1035.2.[2] The record must be viewed in light most favorable to nonmoving party, and all doubts as to existence of material fact must be resolved against moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995). However, once a motion for summary judgment has been properly supported, the burden is on the non-moving party to disclose evidence that is the basis for his argument resisting summary judgment. Pa. R.C.P. No. 1035.3.

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[1] For a more detailed discussion of the various penalties assessed in this case *see F.R.&S. Inc. v. DEP*, EHB Docket No. 97-247-MG (Opinion issued April 17, 1998).

[2] We note that the Permittee in this case failed to respond to the Department's motion in correspondingly numbered paragraphs which admit or deny each averment of the Department. Accordingly, the Department has moved to strike the Permittee's response. We could do so as a sanction against the Permittee for failing to follow the Board's rules of practice and procedure. *RJM Manufacturing, Inc. v. DEP,* EHB Docket No. 97-137-MR (Opinion issued May 13, 1998). However, because we can determine what factual and legal issues are disputed we will not do so, but admonish the Permittee that we may not be so lenient in the future. *Id.*

Both the Board and the courts of the Commonwealth have frequently addressed the issue of what must be proven in order to sustain a claim of unlawful discriminatory or selective enforcement. Often the question is addressed in the context of a claim that the equal protection clause of the United States or Pennsylvania Constitution has been violated.[3] This provision "prohibits differences in treatment of similarly situated persons based upon a constitutionally suspect standard (race or religion) or other classification lacking in rational justification." *Commonwealth v. Stinnett*, 514 A.2d 154 (Pa. Super. 1986). Not only are discriminatory laws prohibited, but also the discriminatory enforcement of laws which are not discriminatory on their face. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). However, it is not enough to sustain an equal protection claim to show that others have been treated differently or more leniently; it is necessary to show intentional and purposeful discrimination on the part of the administrative agency. *E.g., Barksy v. Department of Public Welfare*, 464 A.2d 590 (Pa. Cmwlth. 1983), *affirmed*, 475 A.2d 742 (Pa. 1984). The United States Supreme Court has held that a conscious exercise of selectivity in enforcement does not rise to the level of a constitutional violation. *Oyler v. Boles*, 368 U.S. 448 (1962). Rather,

> [t]o support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situation have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e. based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

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[3] The equal protection clause of the United States Constitution is found in the 14th amendment. In the Pennsylvania Constitution the equal protection provision is contained in Article I. Equal protection analysis under the Pennsylvania Constitution is the same as analysis under the United States Constitution. *James v. Southeastern Pennsylvania Transportation Authority*, 477 A.2d 1302 (Pa. 1984).

United States v. Torquato, 602 F.2d 564, 569 n. 8 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979): Reviewing the Department's motion and the Permittee's response it is clear that there is insufficient evidence to show that others similarly situation were treated differently and that the Department's prosecution of the Permittee was in bad faith.

The Department contends that although two municipal landfills were treated differently when they missed their capping deadlines, the Permittee cannot sustain its burden of proving that the Permittee was intentionally discriminated against by the Department because it is a privately owned landfill. In response the Permittee details how one municipal landfill missed its capping deadline by more than 1,000 days and was assessed no civil penalty. The second municipal landfill missed its capping deadline by 422 days but settled with the Department in a consent order for a penalty much lower than that assessed against the Permittee. The Permittee, a privately owned landfill, was 131 days late in completing its capping project and was assessed a civil penalty of $315,000.

We find that the fact that the Department proceeded differently in prosecuting two other landfills which happened to be municipally owned is insufficient to provide a basis for an claim of improper discriminatory enforcement. The Department has a great deal of discretion in its decision to enforce the laws within its jurisdiction. Decisions concerning who to prosecute involves balancing various factors at play at various facilities. Therefore there must be more proof of intentional discrimination beyond the mere fact that different facilities were treated differently.

The Board's decision in *Coward v. DER*, 1978 EHB 117, is instructive. In that case the appellant challenged an order of the Department that he cease operation of his landfill. In support of his equal protection claim the appellant argued that five other landfills were operating without solid waste permits and several other landfills were operating in violation of the Solid Waste

Management Act.[4] The Board held that the appellant had failed to sustain its burden of proving discrimination just because the Department had failed to prosecute the other landfills. Specifically, the fact of lax enforcement against others is not sufficient to prove discrimination and also the appellant failed to prove that the Department's policy of enforcement against the appellant was unjustified.

Similarly, in *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220, the appellant charged that the Department's order requiring it to conduct groundwater studies violated its equal protection rights because the Department had failed to issue an order to the former owner of the site. The Board, rejecting the appellant's argument, repeated the principle that laxity of enforcement does not amount to purposeful discrimination. The Board further held that even if the Department's failure to prosecute the former owner was improper, that would not relieve the appellant of the necessity of obeying the Department's order.

In this case the evidence proffered by the Permittee details the factual scenarios at two municipally owned landfills which were handled differently by the Department when they missed capping deadlines. The Permittee has not provided any evidence which shows that those two landfills were significantly similar to the Permittee and that the *only* reason they were treated more leniently was because they were municipally owned. Nor is there any evidence that the Permittee was singled out simply because it was privately owned. All the Permittee's evidence shows is that under different facts the Department acted differently in prosecuting two other landfills. The treatment of other violators, alone, is not relevant to the reasonableness of the amount of a penalty

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[4] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003.

assessed against an appellant. *American Auto Wash, Inc. v. DEP*, 1997 EHB 568, 572. Accordingly the Permittee cannot sustain its burden of proving that the Department violated its equal protection rights and this claim must be dismissed. Pa. R.C.P. No. 1035.2(2). We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

F.R.&S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of September, 1998, the Department of Environmental Protection's motion for summary judgment on the issue of discriminatory enforcement in the above-captioned matter is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: September 3, 1998

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

For the Commonwealth, DEP:
Beth Liss Shuman, Esquire
Southcentral Region

For Appellant:
William F. Fox, Jr., Esquire
Harleysville, PA

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SECRETARY TO THE BOARD

ROBERT K. GOETZ, JR.	:	
d/b/a GOETZ DEMOLITION	:	
	:	**EHB Docket No. 97-226-C**
v.	:	**(Consolidated with 97-147-C,**
	:	**97-223-C, 97-224-C, and**
	:	**97-225-C.)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued:** September 10, 1998
PROTECTION	:	

OPINION AND ORDER ON PETITION IN FORMA PAUPERIS AND MOTION FOR COMPULSORY NONSUIT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition in forma pauperis is denied, and a motion for compulsory nonsuit is granted in part and denied in part. The Board will not rule on a facial challenge to the constitutionality of Section 21(b)(1) of the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Surface Mining Act), because the Board does not have jurisdiction to rule on constitutional challenges to statutes.

An appellant who fails to present concrete evidence concerning his personal worth and assets at his disposal has not made a prima facie case that he was unable to prepay a civil penalty assessed against him. Testimony concerning the assets of one enterprise owned by the appellant is irrelevant to the issue of his personal ability to prepay where (1) the enterprise is just one of two that the appellant owns as a sole proprietor, and (2) he failed to present any evidence concerning the finances

of his other enterprise or assets he may have from other sources.

The Board will not dismiss an appeal of a civil penalty assessed under the Noncoal Surface Mining Act for failure to prepay within 30 days of notice of the assessment where the appellant filed a "petition in forma pauperis" within that time asserting that he was financially unable to prepay the penalty--even though the Board has subsequently determined that the appellant cannot prevail on that claim. However, if the Appellant fails to prepay the penalty within 30 days of the Board rejecting his claim that he was unable to prepay the penalty, the Board will dismiss his appeal.

OPINION

This appeal was initiated with the October 21, 1997, filing of a notice of appeal by Robert K. Goetz, Jr., (Appellant) challenging a noncoal inspection report the Department of Environmental Protection (Department) issued on September 9, 1997. The report, prepared by Thomas Flannery, identified alleged violations of the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Surface Mining Act), which Appellant allegedly engaged in on property in Franklin Township, Adams County (the site). Among other things, the notice of appeal asserts that the inspection report is legally insufficient and factually inaccurate.

On December 16, 1997, pursuant to a Department motion, we consolidated Appellant's appeal of the noncoal inspection report with three other appeals he had pending before the Board: (1) an appeal challenging a June 6, 1997, noncoal inspection report identifying alleged violations at the site (docketed at EHB Docket No. 97-147-C); (2) an appeal challenging September 19, 1997, civil penalty assessment for $56,000 for violations of the Noncoal Surface Mining Act and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean

Streams Law), at the site (docketed at EHB Docket No. 97-223-C); (3) an appeal challenging a September 30, 1997, noncoal inspection report identifying alleged violations at the site (docketed at EHB Docket No. 97-224-C); and (4) an appeal challenging a September 3, 1997, noncoal inspection report identifying alleged violations at the site (EHB Docket No. 97-225-C). We consolidated all four appeals at the instant docket number, EHB Docket No. 97-226-C.

We have issued one previous decision in this appeal, a July 24, 1998, opinion and order denying a Department motion to quash. *Goetz v. DEP*, EHB Docket No. 97-226-C.

On October 21, 1997, when Appellant filed his appeal of the civil penalty assessment, he also filed a "Petition Forma Pauperis."[1] The petition avers that Appellant was unable to prepay the penalty because he had overextended his credit and was experiencing financial difficulties as a result of divorce proceedings with his wife, and the petition requested that the Board waive the prepayment requirement or, at least, reduce the amount Appellant must prepay. The Board held a hearing on Appellant's ability to prepay the penalty on January 21, 1998, and April 21, 1998. After Appellant presented his case in chief, the Department moved for compulsory nonsuit. However, noting that the entire Board had to rule on a motion for compulsory nonsuit, the presiding administrative law judge deferred ruling on the motion, instructed counsel to address the issue in their post-hearing memoranda, and directed the Department to present its case in chief.

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[1] An action "in forma pauperis" is an action to allow a poor person to proceed without having to pay the usual fees to the tribunal for his action. *See, e.g., Black's Law Dictionary* 779 (6th. ed. 1990). The present petition is not a true petition to proceed "in forma pauperis" because Appellant seeks to avoid prepaying a penalty imposed by the Department, not fees imposed by the Board itself.

Ordinarily, the issue of whether an appellant can prepay a civil penalty comes before the Board when the Department files a motion to dismiss an appeal for failure to prepay the civil penalty, and the appellant then asserts that he is unable to do so.

Appellant filed a post-hearing memorandum on May 27, 1998. The Department filed its post-hearing memorandum on May 29, 1998. For purposes of this opinion, we will confine our attention to Appellant's petition in forma pauperis and the Department's motion for compulsory nonsuit.

In its post-hearing memorandum, the Department argues that it is entitled to compulsory nonsuit because Appellant failed to make a prima facie case that he was unable to prepay the penalty. According to the Department, his appeal should be dismissed because jurisdiction will attach to an appeal of a civil penalty assessed under the Noncoal Surface Mining Act only if the appellant prepays the assessment or is unable to do so. Appellant takes a different view. He argues that he did make a prima facie case that he was unable to prepay the penalty. In addition, Appellant argues that the prepayment requirement violates the Due Process Clause of the Fifth and 14th Amendments, and provisions in Article V, Section 9, and Article I, Section 11 of the Pennsylvania Constitution, which guarantee persons an unfettered right to appeal.

We shall address Appellant's constitutional arguments first.

I. IS THE PREPAYMENT REQUIREMENT CONSTITUTIONAL?

In its post-hearing memorandum, Appellant makes a facial challenge to Section 21(b)(1) of the Noncoal Surface Mining Act, 52 P.S. § 3321(b)(1). According to Appellant, Section 21(b)(1) is unconstitutional because it requires that persons prepay civil penalties before having an opportunity to challenge the penalty, and the statute makes no exceptions for persons who may be financially unable to prepay. The Department argues that Section 21(b)(1) is constitutional, and that, in any event, the Board does not have jurisdiction to decide whether a statute is constitutional. In support of the latter proposition, the Department points to *Empire Sanitary Landfill, Inc. v.*

Department of Environmental Protection, 684 A.2d 1047 (Pa. 1996).

Empire Sanitary Landfill does not hold that the Board lacks jurisdiction over constitutional challenges to statutes. The case simply held that the Board does not have jurisdiction to grant declaratory judgment or injunctive relief under the Declaratory Judgments Act, 42 Pa.C.S.A. §§ 7531- 7541. In the relevant portion of the opinion, the Court wrote:

> The EHB has the authority to review, in certain cases, constitutional questions raised about regulations in the context of its jurisdiction. It does not, however, have the power to grant declaratory judgment and injunctive relief under the Declaratory Judgments Act because only courts of record of the Commonwealth have that jurisdiction.

684 A.2d 1047, 1055 (citations omitted).

Although *St. Joe Minerals Corporation v. Goddard,* 324 A.2d 800 (Pa. Cmwlth. 1974), has often been cited for the same proposition the Commonwealth advances here, *St. Joe Minerals* is similar to *Empire Sanitary Landfill* in that the case does not hold that the Board lacks jurisdiction to rule on the constitutionality of statutes. In *St. Joe Minerals*, the operator of a zinc smelter filed a complaint in equity with the Commonwealth Court requesting that the Court enjoin the enforcement of certain Department regulations the operator alleged were unconstitutional. The Court held that it did not have jurisdiction over the complaint because the operator had failed to exhaust his administrative remedy with the Board. Although the Court did say that the Board would not have jurisdiction over a facial challenge to a statute, it is clear from the context that the statement is merely dicta. The Court wrote:

> In the instant case, the plaintiff is attacking not the constitutionality of a statute but the constitutionality of a regulation promulgated by [the Environmental Quality

> Board (EQB)]. Although EHB would not have the authority to pass upon the constitutionality of a statute, it does have the authority to review the validity of a regulation promulgated by EQB, and if, in its opinion, the regulation was improvidently promulgated or is arbitrary as to plaintiff's operation, it may reverse or modify the [Department] order granting a variance, the terms of which were more limited than sought by St. Joe.

684 A.2d 800, 802.

Since *St. Joe Minerals* involved a challenge to the constitutionality of a regulation, as opposed to a statute, the statements in the opinion concerning the Board's authority to rule on the constitutionality of statutes are simply dicta. "Statements of rules of law must be considered as those applicable to the particular facts of that case, and all other legal conclusions stated therein regarded as mere 'obiter dicta' and not of binding authority." 1 *Standard Pennsylvania Practice 2d* § 2:126.

Like *Empire Sanitary Landfill* and *St. Joe Minerals*, most of the other Pennsylvania cases which have confronted the issue of whether an administrative agency can adjudicate constitutional challenges to a statute have involved actions requesting declarative or injunctive relief from the courts.[2] The fact that these actions were brought in the courts in the first instance, rather than in an

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[2] *See, e.g., Cherry v. City of Philadelphia*, 692 A.2d 1082 (Pa. 1997) (action seeking declaratory judgment); *Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1977) (action seeking injunctive relief and punitive damages); *Borough of Green Tree v. Board of Property Assessments*, 328 A.2d 819 (Pa. 1974) (action seeking injunction); *Ruszin v. Department of Labor and Industry*, 675 A.2d 366 (Pa. Cmwlth. 1996) (action seeking declaratory judgment); *Lyman v. City of Philadelphia*, 529 A.2d 1194 (Pa. Cmwlth. 1987) (action seeking declaratory judgment); *Allegheny Ludlum Steel Corporation v. Pennsylvania Public Utility Commission*, 447 A.2d 675 (Pa. Cmwlth. 1982) (action seeking declaratory judgment); *Myers v. Department of Revenue*, 423 A.2d 1101 (Pa. Cmwlth. 1980) (action seeking declaratory judgment); *Philadelphia Life Insurance Company v. Commonwealth*, 190 A.2d 111 (Pa. Cmwlth. 1963) (action seeking injunction). One of the few cases not involving declaratory judgment or injunctive relief is *Bunch v. Board of Auctioneer Examiners*, 620 A.2d 578 (Pa. Cmwlth. 1993). In *Bunch*, an auctioneer challenged the revocation of his license by the Board of Auctioneer Examiners (BAE), averring that the Auctioneer and Auction Licensing Act, Act of December 22, 1983, P.L. 327, *as amended*, 63 P.S. § 734.1-734.34, violated due process

administrative tribunal is important. Under the doctrine of primary jurisdiction, courts usually accord administrative agencies exclusive jurisdiction over actions involving matters within the statutory jurisdiction of the agency, *see, e.g., Elkin v. Bell Telephone Company of Pennsylvania*, 420 A.2d 371 (Pa. 1980), and litigants get a right to judicial review only after they have exhausted all available administrative remedies. *Canonsburg General Hospital v. Department of Health*, 422 A.2d 141, 144. However, several exceptions exist to the requirement that one must exhaust his administrative remedies before judicial review. The Supreme Court summarized them in *Empire Sanitary Landfill v. Department of Environmental Protection*, 684 A.2d 1047 (Pa. 1996):

> The first exception is where the jurisdiction of an agency is challenged. The second exception is where the constitutionality of a statutory scheme or its validity is challenged. The third exception is where the legal or equitable remedies are unavailable or inadequate, or the administrative agency is unable to provide the requested relief. Under the third exception, even though an administrative agency may not have jurisdiction over all the constitutional issues raised by a litigant, the litigant must first exhaust its administrative remedies where there is no allegation that the available statutory remedy is inadequate.

684 A.2d 1047, 1054 (Pa. 1996).

It is clear from the case law that an administrative agency has exclusive jurisdiction over matters within the purview of its enabling legislation unless the matter involves one of the constitutional challenges just discussed, in which case an aggrieved person has a right to immediate judicial review. What is less clear is whether an administrative agency retains concurrent

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guarantees in the Pennsylvania Constitution because the Act allowed the BAE to commingle its prosecutorial and adjudicative functions. The Commonwealth Court held that Bunch had a right to judicial review of his constitutional challenge to the Act, even though he failed to raise the issue in his administrative action before the BAE.

jurisdiction where a complainant has a right to immediate judicial review of an issue, or whether, instead, the right to immediate judicial review deprives the agency of jurisdiction. The Pennsylvania courts do not appear to have directly ruled on this question. However, their decisions on the related issue of whether an individual challenging an agency action has a right to immediate judicial review sometimes contain dicta suggesting that, where the action involves a facial challenge to the validity of a statute, the right to immediate judicial review deprives the agency of jurisdiction.[3]

Although the Board has consistently held that we do not have jurisdiction over facial constitutional challenges to statutes, we have traditionally relied on *St. Joe Minerals Corporation v. Goddard,* 324 A.2d 800 (Pa. Cmwlth. 1974), for that proposition, inadvertently misconstruing the

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[3] *See St. Joe Minerals Corporation v. Goddard,* 324 A.2d 800, 802 (Pa. Cmwlth. 1974) ("EHB would not have the authority to pass upon the constitutionality of a statute. . . ."), *Lyman v. City of Philadelphia*, 529 A.2d 1194, 1195 (Pa. Cmwlth. 1987) ("While administrative agencies can pass upon the constitutionality of their own regulations, they do not possess the authority to pass upon the validity and constitutionality of Act of the General Assembly."), and *Philadelphia Life Insurance Company v. Commonwealth*, 190 A.2d 111, 116 (Pa. Cmwlth. 1963) ("Certainly, the Department of Revenue and the Board of Finance and Revenue are not competent tribunals to pass upon questions of the validity or constitutionality of statutes and the determinations of such questions by administrative tribunals was clearly not within the legislative purview.")

Numerous other opinions contain dicta stating that an agency cannot decide the constitutionality of its own enabling legislation. *See Bunch v. Board of Auctioneer Examiners*, 620 A.2d 578, 581 (Pa. Cmwlth. 1993), *Myers v. Department of Revenue*, 423 A.2d 1101, 1104 (Pa. Cmwlth. 1980), *Ruszin v. Department of Labor and Industry*, 675 A.2d 366, 371 (Pa. Cmwlth. 1996), *Borough of Green Tree v. Board of Property Assessments*, 328 A.2d 819, 825 (Pa. 1974). The rationale is usually that "The more clearly it appears that the question raised goes directly to the validity of the statute the less the need exists for the agency involved to throw light on the issue through exercise of its specialized fact-finding function or application of its administrative expertise." *Borough of Green Tree,* 328 A.2d at 825. The same reasoning would seem to apply with equal force where, as here, an individual makes a facial challenge to a statute before an agency and the statute is *not* the agency's enabling statute.

holding in *St. Joe Minerals*.[4] (As noted previously in this opinion, the language in *St. Joe Minerals* that says that the Board cannot decide constitutional challenges to statutes is mere dicta.) Nevertheless, after reexamining the issue anew, we are convinced that we were correct to conclude that we do not have jurisdiction over such facial challenges. This conclusion is not only consistent with our previous decisions and dicta in numerous court decisions, it also comports well with Pa.R.A.P. 1551(a). Rule 1551(a) provides:

> **Review of quasi judicial orders**--Review of quasi judicial orders shall be heard by the court on the record. No question shall be heard or considered by the court which was not raised before the government unit except: (1) Questions involving the validity of a statute.

Thus, by refusing to rule on Appellant's facial challenge, there is no chance that we are depriving Appellant of his opportunity for a hearing on his facial challenge. We think it unlikely that the Rules of Appellate Procedure would make an exception to the usual waiver rule under Pa.R.A.P. 1551(a) unless administrative agencies lacked jurisdiction to decide those issues.

Accordingly, we will not decide the merits of Appellant's facial challenge to Section 21(b)(1) of the Noncoal Surface Mining and Reclamation Act.

II. DID APPELLANT PRESENT SUFFICIENT EVIDENCE IN HIS CASE IN CHIEF TO MAKE A PRIMA FACIE CASE THAT HE IS UNABLE TO PREPAY THE CIVIL PENALTY?

In its post-hearing brief, the Department argues that the Appellant failed to present sufficient

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[4] *See, e.g., Philadelphia Chewing Gum v. DER,* 1976 EHB 269, 294, *Pennsylvania Mines Corporation v. DER*, 1982 EHB 215, 245, *Latimer Brothers v. DER*, 1982 EHB 305, 306, and *Chemclene Corporation v. DER*, 1982 EHB 485, 487.

evidence in his case in chief to establish that he was financially unable to pay the penalty. Appellant, predictably, disagrees. However, after carefully examining the evidence Appellant presented as part of his case in chief, we agree with the Department that Appellant failed to make a prima facie case that he was financially unable to prepay the penalty.

Section 21(b)(1) of the Noncoal Surface Mining Act provides, in pertinent part:

> When the department proposes to assess a civil penalty, the secretary shall inform the person ... of the proposed amount of the penalty. The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account ... or post an appeal bond.... Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Although Section 21(b)(1) does not expressly create an exception for appellants unable to prepay the assessment, the Commonwealth Court has held that similar provisions in other acts require that, where an appellant asserts that he is unable to prepay the penalty, the Board must determine whether he can prepay or not.[5] The appellant bears the burden of proving that he is

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[5] *See Twelve Vein Coal v. Department of Environmental Resources*, 561 A.2d 1317 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied* 578 A.2d 416 (Pa. 1990) (construing the prepayment requirements in Section 18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a. (Surface Mining Act), 52 P.S. § 1396.18d, and Section 605(b)(1) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law), 35 P.S. 691.605(b)(1)), and *Pilawa v. Department of Environmental Protection*, 698 A.2d 141 (Pa. Cmwlth. 1997) (construing the prepayment requirement in Section 1307(b) of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Storage Tank Act), 35 P.S. § 6021.1307(b).).

unable to prepay the penalty.[6]

Appellant failed to prove that he cannot prepay the penalty. The Department assessed the civil penalty against Appellant personally. However, Appellant introduced virtually no evidence in his case in chief concerning his personal worth. Instead, the overwhelming majority of the evidence he presented concerned the finances of Goetz Demolition Company (GDC), a business he owns.

As part of his case in chief, Appellant testified himself and presented testimony from two other witnesses: Lorraine Repka Nagy and Joyce Riley Maitland. Repka, an accountant, testified about a December 31, 1997, Draft Balance Sheet and Statement of Income (1997 Draft Balance Sheet) and a December 31, 1996, Balance Sheet and Statement of Income she helped prepare for GDC, a sole proprietorship owned by Appellant. She explained that the 1997 Draft Balance Sheet showed that GDC lost slightly over $43,000 in 1997. Maitland, the secretary/bookkeeper of GDC, testified about the business's internal accounting methods and records she provided to Repka for the preparation of the 1997 Draft Balance Sheet. Goetz testified that his ability to run his business and

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[6] Although neither party addressed the issue in any detail, both Appellant and the Department assume that Appellant bears the burden of proving that he is financially unable to prepay the penalty. Appellant's post-hearing brief, p. 7, Department's post-hearing brief, p. 6. We agree that this is the correct allocation of the burden of proof. Although we have held that the Department generally bears the burden of proof in appeals of civil penalty assessments, *see, e.g., Delaware Valley Scrap Company, Inc. v. DER*, 1993 EHB 1113, *aff'd* 645 A.2d 947 (Pa. Cmwlth. 1994), there is good reason to make an exception for hearings concerning an appellant's ability to prepay a civil penalty assessment. Ordinarily, an appellant has much greater access to information concerning his financial condition than the Department. The courts frequently assign the burden of proof to a party with peculiar access to certain information, even if he would not ordinarily bear the burden of proof. Leonard Packel and Anne Bowen Poulin, *Pennsylvania Evidence* § 301.1 (1987). Furthermore, the prepayment requirement in Section 21(b)(1) of the Noncoal Surface Mining Act makes no exception whatsoever for appellant's failure to prepay a civil penalty. Thus, it seems more appropriate to require Appellant to prove that he should be excused from the prepayment requirement than to require the Department to prove that the prepayment requirement applies to him.

secure credit has been hampered because he had overextended his credit and because of proceedings pending between him and his wife.

Although the testimony by Nagy and Repka about GDC's finances was *potentially* relevant to Appellant's ability to prepay, Appellant failed to connect up and present evidence showing the relationship between GDC's finances and his personal finances. For instance, the testimony of Nagy and Repka concerned the preparation of 1997 Draft Balance Sheet for GDC. However, even assuming the 1997 Draft Balance Sheet paints an accurate picture of GDC's finances between September 22, 1997, (when Appellant's notice of appeal avers he first received notice of the Department's action) and October 22, 1997, (when Appellant's deadline for prepaying the penalty expired), the 1997 Draft Balance Sheet would shed no light on Appellant's personal finances at that time. Nagy testified that GDC is one of at least two businesses Appellant owns as a sole proprietor. (N.T. 73) Since the Department assessed the civil penalty against Appellant personally, Appellant had to do more than simply show that *GDC* could not prepay. He had to show that *he himself* could not prepay given all the assets at his disposal--whether they were associated with GDC, or another enterprise he owned, or Appellant obtained them from some other source. Since Appellant failed to present any evidence concerning the finances of his other business(es), we determine that we cannot draw any conclusions about Appellant's personal ability to prepay based on GDC's finances.

That leaves only Appellant's testimony. His testimony was very limited--it occupies less than five pages of the transcript from the hearing. The material averments in Appellant's testimony are as follows:

(1) he and his wife are presently in the midst of divorce proceedings (N.T. 106-107);

(2) because of the divorce, banks and bonding companies have become apprehensive

about loaning him money, adversely affecting his business (N.T. 107);

(3) he has already used all of his assets to secure lines of credit (N.T. 108);

(4) he has a $100,000 letter of credit, of which $75,000 has already been expended (N.T. 107);

(5) a bank will loan him money to do contracts, but only if he agrees to assign the payments on the contract to the bank (N.T. 108);

(6) he did not request a line of credit to prepay the penalty because he thought the request would be futile and might jeopardize his preexisting line of credit (N.T. 109);

(7) his bonding agent talked to three or four bonding companies and was unable to secure an appeal bond, and his attorney also told him that he would not be able to obtain an appeal bond (N.T. 110); and,

(8) work was slow for him in 1997 despite the fact that he was actively seeking business (N.T. 109-110).

Even assuming these statements are true, they do not show that Appellant was unable to prepay the penalty. Much of Appellant's financial situation remains obscure. For instance, Appellant failed to introduce his personal income tax return, or to otherwise present evidence concerning his annual income. Nor do we know the value of Appellant's current assets, the proportion of those assets which may be tied up in his divorce proceedings, or the amount of assets at his disposal.[7]

Rather than *showing* the Board that he was unable to prepay the penalty, Appellant would have us simply take his word--or that of his agents-- that he is unable to pay. Appellant testified that his attorney and his bonding agent told him that he would not be able to get an appeal bond. But

[7] As noted previously in this opinion, Goetz did testify that he had put up all of his assets as security for the $100,000 line of credit he obtained. Nevertheless, he should still have been able to get more credit if the value of the assets at his disposal was substantially greater than $100,000.

Appellant's attorney and his bonding agent never took the stand, or otherwise gave evidence to support Appellant's hearsay statements. It is the Board's duty to determine whether Appellant can prepay the penalty, and, to do that, we need hard evidence.[8,9] We cannot simply defer to Appellant's hearsay testimony that his agents told him that he could not get an appeal bond.

Appellant's failure to even request a line of credit from his bank so that he could prepay the penalty underscores the deficiencies in his case. Appellant failed to introduce any evidence about the value of assets he had at his disposal. It is possible, therefore, that either he could have prepaid the penalty directly or that the value of the assets at his disposal sufficiently exceeded his $100,000 line of credit that he could obtain additional credit. The fact that Appellant refused to even ask the bank for credit before asserting that he was unable to prepay the penalty is a strong indication that Appellant failed to exhaust all reasonable means at his disposal to prepay the penalty.

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[8] For instance, Courts of Common Pleas have held that they would not relax a rule requiring that out-of-state plaintiffs provide security for costs simply because a plaintiff's attorney stated that his client could not obtain a bond. *See Bower v. Bower*, 44 Pa. D. & C. 44 (Philadelphia County, 1942).

[9] Relevant evidence concerning an appellant's ability to prepay a penalty would ordinarily include recent financial statements and income tax returns, as well as information concerning any:

a. accounts held at financial institutions;
b. accounts and notes receivable;
c. marketable securities owned by appellant;
d. interests appellant owns in closely held corporations or partnerships;
e. intangible property owned by appellant;
f. vehicles owned by appellant;
g. real estate owned by appellant;
h. oil, gas, or mineral rights owned by appellant;
i. recent loan applications filed by appellant;
j. insurance policies naming appellant as the insured or beneficiary; and,
k. property appellant recently sold for value or transferred as a gift.

Since Appellant failed to make even a prima facie case that he was unable to prepay the penalty assessment, we will not excuse Appellant from the prepayment requirement and will deny his "Petition Forma Pauperis."

III. WHAT IS THE EFFECT OF APPELLANT'S FAILURE TO MAKE A PRIMA FACIE CASE THAT HE IS UNABLE TO PREPAY THE PENALTY?

In its post-hearing memorandum, the Department argues that the Board must dismiss Appellant's appeal because he failed to prepay the penalty within 30 days and failed to prove he was unable to prepay the penalty. Appellant did not specifically address this argument in his post-hearing memorandum.

We do not agree that an appellant necessarily loses his right to appeal an assessment simply because he fails to prepay a civil penalty assessment within 30 days of the Department's action, and the Board subsequently determines he could have prepaid the penalty. Where, as here, an appellant asserts that he is unable to prepay the assessment, and he raises the issue within 30 days of the Department's action, the Board may extend him another opportunity to prepay within 30 days or less of the Board determining that he could prepay the penalty.[10]

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[10] We realize that the Commonwealth Court has held that, under a similar prepayment provision at Section 1307 of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Storage Tank Act), an appellant can raise the issue of his ability to prepay even if he raises the issue more than 30 days after the Department action. *Pilawa v. DEP*, 698 A.2d 141 (Pa. Cmwlth. 1997). The question that we confront here, however, is different. *Pilawa* dealt with the question of whether an appellant can raise the issue of his ability to prepay after the deadline for prepayment has expired. Here, we confront a situation where an appellant raised the issue of his ability to prepay *before* the deadline expired but failed to prove that he was unable to prepay when the Board held a hearing on the issue. The question we must decide is not whether Appellant can have an opportunity to litigate the issue of his ability to prepay within the initial 30-day deadline, but whether he may have another opportunity to prepay

If Section 21(b)(1) of the Noncoal Surface Mining Act, 52 P.S. § 3321(b)(1), were the last word on the issue, we might have come to a different conclusion. Section 21(b)(1) of the Act provides, in pertinent part, "Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." But Section 21(b)(1) is not the last word on the issue. Although the 30 day prepayment requirement in Section 21(b)(1) may seem at first to be absolute and jurisdictional, the Commonwealth Court has made it clear that neither is the case. In *Twelve Vein Coal v. Department of Environmental Resources*, 561 A.2d 1317 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied,* 578 A.2d 416 (Pa. 1990), for instance, the Commonwealth Court examined an identical provision in Section 18.4 of the Surface Mining Act, 52 P.S. § 1396.18d, while reviewing a Board decision dismissing an appeal for failure to comply with the 30 day prepayment requirement. The Court held that the Board had erred by dismissing the appeal based on the 30 day prepayment requirement because the appellant had asserted that he was unable to prepay the penalty, and the Court remanded the case back to the Board for a hearing on the appellant's ability to prepay. In explaining its decision, the Court pointed to Article V, Section 9 and Article I, Section 11 of the Pennsylvania Constitution and noted that there was ample reason to tread carefully where an appellant might be denied access to a tribunal because of "alleged impecunity." 561 A.2d at 1319.

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after that deadline, once the Board determines that he was able to prepay.

While we conclude that Appellant is entitled to another opportunity to prepay the civil penalty, our conclusion is based, in part, on the fact that Appellant raised the issue of his ability to prepay within the initial 30-day prepayment period. Whether an appellant would be entitled to another opportunity to prepay had he not raised the issue of his ability to prepay within the initial 30-day period is a tougher question (since there is greater potential for delaying the Board's proceedings) but one which is beyond the scope of this appeal.

There is good reason for us to tread carefully here as well, where we confront another problem relating to appellants who assert that they are unable to prepay a penalty. The Department would have us hold that an appellant must prepay his penalty within 30 days or risk having his appeal dismissed if we subsequently determine that he could have prepaid the appeal. Yet, were we to adopt the Department's position, we would force some financially vulnerable appellants to navigate between Scylla and Charybdis. Although it is clear in many instances whether an appellant can prepay a penalty, in other situations, the answer is more abstruse. An appellant acting in good faith may not know for certain whether he has an obligation to prepay a penalty. For instance, an appellant may technically have sufficient assets to prepay a civil penalty, but only be able to do so with extreme financial hardship to himself, his family, or his business. If the amount of the civil penalty is large and the appellant feels his case is strong, he may be inclined prepay the civil penalty--regardless of the hardship involved--simply to avoid the risk that he might otherwise waive his right to challenge the penalty.

Allowing an appellant a brief opportunity to prepay the civil penalty after the Board rejects a claim that he was unable to prepay the penalty protects financially vulnerable appellants from this catch-22 without compromising the Department's interests. In *Boyle Land and Fuel Company v. Environmental Hearing Board,* 475 A.2d 928 (Pa. Cmwlth. 1984), *aff'd* 488 A.2d 1109 (Pa. 1985), the Commonwealth Court wrote that the purpose of prepayment requirements akin to Section 21(b)(1) of the Noncoal Surface Mining Act is to "promote the public interest" by ensuring that the Department's "efforts in enforcing the law should not be frustrated by appeals which, although constitutionally permitted, may be taken solely for the purpose of delay while the violations continue." 475 A.2d at 930. We can safeguard the Department's interests without having to require

that appellants risk choosing between litigating their ability to prepay a penalty and preserving their right to challenge the merits of the Department's action. If we reject an appellant's claim that he was unable to prepay the penalty, we can simply require that he prepay it within 30 days or less of our determination or we will dismiss his appeal. This allows an appellant who is financially vulnerable to raise the issue of his ability to prepay without having to risk his right to challenge the assessment if the Board ultimately determines that he could have prepaid. An appellant who has the means to prepay initially would have little incentive to argue that he is unable to do so: If the Board determines that he could have prepaid, he would still be required to prepay before the Board will look to the substance of his appeal, and any resources he spent litigating his ability to prepay will have been wasted. Furthermore, if it is clear that an appellant is raising the issue for spurious reasons, sanctions may also be appropriate. Finally, allowing an appellant a second opportunity to prepay within 30 days or less of the Board's determination of his ability to prepay should not greatly delay the resolution of his appeal where the appellant raises the issue of his ability to prepay within the initial 30-day prepayment period.

In light of the foregoing, Appellant has 30 days in which to prepay his civil penalty or have his appeal of the penalty assessment dismissed. Accordingly, the Department's motion for compulsory nonsuit is granted to the extent that the Department sought judgment against Appellant on the issue of Appellant's ability to prepay the penalty, but denied to the extent that the Department requested dismissal of Appellant's appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR.	:	
d/b/a GOETZ DEMOLITION	:	
	:	**EHB Docket No. 97-226-C**
v.	:	**(Consolidated with 97-147-C,**
	:	**97-223-C, 97-224-C, and**
	:	**97-225-C.)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

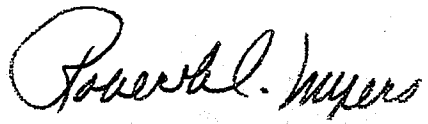
AND NOW, this 10th day of September, 1998, it is ordered that Appellant's "Petition in Forma Pauperis" is denied, and the Department's motion for compulsory nonsuit is granted to the extent the Department sought judgment against Appellant on whether Appellant could prepay the penalty, but denied to the extent that the Department requested dismissal of Appellant's appeal. Appellant shall prepay the civil penalty or file an appeal bond for the amount of the penalty, in accordance with Section 21(b)(1) of the Noncoal Surface Mining Act, by **October 13, 1998.**

ENVIRONMENTAL HEARING BOARD

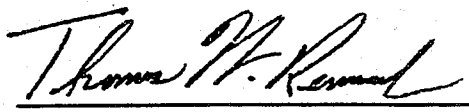
George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

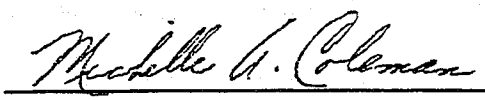
EHB Docket No. 97-226-C
(Consolidated with 97-147-C,
97-223-C, 97-224-C, and 97-225-C)



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 10, 1998

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

For the Commonwealth, DEP:
Dennis A. Whitaker, Esquire
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Southcentral Regional Counsel

For Appellant:
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jb/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BELTRAMI BROTHERS REAL ESTATE	:	
	:	
v.	:	**EHB Docket No. 89-016-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 11, 1998**

OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

by Robert D. Myers, Member

Synopsis:

The Department has the authority to abate a public nuisance under Section 16(a)(1) of the Land and Water Conservation Act, 32 P.S. § 5116(a)(1); Section 407 of the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1237; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17. The public nuisances in this case are a highwall created by unregulated surface coal mining and related spoil piles. The Department used the spoil piles to backfill the hazardous strip mining pit.

However, the Department's Motion for Summary Judgment is denied because there exists a genuine issue of material fact as to whether the Department could have used an alternative method to abate the public nuisances which would have had a lesser impact on Appellant's economic interest in the spoil piles.

The Board rejects an argument by the Department that the Board cannot grant effective relief

to Appellant. To begin, the Department first raised this issue in its reply brief; thus, Appellant had no opportunity to respond. Even so, the Board concludes that it can grant effective relief to the Appellant if the Board finds that the Department's abatement action constituted a regulatory taking.

OPINION

The history of this case is long and involved. The appeal was filed on January 19, 1989, seeking Board review of a December 23, 1988 letter (access notice) of the Department of Environmental Protection[1] (Department) announcing its intention to enter upon the real estate leased by Appellant in Kline Township, Schuylkill County, for the purpose of reclaiming an abandoned strip mine. Another appeal was filed at EHB Docket No. 89-018 by Beltrami Enterprises, Inc., the owner of the real estate. Both appeals were accompanied by petitions for supersedeas. The Board, *sua sponte*, denied the petitions for supersedeas on January 27, 1989, for failure to conform with the Board's rules of procedure, and consolidated the two appeals at EHB Docket No. 89-016.

While the consolidated appeals were in the discovery stage, Beltrami Enterprises, Inc. filed a voluntary petition on June 3, 1991 under Chapter 11 of the U.S. Bankruptcy Code. Subsequently, the corporation, acting as a debtor-in-possession, was authorized to continue with the appeal. A hearing scheduled to begin on May 19, 1992, was postponed after Appellants decided that the Board lacked jurisdiction of the takings claims asserted in the appeals. They filed a petition for the appointment of viewers under the Eminent Domain Code in the Court of Common Pleas of Schuylkill County and filed a motion to dismiss for lack of jurisdiction with the Board.

The Schuylkill County Court dismissed Appellants' eminent domain petition in September

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[1] At the time of the letter, the agency was known as the Department of Environmental Resources.

1992, and Appellants appealed the matter to Commonwealth Court. The Board denied the motion to dismiss in an opinion and order issued July 30, 1993 (*Beltrami Brothers Real Estate Inc. v. DER*, 1993 EHB 1014), and Commonwealth Court clearly affirmed the Board's primary jurisdiction to decide takings claims arising out of regulatory actions of the Department in an opinion handed down on October 13, 1993. *See Beltrami Enterprises, Inc. v. Department of Environmental Resources*, 632 A.2d 989 (Pa. Cmwlth. 1993). Appellants' petition for allowance of appeal to the Pennsylvania Supreme Court was denied on June 16, 1994.

With the Board's jurisdiction no longer in contention, it was still not possible to move these appeals to hearing because of complications and conflicts created by the bankruptcy of Beltrami Enterprises, Inc. That proceeding was finally concluded in 1997 after approval of a plan of reorganization that provided for the settlement of litigation between Beltrami Enterprises, Inc. and the Department. As a consequence, Beltrami Enterprises, Inc. rejected the lease with Appellant and withdrew its own appeal at EHB Docket No. 89-018 on November 4, 1997. A case management order for the surviving appeal was issued on December 19, 1997.

The Department filed a Motion for Summary Judgment with accompanying affidavits and memorandum of law on May 29, 1998. Appellant filed its response, also with affidavits and legal memorandum, on July 24, 1998. The Department filed a reply brief on August 21, 1998.

In its Motion, the Department claims that it is entitled to summary judgment because it acted pursuant to the police power to abate a public nuisance, and because its actions affected no rights of Appellant. The Department argues further, in its reply brief, that the Board cannot grant effective relief at this point because no supersedeas of the Department's access notice was ever granted and the reclamation project is now completed. Appellant argues that disputed issues of material fact

exist on several crucial matters, preventing the entry of summary judgment.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995). Summary judgment may be entered only in those cases where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

The pertinent facts, as set forth in the Department's Motion and supported either by affidavits or exhibits, begin with a short history of unregulated anthracite surface coal mining in east-central Pennsylvania that left huge open pits and great spoil piles of material removed to gain access to the coal. One of these was a 265-acre site near the village of Kelayres, Schuylkill County (Kelayres Pit), which had a sheer rock wall (highwall) 400 feet deep extending for 6,500 feet and millions of tons of material in spoil piles as high as 125 feet. Homes were nearby and there were no barriers to keep people off the site.

In November 1978, a 12-year old boy from the neighborhood was playing near the highwall and plunged to his death. At the time, the Kelayres Pit was owned by Beltrami Enterprises, Inc. as a result of its 1975 merger with a wholly-owned subsidiary, Booty's Mining Co., Inc. (Booty's). The record is silent on Booty's activities at the Kelayres Pit prior to the merger, but the Department apparently concluded that neither Booty's nor Beltrami Enterprises, Inc. had any legal obligation to

reclaim the site.

After the death of the 12-year old boy, the Department's Bureau of Abandoned Mine Reclamation determined that the highwall created a condition of extreme danger and that the spoil piles created a significant hazard. Following a thorough evaluation, the Department decided to seek $14,000,000 in federal funding in order to reclaim the Kelayres Pit by using the spoil piles to backfill the highwall. Exactly when this occurred is not stated, but it took the Department until 1988 to obtain the funding and be prepared to start the work.

In the meantime, Beltrami Enterprises, Inc. entered into a Lease Agreement on June 10, 1981, with Appellant, a Pennsylvania limited partnership formed by the four sons of Louis Beltrami, Sr., the principal of Beltrami Enterprises, Inc. The Lease Agreement, revised on December 5, 1984, gave Appellant the right to conduct certain activities, including but not limited to, quarrying, stone crushing and sizing, and asphalt processing, on a 727-acre tract that included the Kelayres Pit. The term of the lease extended to 2004, with possible further extensions, and provided for a rental based on tonnage of material removed for processing.

Before it could start operations under the Lease Agreement, Appellant had to obtain from the Department a non-coal surface mining operator's license and a non-coal surface mining permit. The license was obtained eventually, and on June 5, 1985, Appellant applied for a permit covering a 128-acre portion of the leased premises located north of, and entirely outside of, the Kelayres Pit. This permit was issued by the Department on September 15, 1987.

During this period of the 1980's, when the Department was planning and designing the reclamation of the Kelayres Pit, it tried diligently to obtain the consent of Beltrami Enterprises, Inc. and Appellant to the Department's entry onto the site and conduct of the project. This was not

successful. Accordingly, the Department issued the access notice on December 23, 1988. This notice, addressed both to Appellant and Beltrami Enterprises, Inc., recites the Department's determination that a hazard exists and the refusal of the addressees to consent to the elimination of the hazard. It then refers to a November 8, 1988 Finding of Fact by the Department Secretary Arthur A. Davis authorizing the reclamation project to proceed without the consent of the addressees.

The Finding of Fact, attached to the access notice, refers to an investigation by the Bureau of Abandoned Mine Reclamation concluding that the dangerous highwall presents a public health and safety hazard. The Finding goes on to state that "the abandoned mine hazard ... is at a stage where, in the public interest, action should be taken" and concludes with an authorization to enter the site and expend funds to abate the hazard. The description of the work to be performed includes "backfilling strip mined pits using unconsolidated mine spoil found on site."

Both the access notice and the Finding of Fact refer to authority provided by Section 16(a)(1) of the Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P.L. (1967) 996, *as amended*, 32 P.S. § 5116(a)(1); Section 407 of the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), P.L. 95-87, *as amended*, 30 U.S.C. § 1237; and Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17.

The Department entered the site and commenced reclamation on or about September 11, 1989 and completed the project on or about September 4, 1992.

The Land and Water Conservation Act, cited by the Department, resulted from the approval by the electorate in 1967 of an amendment to Article IX of the Pennsylvania Constitution authorizing the borrowing of $500 million for a Land and Water Conservation and Reclamation Fund to be used, in part, to restore abandoned strip mines. This need, according to the legislative

findings in Section 2 of the Act, 32 P.S. § 5102, was "urgent," requiring state action for the protection of the health and welfare of the citizenry, "especially those living on or adjacent to affected areas." Before funds could be used for this purpose, Section 16(a)(1), 32 P.S. § 5116(a)(1), required the Secretary of the Department to make findings of fact that a hazard exists and that the landowners refuse entry. Based on those findings, the Department could enter the property and do the restoration work. "Such entry shall not be construed as an act of condemnation of property or trespass thereon."

A similar procedure is found in Section 407 of federal SMCRA which reads as follows:

> If the Secretary or the State pursuant to an approved State program,[2] makes a finding of fact that -
>
> (1) land or water resources have been adversely affected by past coal mining practices; and
>
> (2) the adverse effects are at a stage where, in the public interest, action to restore, reclaim, abate, control, or prevent should be taken; and
>
> (3) the owners of the land or water resources where entry must be made to restore, reclaim, abate, control, or prevent the adverse effects of past coal mining practices are not known, or readily available; or
>
> (4) the owners will not give permission for the United States, the States, political subdivisions, their agents, employees or contractors to enter upon such property to restore, reclaim, abate, control, or prevent the adverse effects of past coal mining practices.

Then, upon giving notice by mail to the owners if known or if not known by posting notice upon the premises and advertising once in a newspaper of general circulation in the municipality in which the land lies, the Secretary, his agents, employees, or contractors, or the State pursuant to an approved State program, shall have the right

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[2] Pennsylvania's program was approved in the early 1980's.

> to enter upon the property adversely affected by past coal mining practices and any other property to have access to such property to do all things necessary or expedient to restore, reclaim, abate, control, or prevent the adverse effects. Such entry shall be construed as an exercise of the police power for the protection of public health, safety, and general welfare and shall not be construed as an act of condemnation of property nor of trespass thereon.

The third statutory authority claimed by the Department is Section 1917-A of the Administrative Code, 71 P.S. § 510-17, the familiar "abatement of nuisances" provision. Under this section the Department is to protect the public from nuisances, including those declared to be such by any law administered by the Department, ordering them to be abated, and doing the abatement itself if the owner or occupant of the premises fails to do so. The Department's derivative authority here is Section 4.2(a) of the Pennsylvania Surface Mining and Conservation Act (SMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4b(a), which specifically declares any "unguarded and unfenced open pit area, highwall, water pool, spoil bank and culm bank" presenting a risk of landslide, subsidence or cave-in to be a nuisance within the meaning of Section 1917-A of the Administrative Code.

It seems clear that the Department's actions with respect to eliminating the highwall in the Kelayres Pit were in strict accordance with statutory law. We would have no hesitation in dismissing Beltrami Enterprises, Inc.'s appeal if it were still pending. Appellant's appeal, however, rests on different ground, contending that the Department's use of the spoil piles to eliminate the highwall was an abuse of discretion and a taking of Appellant's property without just compensation.

The Department argues that Appellant had no property right in the spoil piles because the Lease Agreement does not specifically mention them. We disagree. Paragraph 9 of both versions states that the present condition of the property shall not be disturbed nor any material removed from

its present location without the prior express written consent of Appellant. "This includes, but is not limited to, efforts to relocate spoil banks, culm banks, or overburden deposits." If spoil piles were not intended to be covered by the lease, why would they be singled out in this provision which was designed to protect Appellant's economic interest in the recoverable material?

In addition, Appellant has submitted affidavits of Louis J. Beltrami and Michael Beltrami, attesting to the intention of the parties to the Lease Agreement that all spoil piles, including those in or near the Kelayres Pit, were included. We do not consider this to be a disputed issue of material fact, the affidavits simply reiterating what is clear from the language of the Lease Agreement.

The next argument of the Department is that the spoil piles, as well as the highwall, were public nuisances which the Department acted to abate. Supporting this contention is the affidavit of Michael R. Ferko, District Engineer of the Department's Wilkes-Barre District Office, who supervised the reclamation work at the Kelayres Pit. He states that there were footpaths on the spoil piles, evidencing use by area residents, that the piles were unstable and that there were no barriers to prevent an accident from occurring. Appellant admits the absence of any barriers but, curiously, avers a lack of knowledge about the footpaths and the unstable condition of the piles.

This certainly suggests a lack of attentiveness to material that supposedly has economic value to the Appellant. The suggestion is strengthened by a claimed lack of knowledge about the height and size of the piles, although Appellant admits that some of them were within 30 feet of occupied dwellings.

In any event, under Pa. R.C.P. No. 1035.3, Appellant was required in its response to the Motion to identify evidence in the record controverting the Department's allegations or to supplement the record with such evidence or explain why it cannot do so. Since Appellant did none

of these, the Department's contentions about the condition of the spoil piles are deemed admitted. The spoil piles in and near the Kelayres Pit, therefore, fell within the scope of statutory nuisances described in Section 4.2(a) of Pennsylvania SMCRA, 52 P.S. § 1396.4b(a), quoted earlier, "unguarded and unfenced ... spoil bank and culm bank," creating a "risk of ... landslide, subsidence [and] cave-in," and were proper subjects of abatement under Section 1917-A of the Administrative Code, 71 P.S. § 510-17. Appellant's unsupported contention that the spoil piles were not a hazard is rejected.

The Department asserts the legal position that, when private property is taken for public use in the abatement of a public nuisance, there is no right of compensation. This maxim is of long standing, founded on the principle that a landowner must use his property in such a manner as not to injure that of another: *sic utero tuo ut alienum non laedas* as expressed by the ancient common law. The takings clause of the Fifth Amendment to the U.S. Constitution did not convert this ancient principle to one requiring compensation whenever the state acts to enforce it. *Mugler v. Kansas*, 123 U.S. 623 (1887); *Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470 (1987). Pennsylvania Courts, construing a similar takings clause in Article I, Section 10, of the Pennsylvania Constitution, have reached the same conclusion. *Commonwealth v. Barnes & Tucker Company (Barnes and Tucker II)*, 371 A.2d 461 (Pa. 1977).

Both the Land and Water Conservation Act and federal SMCRA, two of the statutes cited by the Department, contain legislative declarations of public nuisance and expressly state that Department entry on to the affected land to abate the nuisance "shall not be construed as an act of condemnation of property." *See* 32 P.S. § 5116(a)(1) and 30 U.S.C. § 1237(a). Pennsylvania SMCRA also contains a legislative declaration of public nuisance for unfenced and unguarded spoil

piles. *See* 52 P.S. § 1396.4b(a). These legislative declarations also trigger the Department's abatement power under the Administrative Code. *See* 71 P.S. § 510-17. The Department, therefore, had ample authority to enter the Kelayres Pit and abate the public nuisances existing there without having to pay compensation to Appellant. *Barnes & Tucker II*, 371 A.2d at 467.

The means chosen to abate the nuisance, however, must appear reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon Appellant. *Lawton v. Steele*, 152 U.S. 133 (1894); *Commonwealth v. Barnes & Tucker Company (Barnes & Tucker I)*, 319 A.2d 871 (Pa. 1974); *Barnes & Tucker II*, 371 A.2d at 468. Appellant's chief contention is that the spoil piles were not public nuisances and, for that reason, the Department's use of the material to backfill the highwall was unreasonable. As noted above, we have rejected that argument and determined that the unfenced, unguarded spoil piles creating a risk of landslide, subsidence and cave-in were a public nuisance subject to abatement by the Department.

Appellant also argues, inferentially, in its memorandum of law that the Department did not have to use the specific spoil piles chosen for abatement and, in fact, left others untouched. This suggests that the Department reasonably could have used an alternative method which would have impacted less on Appellant's economic interest. Unfortunately, the record is silent on this issue and we are unable to resolve it at this time. At the hearing, it will be Appellant's burden to present evidence showing a more reasonable alternative than that chosen by the Department, the implementation of which would have had a lesser impact on Appellant's economic interest in the spoil pile material.

Carrying this burden will not be an easy task, in our opinion. The Department's use of the spoil material that came out of the pit to backfill it appears to us eminently reasonable. The same

can be said for the Department's use of the most convenient spoil piles to the highwall area. It must be remembered that public funds were being used in this abatement work and the Department had a responsibility to complete the work in the most economical way possible.

We also have some doubt about the economic value of the spoil piles used by the Department. They existed in the Kelayres Pit, a 265-acre portion of a 727-acre area covered by the Lease Agreement. The remaining 462 acres presumably also contained spoil material that Appellant could process. In fact, the acreage that Appellant first permitted was not in the Kelayres Pit at all but a 128-acre area north of it. Appellant continued to work this area until the 1990s, suggesting that plenty of spoil material was present there and had a greater economic value to Appellant than that in the Kelayres Pit.

While we believe that Appellant has a heavy burden on this issue, we are not comfortable granting summary judgment on it to the Department. The issue is not clear and free from doubt at this point, and we will give Appellant the opportunity to present evidence in an effort to persuade us. Nor should our comments be construed as foreclosing any aspects of the issue. We simply want Appellant to know of the areas where we have considerable doubt.

The Department raises two other issues which must be addressed. The first relates to the Department's averment, supported by Ferko's affidavit, that, in doing the reclamation work, the Department did not take title to Appellant's property, assert any ownership interest in it, or permanently install any item on it. Appellant admits the averment but denies the succeeding averment which states that all the Department did was relocate the spoil piles to a position where they no longer presented a hazard. In further response, Appellant contends that, by moving the spoil piles from their above-ground location into the pit, the Department made the quarrying of the

material economically unfeasible.

Neither the Department's averment about what it did nor Appellant's response is supported by affidavit or other record evidence. Since this claim apparently is the core of Appellant's argument that there was a more reasonable alternative, this disputed issue of fact will have to be addressed at the hearing.

Finally, the Department argues in its reply brief that the Board can grant no effective relief to Appellant because Appellant never obtained a supersedeas and the reclamation work has now been completed. The Board's power to set aside the access notice as an unconstitutional taking has expired by subsequent events; and any further proceedings before the Board would be declaratory in nature and beyond our jurisdiction. *See Costanza v. Department of Environmental Resources*, 606 A.2d 645 (Pa. Cmwlth. 1992). Since this issue was raised first in the Department's reply brief, Appellant had no opportunity to respond to it. We could dismiss it for that reason alone; but, because of its significance, will address it now.

We rejected a similar argument in *Lower Windsor Township v. DER*, 1993 EHB 1305, 1366*ff*, relying in part on *Concerned Citizens Against Sludge v. DER*, 1983 EHB 442. Those decisions concerned Department permits rather than Department actions to abate nuisances. Nonetheless, the Board held in both cases that the Board could order the removal of material placed by a permittee in reliance on its permit if the Board found that the permit was unlawfully issued and that removal was the appropriate remedy. Theoretically, at least, we could do something similar here, ordering the Department to remove Appellant's spoil material from the backfilled highwall if we determined that there was an unconstitutional taking.

We will not do that here for several reasons. First, Appellant does not seek that relief. It

seeks instead a ruling that the action was a taking so that it can proceed to seek damages in an appropriate forum. *See Beltrami Enterprises, Inc. v. Department of Environmental Resources*, 632 A.2d 989 (Pa. Cmwlth. 1993); *Domiano v. Department of Environmental Protection*, 713 A.2d 713 (Pa. Cmwlth. 1998). Secondly, we seriously doubt that Appellant could have obtained a supersedeas in any event. The Board is prohibited by statute from granting a supersedeas where "injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." Section 4(d)(2) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(d)(2). Since the Department was acting to abate public nuisances in the form of the highwall and the spoil piles, the Board probably would have invoked this statutory proscription to deny a supersedeas request. But, even if there were no statutory impediment, the Board would very likely have deferred to the Department's choice of an abatement plan, leaving to later litigation any objections to it by those with an interest in the real estate.

We conclude that we can grant effective relief to Appellant if we find that the Department's abatement action constituted a regulatory taking. As noted earlier, we cannot resolve that issue at this point because of disputed issues of fact.

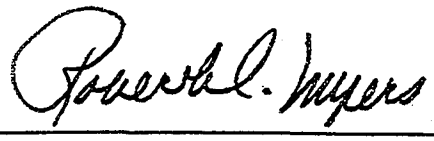
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BELTRAMI BROTHERS REAL ESTATE :		
	:	
v.	:	**EHB Docket No. 89-016-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 11th day of September, 1998, it is ordered that the Department's Motion for Summary Judgment is denied in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 11, 1998

See next page for a service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

THOMPSON BROTHERS COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 96-028-R**
	:	**(Consolidated with 96-029-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 15, 1998**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

In an appeal of a bond release denial, the permittee has the burden of proving that it is entitled to bond release and that the Department of Environmental Protection erred or abused its discretion in denying the request for release. The Department of Environmental Protection did not abuse its discretion when it denied a permittee's request for bond release due to the existence of an acid mine discharge on the permit site. Although the discharge exists within a "barrier area," which may not be affected by the permittee without further approval by the Department, it is contained within the boundaries of the surface mining permit and is, therefore, an "on-permit" discharge.

BACKGROUND

This matter is a consolidated appeal by Thompson Brothers Coal Company, Inc. (Thompson Brothers) from the Department of Environmental Protection's (Department) denial of four applications for bond release for the Morris No. 2 surface mine in Clearfield County. The

Department denied the bond release applications on the following grounds: failure to reclaim temporary erosion and sediment control structures at the site and the existence of an acid mine drainage discharge located on or hydrogeologically connected to the surface mining permit area.

Thompson Brothers appealed the bond release denials and the appeals were consolidated at EHB Docket No. 96-028-R. A hearing was held on December 12, 1997; December 15-18, 1997; January 12-16, 1998; and February 23-25, 1998. Thompson Brothers and the Department filed post-hearing briefs on June 5, 1998 and July 10, 1998, respectively. Thompson Brothers also filed a reply brief on July 30, 1998. After a complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant, Thompson Brothers, is a Pennsylvania corporation with a business address of P.O. Box 626, Philipsburg, PA 16866. (Notice of Appeal)

2. The Department is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.31 (Surface Mining Act); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001; and the rules and regulations promulgated thereunder.

3. Thompson Brothers is the permittee of a bituminous surface coal mine located in Morris Township, Clearfield County, known as the Morris No. 2 mine. (Notice of Appeal)

4. Thompson Brothers was authorized to conduct surface mining activities at the Morris

No. 2 mine pursuant to Surface Mining Permit No. 17810104. (App. Ex. 46)[1]

5. Al Hamilton Contracting Company (Al Hamilton) was a contract operator for Thompson Brothers at the Morris No. 2 mine. (T. 193)

6. In March and December 1994, Thompson Brothers applied for bond release for bonding increments 01, 02, 03, and 04 at the Morris No.2 mine. (App. Ex. 2 and 3)

7. The Department denied Thompson Brothers' request for bond release on the following grounds: the existence of an on-permit discharge of acid mine drainage and failure to reclaim erosion and sedimentation control structures. (Notice of Appeal)

8. Acid mine drainage is discharged at Monitoring Point No. 11 (MP-11). (T. 1508)

9. There is conflicting testimony as to whether the southern boundary of the surface mining permit area is Township Road 805 or the township line separating Morris and Decatur Townships. (T. 173, 966, 2202)

10. MP-11 is located north of Township Road 805 (T. 966, 2202; Comm. Ex. 8, 25, 33; Site View)

11. MP-11 is located north of the Morris - Decatur Township line. (Comm. Ex. 33)

12. MP-11 is located approximately 15 feet from the traveled portion of Township Road 805. (T. 175)

13. The Department's regulations prohibit mining within 100 feet of a township road unless a variance is obtained. (T. 176; 25 Pa. Code § 86.37)

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[1] "App. Ex." refers to an exhibit submitted by Thompson Brothers at the hearing. "Comm. Ex." refers to an exhibit submitted by the Department. "T. __" refers to a page of the hearing transcript.

14. Thompson Brothers did not request or obtain a variance to mine within 100 feet of Township Road 805 in the vicinity of MP-11. (T. 177-78, 994-95)

15. It is common for a surface mining permit to include "barrier" areas where mining may not occur unless a variance is obtained. (T. 2221-22)

16. Such barrier areas fall within the area of the surface mining permit. (T. 2221-22)

17. Thompson Brothers would not have been required to file a request for additional acreage to mine within 100 feet of Township Road 805 within the vicinity of MP-11. (T. 2224-25, 2227)

18. In or about 1991 to 1992, Thompson Brothers filed with the Department a request to delete from its permit area the acreage on which MP-11 is located. (T. 2230) The request was denied. (T. 2230)

DISCUSSION

In an appeal of a bond release denial, the appellant has the burden of proving by a preponderance of the evidence that it is entitled to bond release. 25 Pa. Code § 1021.101(a); *Al Hamilton Contracting Co. v. DER*, 1995 EHB 855. *See also, Dunkard Creek Coal, Inc. v. DER*, 1988 EHB 1197, 1200 ("[I]n appeals of bond release denials, it is the appellant who bears the burden of proof. . .The affirmative issue in such appeals is whether the applicable bond release criteria were satisfied. . . .") Therefore, Thompson Brothers must demonstrate that the Department erred or acted arbitrarily in denying its application for bond release at the Morris No. 2 site.

The basis for the Department's denial of Thompson Brothers' request for bond release is an

area of acid mine drainage known as MP-11.[2] According to the testimony of the Department's mining conservation inspector for the Morris No. 2 site, the precise location of MP-11 has changed at times. However, there is no dispute that the current location of MP-11 is an area of seepage emanating from a ditch located along Township Road 805. It is the Department's contention that MP-11 is within the boundaries of Thompson Brothers' surface mining permit or, in the alternative, that MP-11 is hydrogeologically connected to the permit site. Thompson Brothers refutes both contentions.

There is conflicting testimony as to what constitutes the southern boundary of the Morris No. 2 permit. The Department's mining inspector Owen Biesinger, who testified on behalf of Thompson Brothers, stated that the definitive southern boundary of the permit area is the township line separating Morris and Decatur Townships. The Department's District Mining Manager Michael Smith, who testified on behalf of the Department, stated that Township Road 805 constitutes the southern boundary of the permit. In either case, a survey done by the Department shows MP-11 to be north of both Township Road 805 and the Morris - Decatur Township line (F.F. 10, 11) and, therefore, within the area covered by the permit.

This is further supported by the fact that MP-11 historically has been treated as an on-permit discharge by both the Department and Thompson Brothers. When mining inspector Owen Biesinger was asked to draw a map of the Morris No. 2 site for his supervisor in order to familiarize her with the location of MP-11, he placed MP-11 north of the southern boundary line of the permit. (Comm.

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[2] The bond release denials also stated that Thompson Brothers had failed to reclaim erosion and sedimentation control structures at the site. However, Thompson Brothers did not challenge this issue at the merits hearing or in its post-hearing brief.

Ex. 22; T.1041-45) In addition, Inspector Biesinger included MP-11 on an inventory of on-permit discharges which he prepared for the Morris No. 2 site. (Comm. Ex. 5; T. 869, 870-75, 2207-08) Further, in or about 1991-1992, Thompson Brothers filed with the Department a request for acreage reduction from its surface mining permit for the Morris No. 2 site. The request, which was denied by the Department, would have covered that portion of the site where MP-11 was located. (F.F. 18) Although the historical treatment of MP-11 as an on-permit discharge does not conclusively establish it as such, this fact, combined with the Department's survey and Thompson Brothers' lack of convincing evidence to the contrary, leads us to conclude that MP-11 falls within the perimeter of the Morris No. 2 permit boundary.

Having determined that the physical location of MP-11 is within the borders of the permit, we now turn to the question of whether MP-11 is "legally" within the scope of the permit. The parties agree that MP-11 is located within what is referred to as a "barrier area," i.e. an area where mining cannot take place unless certain conditons are first met. 25 Pa.Code § 86.37(a)(5)(iv). MP-11 is located approximately 15 feet from Township Road 805. (F.F. 12) Pursuant to Department regulations, mining may not take place within 100 feet of the outside right of way of a public road unless approval is first obtained from the Department and the agency which has jurisdiction over the road. 25 Pa. Code § 86.102(8)(ii). The parties agree that Thompson Brothers has not applied for nor obtained a variance from the Department to mine within 100 feet of Township Road 805. (F.F. 14) Since Thompson Brothers has no permission to mine in this area, it argues that MP-11 cannot be within its permit area.

The Department takes the position that MP-11's location within a barrier area is irrelevant to the question of whether it is covered by the permit. Testifying for the Department, District

Mining Manager Michael Smith noted there are three types of barrier areas with regard to surface mining -- road barriers, stream barriers, and house barriers -- and "it's common practice to include all those barriers within the limits of a surface mining permit. In fact, if you didn't, you [would] have this permit area that looked like Swiss cheese[;] with every little barrier area -- stream barrier or road barrier -- there would be some piece cut out of it . . . ." (T.2221) He further stated that "a permit has to be a contiguous area and there would be so many pieces carved out of it that it wouldn't even be able to be constructed as one contiguous unit." (T. 2221)

Section 86.37 of the mining regulations sets forth the general criteria which the Department must consider in approving or denying a permit application. The proposed permit area may not be within 100 feet of the outside right-of-way line of a public road, except as provided in Subchapter D.[3] According to Section 86.102 of Subchapter D, surface mining operations may not be conducted within 100 feet of a public road except where the Department, with the concurrence of the agency with jurisdiction over the road, allows the area to be affected after public notice and hearing and after determining the interests of the public will be protected. 25 Pa. Code § 86.102(8)(ii).

The Department interprets these sections of the regulations as follows: Surface mining permits contain so-called "barrier areas" where mining is prohibited unless further permission is obtained from the Department. As long as a barrier area isn't physically affected, the permittee is not required to obtain a variance for it. However, if the permittee wishes to affect the area, it must go through the further steps of obtaining a variance for it.

It is within the power of the Department to interpret its own regulations. *Kise v. DER*, 1992

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[3] See 25 Pa. Code § 86.37(a)(5)(iv).

EHB 1580, 1616. The Department's interpretation is entitled to deference unless we find it to be clearly erroneous. *Id.* Taking into account the language of the aforesaid regulations and the permitting process, we agree with the Department's interpretation of the regulations in question. When issuing a permit for the surface mining of coal, it would not be practical or even feasible for the Department to carve out every location within the boundaries of the permit where mining is limited or prohibited. A much more reasonable approach is that practiced by the Department, whereby the permit covers the entire area within the permit borders, but certain sections within the permit -- such as the area within 100 feet of a roadway or stream or within 300 feet of a dwelling -- may not be physically disturbed unless certain conditions are first met.

That a barrier area is part of the permit is further reinforced by the manner in which the Department views a mine operator seeking to affect land within a barrier area. If a permittee wishes to affect land located inside a barrier area, it is not required to obtain a permit revision to add acreage *if the barrier area is within the physical boundary of the surface mining permit.* (T.2224-25) When Thompson Brothers sought a variance to mine within 100 feet of another township road running through the Morris No. 2 mine site, it was not required to add additional acreage to its permit to mine this barrier area since it was already considered to be part of the permit. (T. 606-07)

Were we to adopt the reasoning of Thompson Brothers, that a barrier area is not part of the permit, this would require that a permittee seek a revision to its permit to add acreage each time it wished to affect land within a barrier area, and the Department would be required to treat the request as an application for a *new* permit. 25 Pa. Code § 86.52(d). Thus, each time a mine operator sought to affect any barrier area within the perimeter of its permit, it would be required to submit the same documentation and undergo the same level of evaluation as when it applied for the original permit.

We do not find this to be a reasonable interpretation of the regulations.

For the reasons set forth, we conclude that MP-11 falls within the physical and legal boundaries of Thompson Brothers' permit for the Morris No. 2 mine.

The Department cites regulations 25 Pa. Code §§ 86.171 and 86.172 as the basis for its denials. These regulations govern the release of bonds for a coal mining permit. In reviewing a request for bond release, the Department must consider whether the permittee has satisfactorily complied with the applicable environmental statutes and regulations and the conditions of its permit. 25 Pa. Code § 86.171(f)(1)(ii). In addition, the Department must consider whether pollution of surface or subsurface water is occurring, the probability of future pollution, and the estimated cost of abating that pollution. 25 Pa. Code § 86.171(f)(1)(iii).

Unauthorized discharges of acid mine drainage are prohibited by Sections 315 and 316 of the Clean Streams Law, 35 P.S. §§ 691.315 and 691.316, and Section 18.6 of the Surface Mining Act, 52 P.S. § 1396.18f. Since such a discharge is occurring on Thompson Brothers' permit site, the Department was authorized to withhold bond release to insure that such condition was properly abated.

Thompson Brothers suggests that the acid mine discharge at MP-11 may have pre-existed its mining of the Morris No. 2 site or may have been caused by other mining in the area. However, the burden of proof in this case does not lie with the Department to prove that Thompson Brothers' mining caused the discharge at MP-11. Rather, the burden is on Thompson Brothers to prove that it is entitled to the release of its bond money. Where a discharge of acid mine drainage exists untreated on the permit site, that burden of proof has not been met.

Moreover, even if Thompson Brothers were to establish that acid mine drainage existed at

of this appeal.

2. In an appeal of a bond release denial, the appellant has the burden of proving by a preponderance of the evidence that it is entitled to bond release. 25 Pa. Code § 1021.101(a). *Al Hamilton Contracting Co. v. DER*, 1995 EHB 855.

3. A "barrier area" is an area where mining may not take place unless certain conditions are first met pursuant to 25 Pa. Code §§ 86.37(a)(5)(iv) and 86.102(8)(ii).

4. A barrier area which is physically located within the perimeter of a permit is legally within the scope of the permit.

5. An acid mine discharge which occurs in a barrier area within the boundaries of the permit is an on-permit discharge.

6. A mining operator is responsible for abating and treating acid mine discharges which occur within its permit area. 35 P.S. § 691.316.

7. The Department did not abuse its discretion in denying bond release due to the existence of MP-11 on Thompson Brothers' permit site.

MP-11 even before it began mining the Morris No. 2 site, that would not change the outcome of this appeal. Where a polluting condition, such as acid mine drainage, exists on a permit site, the owner or operator of the site may be held liable for abatement of the discharge regardless of whether the owner or operator caused the condition. Section 316 of the Clean Streams Law, 35 P.S. § 691.316. *Western Pennsylvania Water Co. v. Commonwealth, Department of Environmental Resources*, 560 A.2d 905 (Pa. Cmwlth. 1989), *aff'd*, 586 A.2d 1372 (Pa. 1991); *Commonwealth, Department of Environmental Resources v. PBS Coals, Inc.*, 534 A.2d 1130 (Pa. Cmwlth. 1987), *allocatur denied*, 551 A.2d 217 (Pa. 1988); *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220.

This holding was recently reaffirmed by the Pennsylvania Supreme Court in *Adams Sanitation Company, Inc. v. Commonwealth, Department of Environmental Protection*, No. 0044 E.D. Appeal Dkt. 1997 (Pa. July 21, 1998), where the Court stated as follows:

> [T]he General Assembly in its enactment of Section 316 "has clearly and unambiguously authorized DER [currently, DEP] to require the correction of water pollution-causing conditons without regard to the source of the pollution."

Slip op. at 7 (quoting from *National Wood Preservers, Inc. v. Commonwealth, Department of Environmental Resources,* 414 A.2d 37 (Pa.), *appeal dismissed, 449 U.S. 803 (1980).*

Therefore, we need not determine whether Thompson Brothers' or its contractor's mining of the Morris No. 2 site caused the acid mine discharge at MP-11. It is sufficient that the discharge exists on the site permitted by Thompson Brothers to withhold the release of its bonds.

Therefore, we reach the following conclusions of law.

CONCLUSIONS OF LAW

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMPSON BROTHERS COAL COMPANY, INC.	:	
v.	:	**EHB Docket No. 96-028-R**
	:	**(Consolidated with 96-029-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of September, 1998, the consolidated appeal of Thompson Brothers Coal Company, Inc. at EHB Docket No. 96-028-R is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 15, 1998

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Northeast Region

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PONDEROSA FIBRES OF PENNSYLVANIA PARTNERSHIP	:	
	:	**EHB Docket No. 98-178-C**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 16, 1998**

OPINION AND ORDER ON PETITION FOR TEMPORARY SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for temporary supersedeas is granted in part and denied in part. The Board will supersede a provision in a Department order where pollution is more likely if the appellant is required to comply with the provision than if the appellant is not required to do so. The Board will not supersede provisions of a Department order which will not result in immediate and irreparable injury to the appellant.

OPINION

This appeal was initiated with the September 10, 1998, filing of a notice of appeal by Ponderosa Fibres of Pennsylvania Partnership (Appellant) to a September 9, 1998, order issued by the Department of Environmental Protection (Department). The order pertains to a plant Appellant operates in Northampton, PA, that recycles post-consumer waste paper into marketable pulp for use in recycled content paper. The order alleged that, on 11 separate occasions, the Appellant's plant emitted malodors which were detectable off site and objectionable to the public, in violation of

Sections 8 and 13 of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001- 4106, at §§ 4008 and 4013, and Section 123.31(b) of the Department's regulations, 25 Pa. Code § 123.31(b). The order directed Appellant to:

(1) cease operation of the plant's air contamination sources (sources) within 48 hours of receipt of the order (Order, paragraph 1);

(2) remove all sludge, process water, and industrial wastewater from the plant within 10 days of ceasing operation of the sources (Order, paragraph 1);

(3) resume operation of the sources only after Appellant submits, and the Department approves, a plan approval application providing for air pollution control devices that will eliminate all malodorous emissions from the facility (Order, paragraph 2);

(4) notify the Department at least five days before resuming operation of the sources (Order, paragraph 3);

(5) operate the sources and all related equipment in accordance with "good air pollution control practices," the Air Pollution Control Act, the Department's rules and regulations, and in such a manner that they will not emit malodors (Order, paragraph 3).

On September 11, 1998, Appellant filed an amended notice of appeal, a petition for temporary supersedeas, and a petition for supersedeas. The Board conducted a conference call on the petition for temporary supersedeas on September 14, 1998, and issued two related orders. One scheduled a supersedeas hearing for September 18, 1998. The other order granted in part and denied in part Appellant's petition for temporary supersedeas. We granted Appellant a supersedeas until September 18, 1998, to the extent the Department's order directed Appellant to remove all sludge, process water, and industrial wastewater from the plant within 10 days of ceasing operation of the sources. However, we denied the petition for temporary supersedeas with respect to the other aspects of the Department's order. This opinion explains our order on the petition for temporary

supersedeas.

In its petition for temporary supersedeas, Appellant averred that it is entitled to a temporary supersedeas of the Department's order because Appellant will likely prevail on the merits of its appeal, Appellant would otherwise suffer irreparable harm, and no harm would result from preserving the status quo ante. In support of its contention that it would suffer irreparable injury without a temporary supersedeas, Appellant argues that:

> (1) it is physically impossible to remove all the sludge, process water, and industrial wastewater from the plant within 10 days, as required by the Department's order;
>
> (2) even if it were possible to remove all the sludge, process water, and industrial wastewater from the plant within 10 days, Appellant could not do so without violating its National Pollution Discharge Elimination System (NPDES) permits; and,
>
> (3) suspending operations at the plant would result in financial loss, and could jeopardize Appellant's position in bankruptcy proceedings and potential financing arrangements.

In its response to the petition for temporary supersedeas, the Department argued that we should deny Appellant's petition for temporary supersedeas because a temporary supersedeas would result in Appellant continuing to emit malodors, and the Board could prevent irreparable injury to Appellant, even without a temporary supersedeas, by holding the supersedeas hearing promptly.

During the conference call on September 14, 1998, Appellant advised the Board that it had voluntarily suspended operations at the plant on September 11, 1998, until October 10, 1998, and that, during the shutdown, it would start removing the sludge, process water, and industrial wastewater from the plant. However, Appellant continued to maintain that it could not remove the materials within 10 days, as required in the Department's order.

I. The Standard for Granting Temporary Supersedeas

Where a party fears that immediate and irreparable injury will result from a Department action before the Board can conduct a hearing on a petition for supersedeas, he may file a petition for temporary supersedeas, requesting that the Board supersede the Department's action until the Board can conduct a supersedeas hearing. 25 Pa. Code § 1021.79. When determining whether to grant a petition for temporary supersedeas, Section 1021.79(e) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.79(e), provides that the Board shall consider:

> (1) The immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held.
>
> (2) The likelihood that injury to the public, including the possibility of pollution, will occur while the temporary supersedeas is in effect.
>
> (3) The length of time before the Board can hold a hearing on the petition for supersedeas.

We have held that, when determining whether an appellant will suffer irreparable injury for purposes of a petition for temporary supersedeas, the appellant must show that he would suffer irreparable injury if forced to comply with the Department's action *until the supersedeas hearing*--not merely that he would suffer irreparable injury if forced to comply with the Department's action *until the Board resolves his appeal. A&M Composting, Inc. v. DEP,* 1997 EHB 965.

II. Provision of Order Requiring the Removal of Sludge, Process Water, and Industrial Wastewater Within 10 Days of Plant Shutdown

Appellant has proven that it is entitled to a temporary supersedeas with respect to the requirement that it remove the sludge, process water, and industrial wastewater from the plant within 10 days of suspending operations. Appellant contends that it is physically impossible to remove these substances from the plant within 10 days and that, even if it were possible, Appellant could not

remove the substances within 10 days without violating its NPDES permits. Appellant submitted an affidavit from Thomas Meersman, Mill Manager at the plant, in support of both propositions. (Petition for Supersedeas, Exhibit B, paragraphs 11 and 12.) The Department failed to convincingly rebut either proposition in its response to the petition for temporary supersedeas or the September 14, 1998, conference call.

Appellant has established that it is entitled to a temporary supersedeas with respect to the requirement that it remove the sludge, process water, and industrial wastewater from the plant within 10 days. Since the plant has suspended operations until October 10, 1998--22 days after the supersedeas hearing--granting the temporary supersedeas will not result in pollution, or any other injury to the public.[1] Indeed, there seems to be a greater likelihood of pollution if we *deny* the petition for temporary supersedeas: If, as Appellant maintains, it is impossible to remove the materials from the plant within 10 days consistent with Appellant's NPDES permits, then forcing Appellant to do so will result in water pollution.

Other Provisions of the Department's Order

Appellant has failed to establish that it is entitled to a temporary supersedeas with respect to the other provisions of the Department's order. Those provisions all pertain to operating the sources at the plant. They direct that Appellant cease operating the sources within 48 hours of receipt of the order; that Appellant resume operation of the sources only after the Department approves a new plan approval and after providing the Department with 5 days notice beforehand; and that Appellant

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[1] Furthermore, during the September 14, 1998, conference call, Appellant stated that, while it could not comply with the 10 day deadline in the Department's order, it would remove the sludge, process water, and wastewater while the plant was shut down.

operate the sources and associated equipment in accordance with "good air pollution control practices," the Air Pollution Control Act, the Department's rules and regulations, and in such manner that the sources will not emit malodors.

None of these provisions of the order will injure Appellant--much less immediately and irreparably injure Appellant--before the supersedeas hearing on September 18, 1998. Appellant concedes that it has already ceased operation of the sources, and that it will not resume operation of the sources until at least October 10, 1998--22 days after the supersedeas hearing. Therefore, Appellant will not be injured by the provisions of the order requiring that Appellant cease operating the sources, that Appellant resume operating the sources only after obtaining a new plan approval from the Department and notifying the Department five days beforehand, and that Appellant operate the plant in accordance with "good air pollution control" practices and without emitting malodors. Those provisions of the Department's order would only affect Appellant if it were to resume operation of the sources on September 23, 1998 or before.

In light of the foregoing, Appellant's petition for temporary supersedeas is granted in part and denied in part. The petition is granted to the extent Appellant seeks a temporary supersedeas of the provision in the Department's order requiring that Appellant remove all sludge, process water, and industrial wastewater from the plant within 10 days of receiving the Department's order. The petition is denied in all other respects.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PONDEROSA FIBRES OF PENNSYLVANIA PARTNERSHIP	:	
	:	**EHB Docket No. 98-178-C**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of September, 1998, it is ordered that Appellant's petition for temporary supersedeas is granted to the extent Appellant seeks a temporary supersedeas of the provision in the Department's September 9, 1998, order requiring that Appellant remove all sludge, process water, and industrial wastewater from the plant within 10 days of receiving the Department's order. This supersedeas shall expire on September 18, 1998. The petition is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 16, 1998

c: **DEP Litigation Library:**
Attention: Brenda Houck
For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAWN M. ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO III	:	
v.	:	**EHB Docket No. 98-074-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	**Issued: October 27, 1998**

OPINION AND ORDER ON MOTION FOR STAY OF PROCEEDINGS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion to stay proceedings is denied where a stay would prejudice the appellants and would not serve to further judicial economy.

OPINION

This appeal was filed on April 24, 1998 by Dawn M. Ziviello, Angela J. Ziviello, and Archimede Ziviello, III (the Ziviellos), challenging the approval of a nutrient management plan submitted by Ting-Kwang Chiou and Chiou Hog Farm, LLC (Chiou), the owners and operators of a hog farm located in Bedford County. On October 6, 1998, Chiou filed a motion seeking a stay of proceedings on the basis that it intends to submit an amended nutrient management plan to the Bedford County Conservation District, which is charged with reviewing such plans. Chiou contends a stay will further judicial economy and avoid undue time and expense for the parties and

the Board. The Ziviellos filed a response to the motion on October 20, 1998, objecting to a stay. The State Conservation Commission, the appellee in this matter, filed no response.

The Ziviellos object to the stay for a number of reasons. First, they contend that most of the changes which Chiou intends to make to its plan by means of an amendment are not authorized by the regulations. Second, the Ziviellos assert that while the amendment may eliminate some of the issues they have raised in their appeal, it will not eliminate all of them, and they will be required to bear the burden and expense of filing another appeal. Finally, they assert that there is no guarantee that Chiou will not begin operating under the existing plan while it pursues an amendment.

As noted in *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 925, "a stay is an extraordinary measure" and therefore "the movant must offer some compelling reasons showing that a stay is warranted." *Id.* at 930 (citing *Stadler v. McCulloch*, 882 F. Supp. 1524 (E.D. Pa. 1995) Relevant factors to be considered are the appellant's interest and potential prejudice, the burden on the appellee agency and the permittee, the burden on the Board, and the public interest. *Id.* (citing *In re Residential Doors Antitrust Litigation*, 900 F. Supp. 749 (E.D. Pa. 1995) Also to be considered are "the time and effort of counsel and litigants with a view toward avoiding piecemeal litigation." *Id.*

Based on their response, the Ziviellos have a substantial interest in moving forward with this appeal. As they note in their response, there is no supersedeas in place, and Chiou may begin operating under its existing permit at any time. There is no way to predict when or if the Bedford County Conservation District will approve the amended plan. Were we to grant a stay at this time, the Ziviellos would have no means of challenging Chiou's operation under the existing plan.

Moreover, Chiou indicates in its motion that the amended plan will not resolve all of the issues raised by the Ziviellos in their appeal, but will address only the "non-substantive non-issues" raised by the Ziviellos. By this, Chiou appears to mean "non-technical" matters. Since it is clear these changes will not eliminate the basis for the Ziviellos' appeal, a stay would not serve to avoid unnecessary litigation in this matter.

Moreover, with regard to the "non-technical" matters which Chiou intends to revise with its plan amendment, these matters could be resolved much more efficiently by means of a stipulation entered into by the parties, rather than the more drastic step of staying the entire appeal.

Finally, in the event a plan amendment is approved and the Ziviellos also file an appeal from the amendment, that appeal may be consolidated with the present one, if consolidation would be in the interest of the parties and judicial economy.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAWN M. ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO III	:	
v.	:	EHB Docket No. 98-074-R
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	

ORDER

AND NOW, this 27th day of October, 1998, the Permittee's Motion for Stay of Proceedings is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 27, 1998

Service list attached.

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

For the Commonwealth, State Conservation Commission:
Mary Martha Truschel, Esq.

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STANLEY T. PILAWA AND DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 96-108-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 25, 1998**

ADJUDICATION

By the Board

Synopsis:

The Department has shown by a preponderance of the evidence that Appellant violated the Storage Tank Act by causing or assisting in the handling of tanks by three uncertified persons, by allowing a release of kerosene to the soil while removing an underground storage tank, and by causing or assisting in the improper storing of contaminated soil. Thus, it was proper for the Department to assess a civil penalty for those violations of the Storage Tank Act.

The Department reasonably concluded that causing or assisting in the handling of tanks by three uncertified persons is a high risk violation. However, it was not reasonable for the Department to conclude that the violation was deliberate. Because the Appellant was only negligent or reckless with respect to the violation, the $9,900 penalty assessed by the Department is reduced to $6,600.

The Department reasonably concluded that allowing a release of kerosene during the removal of a tank was a medium risk violation. However, it was not reasonable to conclude that the violation

was negligent or reckless. Therefore, the $2,000 penalty assessed by the Department is reduced to $1,000.

The Department reasonably concluded that Appellant was negligent or reckless for causing or assisting in the improper storing of contaminated soil. Therefore, we will not disturb the $2,000 penalty assessed by the Department for the violation.

Because Appellant failed to claim in the Notice of Appeal that the underground storage tanks removed in this case were not regulated tanks, the issue is deemed waived under 25 Pa. Code § 1021.51(e).

PROCEDURAL HISTORY

On May 17, 1996, Stanley T. Pilawa and Disposal, Inc. (collectively, Pilawa) filed a Notice of Appeal challenging the Department of Environmental Protection's (Department) April 19, 1996 Assessment of Civil Penalty (Assessment) for violations of the Storage Tank and Spill Prevention Act (Storage Tank Act)[1] at an abandoned gasoline station in Mountaindale, Cambria County (Site).

In the Assessment, the Department alleged that: (1) on or about September 29, 1995, Pilawa removed underground storage tanks without a current installer certification (Violation No. 1); (2) on September 29, 1995, Pilawa caused or assisted in the handling of tanks by three uncertified persons (Violation No. 2); (3) on the same date, Pilawa allowed a release of kerosene to the soil while removing an underground storage tank (Violation No. 3); and (4) on October 2, 1995, Pilawa caused or assisted in the improper storing of contaminated soil (Violation No. 4). Pilawa denies Violation Nos. 3 and 4, asserts that there is no difference between Violation Nos. 1 and 2, and

[1] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104.

contends that the assessed penalties are excessive.

On June 4, 1996, the Department filed a Motion to Dismiss the appeal because Pilawa did not pre-pay the penalty assessment or post an appeal bond. On July 18, 1996, the Board granted the motion and dismissed the appeal. Pilawa appealed to Commonwealth Court, which reversed the Board and remanded the matter for a hearing on Pilawa's ability to pre-pay the penalty assessment.

The Board scheduled such a hearing. However, on October 30, 1997, the Department filed a Stipulation of Fact and Law wherein the Department agreed that Pilawa was unable to pre-pay the penalty assessment. On November 4, 1997, the Board ordered the parties to submit documents and a narrative to show that Pilawa is unable to pre-pay the penalty assessment. The Board reviewed the materials submitted by the parties and, on December 4, 1997, ordered that Pilawa could proceed with the appeal.

A hearing on the merits of the appeal was held before Administrative Law Judge Robert D. Myers, a Member of the Board, on May 6 and 7, 1998. At the hearing, the Department withdrew the allegations asserted in Violation No. 1. (N.T. at 9.) Therefore, the Board need only address the validity of Violation Nos. 2 through 4 and the propriety of the civil penalties assessed for each of them. The draft of this Adjudication was prepared by Judge Myers prior to his retirement from the Board on September 18, 1998.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank Act and the rules and regulations promulgated thereunder. (Joint Stipulation of Facts, No. 1.)

2. Stanley T. Pilawa is an individual with a mailing address of 179 Mountain View

Road, Ebensburg, Pennsylvania 15931. He is also Chief Executive Officer and Secretary of Disposal, Inc. (Joint Stipulation of Facts, No. 2, 5.)

3. Disposal, Inc. is a Pennsylvania corporation with a mailing address of 179 Mountain View Road, Ebensburg, Pennsylvania 15931. The company was incorporated by Stanley T. Pilawa in November 1995 and is engaged in the business of brokering the disposal of waste. Prior to November 1995, Stanley T. Pilawa contracted for and sold numerous underground storage tank removal and remediation projects. He conducted business as Disposal, Inc. and represented to others that Disposal, Inc. was his company. (Joint Stipulation of Facts, Nos. 3-4, 6-7; N.T. at 276.)

4. Mr. Gathagan is the owner of the Mountaindale Site. The Department's Emergency Response Team, the county hazmat team, and the local fire company responded to a gasoline spill at the Site on Friday, September 22, 1995. Gasoline from underground storage tanks had flowed from two uncapped fill pipes onto the ground and into a ditch and stream. (Joint Stipulation of Facts, Nos. 8, 12; N.T. at 17-18, 20, 23-24; Exhibits C-1, C-2, C-3, C-5.)

5. Residents near the Site were evacuated because of high levels of gasoline vapors and fumes. Absorbent booms and pads were used to absorb the gasoline and prevent further releases of gasoline. Approximately 2,000 gallons of gasoline and water were pumped from the underground storage tanks by the Department's contractor, McCutcheon Enterprises. Mr. Gathagan's son, Richard Gathagan, paid the Department's pumping costs. After the emergency response activities were completed, the Site was referred to the Department's Storage Tank Program. (Joint Stipulation of Facts, Nos. 9-11; N.T. at 19-20, 22-26, 30; Exhibit C-5.)

6. On Sunday, September 24, 1995, Bryan McConnell, a hydrogeologist for the Department's Storage Tank Program, visited the Site with Township Supervisor Roger Kruis. They

did not find any liquid in the tanks and observed no adverse effect on the stream. (Exhibits C-4, C-7, C-8.)

7. On Wednesday, September 27, 1995, Stanley T. Pilawa requested information from the Department concerning the requirements for properly removing the underground storage tanks at the Site. The Department provided the following: (1) Underground Storage Tank Closure Notification Form (Closure Notice); (2) Registration of Storage Tank Form (Registration Form); and (3) Registration of Storage Tank Fact Sheet. Stanley T. Pilawa returned by facsimile a completed Closure Notice and Registration Form. The Closure Notice identified "Richard Gathagan" as owner of the tanks and "Edward Edwards," certification number 3783, as the certified installer who would be conducting the tank removal. The Registration form also identified Richard Gathagan as owner of the two tanks and indicated that the tanks were to be removed on September 30, 1995. (Joint Stipulation of Facts, Nos. 13-15, 19-20, 23-24; N.T. at 59.)

8. Tank removal activities began on September 29, 1995. Edwin Edwards, who is the same person as the Edward Edwards identified in the Closure Notice, was not at the Site on that date. Edwards and his wife were opening a restaurant, and, as a result, he was too busy to come. However, Greg Masleh, Jon March, and Matt Lansberry were there. Pilawa had hired these three men to assist in the tank removal, but none is a certified installer. Pilawa believed that Masleh was a certified installer because Masleh had told him so and because Pilawa had observed Masleh remove tanks on at least five occasions without Edwards being present. Therefore, Pilawa allowed the men to begin tank removal activities on September 29, 1995 without Edwards. (Joint Stipulation of Facts, Nos. 32-37, 40-41; N.T. at 292; 295.)

9. Pilawa, Edwards, Masleh and March were employees of Global Spill Management

(Global Spill). Edwards was Global Spill's Operations Manager. Pilawa sold tank removal services for Global Spill and had discussed tank jobs with Edwards on numerous occasions. On this occasion, Pilawa had contacted Edwards about the tank removal. Edwards had agreed to handle the job with Masleh and had given Pilawa his certification number to use. On September 29, 1995, Global Spill equipment was at the Site. (N.T. at 61, 124-25, 130, 132-33, 280-82, 294-95.)

10. McConnell visited the Site on September 29, 1995 at Pilawa's request. Pilawa showed McConnell the Site, including an area where a small amount of kerosene had spilled onto the ground from a tank during removal. While at the Site, McConnell observed Masleh start an air compressor and begin to cut a hole in one of the tanks with an air chisel. McConnell asked whether the tanks had been checked for explosive vapors and was told that there was no meter at the Site. The workers then removed the air chisel from the compressor and put the air hose inside the tank to blow the vapors and fumes out of the tank. McConnell asked the identity of the certified installer at the Site and was told that the certified installer was not there, but that the Department's Conshohocken office allowed Edwards to oversee tank handling activities from offsite. Pilawa learned then that Masleh was not a certified installer, and work was stopped until Pilawa could hire a certified installer. Pilawa hired certified installer Paul Whittaker on or about September 30, 1995 to complete the job. (Joint Stipulation of Facts, Nos. 38, 47; N.T. at 60, 62-63, 67-70, 134, 290, 299-301; Exhibits C-12, C-14.)

11. Later on September 29, 1995, McConnell contacted Edwards. Edwards told McConnell that he had nothing to do with the tank removal. Edwards later wrote a letter to the Department stating that: (1) Global Spill had not been contacted in any way to remove the tank; (2) Masleh and March were on vacation that day; and (3) he did not know Pilawa had used his

certification number for the job. (Exhibits C-15, C-19.)

12. In his testimony before the Board, Edwards again stated that he never discussed the Mountaindale Site with Pilawa. However, on cross-examination, Edwards recalled that Pilawa had told him about the tank removal job but did not mention its location. Edwards testified that he declined to become involved because "my job is not worth that" and because he was busy opening a restaurant with his wife. However, Edwards admitted that Global Spill had done some tank removal activities without him being present at the site. (N.T. at 130, 133-34.)

13. Anna Marie Tempero, Storage Tank Section Chief, testified that certified installers may spill a small quantity of a substance when removing a tank, even when the certified installer is following proper procedures. (N.T. at 242.)

14. On September 30, 1995, McConnell was at the Site again. McConnell noticed that a pile of contaminated soil was not covered with plastic. Lansberry agreed to cover the soil pile with plastic after he was able to purchase a roll of plastic later in the day. (Exhibit C-16.)

15. On October 2, 1995, Corey Giles, a Water Quality Specialist Supervisor for the Department's Storage Tank Program, went to the Site with Ed Gursky, a hydrogeologist for the Department. No workers were present when the two men arrived at the Site. Lansberry appeared around 3:15 p.m. He told them that he was in the area to bid on a water line project and just decided to stop at the Site. Lansberry offered to go to a nearby telephone to call Pilawa so that the inspectors could discuss the inspection with him. The men waited until close to 5:00 p.m. for Lansberry or Pilawa to return but, when no one came back, they left the Site. In the course of their inspection of the Site, the men observed an uncovered pile of contaminated soil and noticed that no work was being done. (Joint Stipulation of Facts, No. 45; N.T. at 108-09, 113-14, 119; Exhibits C-17, C-18.)

16. Lansberry testified about the events of October 2, 1995 as follows:

Q Do you recall being at the job site ...?

A Yes. I clearly recall that day.

Q What were you doing over there?

A Actually, I was over there for one reason specifically, ... the one pile of soil, the biggest pile that was there, I was checking on it. Well, no, actually I wasn't there for that purpose. I was told the day before by the inspector back there ... that [two men] were going to be out there that day. So, I in turn went up. I actually seem to recall that I think [he] said that [they] would be there probably around nine or ten.

So, actually, I was just more or less hanging around, making sure that the pile was covered up with plastic. In turn, I had taken a front end loader and took some dirt off of the bigger pile and had made a smaller pile, which I had put ... on top of plastic that day.

Q I am going to show you [Exhibit C-17]. Does that picture depict the events that you just described?

A Yes, very clearly. I had to go get some more plastic to cover that up for that day, but during the time which I was doing that, [the Department inspectors] came there and they was [sic] walking around the site looking at things.

It was probably -- I think I recall maybe around four or four thirty or something that them [sic] guys had left the site and I was there by myself.

Q [The Department inspector] testified and his notes reflected that you told him you were in the area for a water project?

A No. Mr. [Kruis had] ... a bony pile on his property and I was sort of spending some time with him to see about maybe reclaiming the bony pile, ... he is right across the street. You can see his property on this picture. Prior to, I was waiting for someone who was supposed to show up to look at the area that day. That is why I was there.

Then, of course, after they had left, I seem to think it was around six or six thirty by the time I left. I had staged the dirt on that particular smaller pile there, covered it with plastic. I mean, you could still see in this picture that the highlift door and the windows are still open. So, by no means I was ready to leave.

Q Were you at the site when [the two men] arrived?

A Yes.

Q They testified earlier that they didn't see you.

A Oh, you mean when they came that day? I don't know how long they was [sic] there before I had actually came [sic] back to this property that day.

Q When you left at the end of the day, was the pile covered?

A This smaller pile? Yes. And that was probably, like I said, five thirty or six o'clock.

(N.T. at 226-28.) We do not find Lansberry's testimony to be credible.

17. The Department used a Penalty Assessment Matrix (Matrix) to arrive at a civil penalty for Pilawa's violations of the Storage Tank Act and its regulations. The Matrix provides a framework for the Department to calculate penalties based on factors set forth in the Storage Tank Act, including violation seriousness, duration, and willfulness. (Exhibits C-22, C-24.)

18. According to the Matrix, the seriousness of a violation depends upon the risk to the environment and/or to human health from that violation. The Matrix sets forth three levels of seriousness for a violation: low risk, medium risk, and high risk. (Exhibits C-22, C-24.)

19. A low risk violation is one that is not associated with a release or potential release to the environment, *e.g.*, failing to register tanks, submit closure reports, or maintain proper records. A violator may be assessed from $100 to $1,500 for a low risk violation. (Exhibits C-22, C-24.)

20. A medium risk violation is one that is associated with a release or potential release to the environment. For example, failing to install or upgrade equipment and failing to perform preventive maintenance are medium risk violations. Likewise, an act or omission that increases the risk of a release, or increases the degree and extent of harm that could result from a release, is a

medium risk violation. A violator may be assessed from $1,000 to $3,000 for a medium risk violation. (Exhibits C-22, C-24.)

21. A high risk violation is one associated with a *significant* release to the environment. Whether a release is significant depends on: (1) the aerial extent of the contamination; (2) whether the contamination has moved offsite; (3) the impact on water resources; (4) public exposure; (5) explosion potential; and (6) the quantity, mobility, and characteristics of the substance. High risk violations include the failure to remediate or initiate corrective action activities when there is a substantive threat to public safety, public health, or the environment. A violator may be assessed from $2,000 to $5,000 for a high risk violation. (Exhibits C-22, C-24.)

22. Following the guidelines set forth in the Matrix, the Department concluded that Violation No. 2 was a high risk violation because it was associated with a *significant* release to the environment. The Department assigned a dollar value of $3,300 for violation seriousness. (Exhibit C-24.)

23. With respect to the duration of Violation No. 2, the Department assigned the lowest value which the Matrix allows for the duration of a violation, which is one day, and Pilawa does not contest that figure. (Exhibit C-24.)

24. Willfulness relates to whether the violator knew his act was a violation of the law. The Matrix sets forth three levels of willfulness for a violation: deliberate, negligent or reckless, and basic liability. A violation is deemed deliberate when the violator knew the law and consciously violated it. When a violation is deliberate, the civil penalty is tripled. A violation is deemed negligent or reckless when the violator should have known the law and acted contrary thereto. When a violation is negligent or reckless, the civil penalty is doubled. Where no level of willfulness can

be established, the violator is still basically liable for the amount of the civil penalty. (Exhibit C-22, C-24.)

25. The Department determined that Violation No. 2 was deliberate. The Department based this determination on the fact that Pilawa submitted a Closure Notice listing a certified installer but then hired uncertified persons to do the tank removal. The Department multiplied the $3,300 amount by three to arrive at the total civil penalty of $9,900 for Violation No. 2. (Exhibit C-24.)

26. The Department determined that Violation No. 3 was a medium risk violation because it involved a release. However, because the release was not extensive, the Department assessed the minimum amount for a medium risk violation, which is $1,000. The Department then decided that Pilawa was negligent in allowing the release because the release could have been prevented by using procedures known to certified installers. Therefore, the Department doubled the amount to $2,000. (Exhibit C-24.)

27. The Department determined that Violation No. 4 was a low risk violation and that Pilawa was negligent in failing to properly store the pile of contaminated soil. The Department assessed $1,000 for the low risk violation and doubled it to $2,000 because of Pilawa's negligence. (Exhibit C-24.)

28. The total civil penalty assessed by the Department for Violation Nos. 2, 3, and 4 is $13,900.

DISCUSSION

I. Violation No. 2

The first issue is whether Pilawa caused or assisted[2] in the violation of section 501(c)(2) of the Storage Tank Act, 35 P.S. § 6021.501(c)(2), by employing three uncertified persons to perform tank handling activities on September 29, 1995 at the Site. Section 501(c)(2) of the Storage Tank Act requires that underground storage tanks be removed by a certified installer.

Pilawa does not deny that he hired three uncertified men to remove an underground storage tank. (*See* Notice of Appeal.) Pilawa asserts only that he did not "consciously" do so. (Appellants' Post-hearing Brief at 12.) Therefore, we shall not discuss the fact of the violation any further. We shall, however, consider Pilawa's contention that the $9,900 penalty assessed by the Department for Violation No. 2 is excessive.

A civil penalty assessment by the Department is an exercise of discretion. It is the Department's burden to show by a preponderance of the evidence that the amount assessed was reasonable. "Stated another way, our task is to see if there is a 'reasonable fit' between the amount of the penalty and the violations." *Goetz v. DER*, 1993 EHB 1401, 1428; *see Wilbar Realty, Inc. v. Department of Environmental Resources*, 663 A.2d 857 (Pa. Cmwlth. 1995).

The Department used a Penalty Assessment Matrix (Matrix) to arrive at the $9,900 civil penalty for Violation No. 2. (*See* Exhibits C-22, C-24.) The Matrix provides a framework for the Department to calculate penalties based on factors set forth in the Storage Tank Act, including violation seriousness, duration, and willfulness.

A. Violation Seriousness

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[2] Under section 1310 of the Storage Tank Act, 35 P.S. § 6021.1310, it is unlawful to cause or assist in the violation of any provision of the act or of any rule or regulation promulgated thereunder.

According to the Matrix, the seriousness of a violation depends upon the risk to the environment and/or to human health from that violation. The Matrix sets forth three levels of seriousness for a violation: low risk, medium risk, and high risk. A low risk violation is one that is not associated with a release or potential release to the environment, *e.g.*, failing to register tanks, submit closure reports, or maintain proper records. A violator may be assessed from $100 to $1,500 for a low risk violation.

A medium risk violation is one that is associated with a release or potential release to the environment. An act or omission that increases the risk of a release, or increases the degree and extent of harm that could result from a release, is a medium risk violation. A violator may be assessed from $1,000 to $3,000 for a medium risk violation.

A high risk violation is one associated with a *significant* release to the environment. Whether a release is significant depends on: (1) the aerial extent of the contamination; (2) whether the contamination has moved offsite; (3) the impact on water resources; (4) public exposure; (5) explosion potential; and (6) the quantity, mobility, and characteristics of the substance. A violator may be assessed from $2,000 to $5,000 for a high risk violation.

Following the guidelines set forth in the Matrix, the Department concluded that Violation No. 2 was a high risk violation because it was associated with a *significant* release to the environment. The Department assigned a dollar value of $3,300 for violation seriousness.

The associated release occurred on Friday, September 22, 1995 when gasoline spilled from the uncapped fill pipes of two underground storage tanks onto the ground and into a ditch and stream. The local fire company, the county hazmat team and the Department's Emergency Response Team came to the Site. Those who responded used polypropylene booms and pads to soak up the

gasoline and to prevent further releases into the stream; they evacuated approximately 40 people who lived close to the stream because of gasoline fumes in their homes; and they pumped the gasoline and water from the two tanks. (N.T. at 17-25; Exhibits C-1, C-2, C-3, C-4, C-5, C-7, C-8.)

While Pilawa was not responsible for this initial release, his subsequent removal activities had to consider its significance. The Department was properly concerned about work being done on the Site by uncertified persons.

On September 24, 1995, McConnell, a Department hydrogeologist, inspected the Site. He did not find any liquid in the tanks and observed no adverse effect on the stream. (Exhibits C-4, C-7, C-8.) Thus, the situation was not as serious as it had been. On September 29, 1995, when the tanks were removed by uncertified persons, the Department was primarily concerned about the possibility of an explosion from the improper handling of gasoline vapors remaining in the tanks or from the improper handling of saturated soil around the tanks. (N.T. at 67-71; Exhibit C-24.)

Pilawa insists that it is absurd to consider Violation No. 2 a high risk violation and suggests that Violation No. 2 is only a low risk violation. Pilawa points out that: (1) the Department never assessed a civil penalty for the initial release and paid little attention to the situation after alleviating the emergency; (2) the tanks were empty when Pilawa's men removed them; (3) McConnell signed a note stating that all work performed as of September 30, 1995 was proper and in accordance with regulations; and (4) the $9,900 penalty is nearly four times the actual cost incurred by the Department to clean up the original gasoline spill. (Pilawa's Post-hearing Brief at 15.)

We reject Pilawa's contention that Violation No. 2 is merely a low risk violation. The uncertified persons hired by Pilawa had to remove tanks potentially filled with vapors from soil contaminated with gasoline from the significant release of September 22, 1995. There was clearly

a risk of explosion, and, under the Matrix, the Department may consider a violation to be high risk because of the explosion potential. Moreover, the Department's $3,300 assessment for Violation No. 2 is only $300 above the maximum penalty for a medium risk violation. For these reasons, we cannot say that the Department's $3,300 assessment was unreasonable.

We are not persuaded otherwise by the fact that McConnell signed a note on September 30, 1995 stating that all work performed "thus far" was proper and in accordance with regulations. Given the context of the note, it is clear that the note applies only to the work performed "thus far" on September 30, 1995. McConnell explained that he signed the note on September 30, 1995 because, by that time, Pilawa had hired a certified installer to oversee tank handling activities. With the certified installer at the Site, work was "well on line and in regulation." McConnell also explained that he signed the note despite an uncovered soil pile because he understood that someone was going to buy plastic, come back, and cover the pile. (N.T. at 95, 97; Exhibit A-1.) Thus, the September 30, 1995 note does not take away or excuse the violations of the previous day or the violation of October 2, 1995.

B. Duration

The Department assigned the lowest value which the Matrix allows for the duration of a violation, which is one day, and Pilawa does not contest that figure.

C. Willfulness

Willfulness relates to whether the violator knew his act was a violation of the law. The Matrix sets forth three levels of willfulness for a violation: deliberate, negligent or reckless, and basic liability. A violation is deemed deliberate when the violator knew the law and consciously violated it. When a violation is deliberate, the civil penalty is tripled. A violation is deemed

negligent or reckless when the violator should have known the law and acted contrary thereto. When a violation is negligent or reckless, the civil penalty is doubled. Where no level of willfulness can be established, the violator is still basically liable for amount of the civil penalty.

Here, the Department determined that Violation No. 2 was deliberate. The Department based this determination on the fact that Pilawa submitted a Closure Notice listing a certified installer but then hired uncertified persons to do the tank removal. Thus, the Department multiplied the $3,300 amount by three to arrive at the total civil penalty of $9,900.

Once again, Pilawa maintains that the Department's decision is absurd. The following is Pilawa's account of the events leading up to Violation No. 2. Pilawa contacted certified installer Edwards about the tank job. Edwards was the Operations Manager for Global Spill. Pilawa, who sold tank removal services for Global Spill, had discussed tank jobs with Edwards on numerous occasions. Edwards agreed to handle the Mountaindale job with Greg Masleh, another Global Spill employee, and gave Pilawa his certification number. Pilawa believed that Masleh was also a certified installer because Masleh had told Pilawa as much and because Pilawa had seen Masleh remove tanks on at least five occasions without Edwards being present. After Pilawa secured a contract to perform the tank removal services at the Site and submitted the necessary paperwork to the Department, Pilawa invited McConnell, a Department employee, to visit the Site to observe tank handling activities. On September 29, 1995, Edwards did not appear at the Site because he and his wife were opening a restaurant. However, Masleh was there with the Global Spill equipment. With Masleh at the Site, Pilawa believed it was proper to begin the tank removal without Edwards. Later that day, McConnell arrived and questioned some of Masleh's tank handling activities. Masleh admitted to McConnell that he was not a certified installer but explained that this did not matter

because the Department's Conshohocken office allowed Edwards to oversee tank handling activities from offsite. Pilawa claims that, until that moment, he did not realize that Masleh was uncertified. (N.T. at 60, 133, 276, 280, 282-85, 292-95, 300-02.)

The Department apparently does not believe Pilawa. (N.T. at 259.) This is because the Department contacted Edwards on September 29, 1995 about his role in the Mountaindale tank job, and Edwards claimed that he knew nothing about it. (N.T. at 138; Exhibits C-15, C-19.) However, in his testimony before the Board, Edwards recalled that Pilawa had asked him to do the job, and that Edwards declined to do it because "my job is not worth that" and because he and his wife were busy opening a restaurant. Edwards also admitted that Global Spill had done some tank removals without certified personnel at the work site. (N.T. at 130, 133-34, 137.)

We have carefully considered the testimony of Pilawa and Edwards, along with other relevant evidence, and conclude that Violation No. 2 was *not* deliberate. First, there is no question that Pilawa invited a representative from the Department to observe tank handling activities at the Site. We doubt that Pilawa would have done so if he *knew* that the tank handlers were uncertified, and that no one else at the Site was certified. Second, several witnesses testified that Masleh had previously performed tank removal activities for Global Spill without a certified installer at the work site. Thus, there was a reasonable basis for Pilawa's belief that Masleh was certified.

With respect to Edwards, we believe that: (1) Pilawa asked Edwards to be the certified installer for the job; (2) Edwards agreed to do it; (3) Edwards gave Pilawa his certification number; and (4) Edwards arranged for Global Spill equipment and employees to be at the Site. We reject Edwards' denials for several reasons. First, in 1995, Edwards was not completely honest with the Department. Indeed, Edwards now recalls, three years later, that Pilawa contacted him about

removing the tanks. Second, Edwards had a reason to hide any involvement with the Mountaindale job; Edwards feared losing his job. Third, even if Edwards was busy opening a restaurant, he had previously made tank removal arrangements and then remained offsite while his employees did the work with Global Spill equipment. Edwards could have done the same for Pilawa.

Thus, Violation No. 2 was not deliberate. However, Pilawa was negligent or reckless with respect to Violation No. 2. When Edwards did not appear on September 29, 1995, Pilawa had a duty to confirm his belief that Masleh was certified. Edwards had given Pilawa his certification number; Pilawa should have required as much from Masleh. Because Pilawa sought no proof that Masleh was a certified installer, Pilawa acted in a negligent or reckless manner. (*See* N.T. at 326.)

Because there is *not* a reasonable fit between Violation No. 2 and the penalty assessed by the Department, we reduce the $9,900 penalty to $6,600 according to the guidelines set forth in the Matrix for a negligent high risk violation.

II. Violation No. 3

The next issue is whether Pilawa allowed a release of kerosene to the soil while removing an underground tank. The Department's regulation at 25 Pa. Code § 245.132(a)(5) states that certified installers shall perform activities so that there is no release of regulated substances or contamination of soil caused by regulated substances from a storage tank.

Pilawa does not deny that there was a release of kerosene which contaminated the soil. (N.T. at 229, 297-98.) While Pilawa makes much of the fact that the Department failed to measure the extent of the release, this is irrelevant. The violation occurred. The only question, then, is whether the Department properly assessed $2,000 for Violation No. 3.

The Department determined that Violation No. 3 was a medium risk violation because it

involved a release. Because the release was not extensive, the Department assessed the minimum amount for a medium risk violation, which is $1,000. The Department then decided that Pilawa was negligent in allowing the release. According to the Department, the release could have been prevented by using procedures known to certified installers. Therefore, the Department doubled the amount to $2,000. (*See* Exhibit C-24.)

Pilawa argues that this was not a medium risk violation because the release did not travel offsite. We reject this argument as contrary to the guidelines set forth on the Matrix. Pilawa does not object to the Department's use of these guidelines.

Pilawa also argues that the violation was not negligent because even certified installers may spill the amount of kerosene involved here during a tank removal. We agree with Pilawa on this point. The Department presented a witness who testified that a small release "may happen when someone is following proper procedures." (N.T. at 242.) The Department presented no evidence to show that Pilawa did *not* follow proper procedures here. Therefore, we cannot say that Pilawa was negligent or reckless in allowing a small amount of kerosene to spill during the tank removal.

Because there is *not* a reasonable fit between Violation No. 3 and the penalty assessed by the Department, we reduce the $2,000 penalty to $1,000 in accordance with the guidelines set forth in the Matrix for basic liability for a medium risk violation.

IV. Violation No. 4

The next issue is whether, on October 2, 1995, Pilawa caused or assisted in the improper storing of contaminated soil. The Department's regulation at 25 Pa. Code § 245.308(d) states that, if contaminated soil is stored onsite, the contaminated soil shall be completely and securely covered for the duration of the storage period with an impermeable material of sufficient strength, thickness,

anchoring or weighting to prevent tearing or lifting of the cover, infiltration of precipitation or surface water runon, and exposure of the soil to the atmosphere.

Pilawa does not deny that a pile of contaminated soil was uncovered for a period of time on October 2, 1995. (N.T. at 226; Joint Stipulation of Fact, No. 45; *see* Exhibits C-17, C-18.) However, Pilawa contends that: (1) Lansberry was working that day; (2) Lansberry did not have enough plastic to cover the soil pile; (3) Lansberry left the Site to get more plastic; (4) Lansberry returned to complete his work; and (5) Lansberry covered the soil pile after Department inspectors left the Site. (N.T. at 226-228.) We agree that, if Lansberry was working with the soil pile on October 2, 1995, the soil was not being "stored" and did not have to be covered while the inspectors were there. (*Cf.* N.T. at 214.)

Department inspectors testified that no workers were present upon their arrival at the Site about 2:30 p.m. on October 2, 1995. Lansberry appeared around 3:15 p.m. and spoke with the men but did not indicate that he was there to perform work. According to the inspectors, Lansberry stated that he was in the area to bid on a water line project and just decided to stop at the Site. Lansberry offered to go to a nearby telephone to call Pilawa so that the inspectors could discuss the inspection with him and did so. The men waited until close to 5:00 p.m. for Lansberry or Pilawa to return, but, when no one came back, they left the Site, having observed the uncovered soil pile and no work being done. (N.T. at 113-14, 119; *see* Exhibits C-17, C-18.)

Lansberry's account of the events of October 2, 1995 is different from that of the Department's inspectors, but we find it confusing and reject it. Lansberry stated that he was at the Site on October 2, 1995 to make sure that a big soil pile was covered with plastic, but then Lansberry changed his testimony and stated that he was just hanging around until the Department inspectors

arrived. Later, Lansberry testified that he happened to be at the Site because he was meeting someone across the street. Quite honestly, we cannot say from Lansberry's testimony why he went to the Site on October 2, 1995. Yet, we can say that Lansberry never testified that he went to the Site to move dirt or to "restage" the soil piles. Nevertheless, without explaining why, Lansberry testified that he did so. It does not make sense to us that Lansberry would be at the Site, for whatever purpose, and decide, for no apparent reason, to uncover the big soil pile, remove a small amount of soil to create another soil pile, and then recover the big pile.

We are also troubled by the fact that, according to Lansberry's testimony, he did the work without having enough plastic to cover the smaller pile. Two days before, McConnell had noticed a small uncovered soil pile while at the Site and spoke with Lansberry about it. Lansberry indicated then that he did not have enough plastic to cover the pile, but that he would cover the pile after he purchased more plastic. So, Lansberry knew that the Department inspectors would check to see that the soil piles were properly covered with plastic. Yet, based on Lansberry's testimony, he returned to the Site with plastic for the smaller soil pile, spent more than an hour with the Department inspectors, never mentioned that he had plastic to cover the soil pile, and took no steps to cover the small soil pile.

Because of these concerns, we cannot give credence to Lansberry's claim that he performed work at the Site on October 2, 1995.[3] Moreover, we recognize how difficult it must be for Lansberry

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[3] Pilawa asks the Board to consider two photographs that were offered into evidence: Exhibits C-17 and A-4. Exhibit C-17 supposedly shows that the highlift door and windows were open on October 2, 1995. First, this is not readily apparent from the photograph. Second, we reject the inference that work was being done just because the highlift door and windows were open. Exhibit A-4 is a photograph of soil piles taken on October 3, 1995. Because the violation occurred on October 2, 1995, this photograph is irrelevant.

to testify about events that occurred almost three years ago. The Department has offered as evidence the inspection report that was prepared on October 2, 1995. (N.T. at 115-16; Exhibit C-18.) We accept the Department's evidence and conclude that Pilawa caused or assisted in the improper storing of contaminated soil.

The Department considered Violation No. 4 to be a low risk violation and assessed $1,000 for violation seriousness. The Department also decided that the violation was negligent because Pilawa should have known the legal requirements for storage. Thus, the Department assessed a total penalty of $2,000 for Violation No. 4.

Pilawa claims that the violation was not negligent because Lansberry covered the soil pile after the inspectors left the Site. However, we did not accept Lansberry's testimony on that matter. We agree with the Department that Pilawa was negligent in failing to cover the contaminated soil pile. On September 30, 1995, the Department pointed out the need to cover soil piles with plastic. Pilawa did not have enough plastic to cover all of the piles at that time. Two days later, Pilawa ran out of plastic again. This is negligence. Pilawa's contention that the pile posed no threat to the environment or human health flies in the face of the regulation requiring proper coverage of contaminated soil. Therefore, we will not disturb the Department's penalty assessment for Violation No. 4.

V. Regulated Tanks

Pilawa argues in his Post-hearing Brief that the Department failed to prove that the tanks involved here were "regulated" tanks. However, Pilawa did not raise this issue in his Notice of Appeal. An objection not raised by the appeal shall be deemed waived. 25 Pa. Code § 1021.51(e). Therefore, we shall not address this final matter.

CONCLUSIONS OF LAW

1. The Department has the burden to show by a preponderance of the evidence that the civil penalty is based on violations of the Storage Tank Act. 25 Pa. Code § 1021.101.

2. The Department has shown by a preponderance of the evidence that Pilawa violated the Storage Tank Act by causing or assisting in the handling of tanks by three uncertified persons, by allowing a release of kerosene to the soil while removing an underground storage tank, and by causing or assisting in the improper storing of contaminated soil. Thus, it was proper for the Department to assess a civil penalty for those violations of the Storage Tank Act.

3. The Department reasonably concluded that Violation No. 2 was a high risk violation under the Matrix. However, there is not a reasonable fit between Violation No. 2 and the $9,900 penalty assessed by the Department because the Department unreasonably determined that the violation was deliberate. We conclude that Pilawa was negligent or reckless with respect to Violation No. 2, and that, under the Matrix, a civil penalty of $6,600 is appropriate.

4. The Department reasonably concluded that Violation No. 3 was a medium risk violation under the Matrix. However, there is not a reasonable fit between Violation No. 3 and the $2,000 penalty assessed by the Department because the Department unreasonably determined that the violation was negligent or reckless. We conclude that Pilawa was not negligent or reckless with respect to Violation No. 3, and that, under the Matrix, a civil penalty of $1,000 is appropriate.

5. The Department reasonably concluded that Pilawa was negligent or reckless with respect to Violation No. 4. Therefore, there is a reasonable fit between Violation No. 4 and the $2,000 penalty assessed by the Department for the violation.

6. Because Pilawa failed to claim in the Notice of Appeal that the underground storage

tanks removed in this case were not regulated tanks, the issue is deemed waived. 25 Pa. Code § 1021.51(e).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY T. PILAWA AND DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 96-108-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of September, 1998, it is ordered that:

1. The draft Adjudication of Judge Myers is hereby approved and adopted by the Board.

2. Appellants shall pay a total civil penalty of $9,600.00 for violations of the Storage Tank Act.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 25, 1998

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

ANDREW AND TINA BONANNO	:	
	:	
v.	:	**EHB Docket No. 98-077-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOUTH HEIDELBERG TOWNSHIP	:	**Issued:** September 30, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

A motion to dismiss is granted. The appeal of a letter from the Department is moot by virtue of a subsequent letter from the Department reversing the determination of the first letter. Therefore, no relief can be granted by the Board.

OPINION

This matter was initiated with the April 29, 1998 filing of a notice of appeal by Andrew and Tina Bonanno. The Bonannos appealed an October 3, 1997 letter from Edward J. Muzic, a Water Quality Specialist in the Department's Reading District Office, to South Heidelberg Township stating that the "Fritztown" project was exempt form the requirement to revise the Township's Official Plan for new land development pursuant to the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a. In their appeal, the Bonannos

requested that the Board revoke the Department's October 3, 1997 exemption determination. In a new letter to South Heidelberg Township dated June 10,1998, the Department stated that based upon additional review of the information available, it now believed that the Fritztown project was not exempt from planning requirements under Section 7(b)(5) of the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.7(b)(5).

The Department filed a motion to dismiss and a supporting memorandum of law on July 9, 1998. The Bonannos failed to file a response. Therefore, under section 1021.70(f) of the Board's rules of practice and procedure, 25 Pa Code § 1021.70(f), all properly pled facts in the Department's motion are deemed admitted. *Alice Water Protection v. DEP*, 1997 EHB 447.

The Department argues that it has replaced the appealed letter with a subsequent letter, effectively revoking its previous exemption determination. The Department argues that they, in essence, provided the relief that the appellants seek from the Board, therefore rendering the Board unable to grant effective relief.

We agree. A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived in a stake in the outcome. *New Hanover Corporation v. DER*, 1991 EHB 1127. The Bonannos' appeal is now moot by virtue of the Department's second letter to South Heidelberg Township. On June 10, 1998, the Department replaced its initial letter dated October 3, 1997 with a new letter. The new letter reversed the Department's position and stated that they now believed that the Fritztown project was not exempt from planning requirements of Section 7(b)(5) of the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.7(b)(5). Since the Board can no longer grant effective relief on the Bonanno's appeal, the appeal is dismissed as moot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANDREW AND TINA BONANNO	:	
	:	
v.	:	**EHB Docket No. 98-077-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOUTH HEIDELBERG TOWNSHIP	:	

ORDER

AND NOW, this 30th day of September, 1998, it is ordered that the Department's motion to dismiss is **GRANTED** and Bonanno's appeal is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 30, 1998
See following page for service list.

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

OLYMPIC FOUNDRY, INC.	:	
	:	
v.	:	**EHB Docket No. 98-085-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 5, 1998**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a motion to dismiss the appeal of the appellant for filing an untimely appeal of a Department action. The appeal was filed because the Department rejected the appellant's submission of a notice of intent to remediate, a remedial investigation report, and a cleanup plan for a Pennsylvania Priority List Site. The Board grants the Department's motion because the appeal was not filed within 30 days from the Department action, thereby depriving the Board of jurisdiction. The doctrine of administrative finality bars the appellant from appealing a subsequent letter from the Department after the 30 day appeal period.

BACKGROUND

This matter originated on May 15, 1998, with the filing of an appeal by Olympic Foundry Inc., (Appellant), seeking review of an April 16, 1998 letter from the Department of Environmental Protection (DEP) which denied the Appellant's submission of a notice of intent to remediate for the

former Quakertown Foundry Site, located in Quakertown, Pennsylvania. The Department has filed a Motion To Dismiss contending that the Board lacks jurisdiction because the appeal was untimely filed. The Department argues that the appeal should have been brought within 30 days after its letter dated March 16, 1998, which originally denied the notice of intent to remediate.

The facts surrounding the Department's motion are as follows. The Appellant, through its consultants, Environmental Liability Management, Inc., sent a notice of intent to remediate, to the Department for the former Quakertown Foundry Site on March 9, 1998, under the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, *as amended,* 35 P.S. § 6026.101-6026.908 (Act 2). Included with the notice of intent to remediate were two copies of a remedial investigation report and cleanup plan proposal, in addition to the fees for site remediation and property development under Act 2.[1]

On March 16, 1998, the Department, through Bruce D. Beitler, the Regional Environmental Cleanup Program Manager, returned the NIR to the Appellant's consultants. The letter explained that the NIR was refused because the Department did not receive written approval from the property owner and a schedule of implementation paralleling the Department's schedule for implementation of the selected remedy. Mr. Beitler's letter advised the Appellant "that the Department will no longer consider any NIR for the Quakertown Site." (Department's Motion, Exhibit B page 2) In conclusion, the letter invited the Appellant to participate in settlement discussions under the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 765, *as amended,* 35 P.S. § 6020.101-

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[1] Throughout this opinion the acronym NIR will refer to the entire package submitted by the Appellant, which included a notice of intent to remediate, a remedial investigation report, and a cleanup plan.

6020.1305 (HSCA).

The Appellant's counsel sent a letter to the Department on April 13, 1998, along with the original NIR and fees, asking for reconsideration. The letter argues that the NIR complied with all the Department's conditions. The Appellant asserted in its letter that if the NIR was again rejected by the Department that it would view that as a final decision by the Department, which would be appealed.

On April 16, 1998, the Department, through Mr. Beitler, returned the NIR to the Appellant. The letter explained that the NIR was already rejected for the reasons stated in the March 16, 1998 letter.

The Appellant appealed the Department's April 16, 1998 letter. The Appellant based its appeal on the grounds that the Department acted outside the scope of its legal authority in rejecting the NIR. On June 3, 1998, the Department filed a Motion to Dismiss for lack of jurisdiction. The Department contends that the Appellant had 30 days from its March 16, 1998 letter to file a timely appeal with this Board, and failure to do so deprived the Board of jurisdiction. The Department further contends that the April 16, 1998 letter is not appealable because it merely reaffirms a prior decision made by the Department on March 16, 1998.

OPINION

The Environmental Hearing Board regulations state that jurisdiction will not attach to an appeal from a Department action unless a written appeal is filed with this Board within 30 days from notice of the Department's action, unless a different time period is provided by statute. 25 Pa. Code § 1021.52. Act 2 does not provide a different time period for appeals, therefore, the 30 day appeal period in the Board's regulations applies. The Department asserts that the March 16, 1998 letter

triggered the appeal process, while the Appellant contends that the April 16, 1998 letter triggered the appeal.

In support of the Department's motion, it points to Section 6026.308 of Act 2 which states, "decisions by the department involving the reports and evaluations required under this chapter shall be considered appealable under the act of July 13, 1988 (P.L. 530, No. 94), known as the Environmental Hearing Board Act." 35 P.S. § 6026.308. The Department asserts that the March 16, 1998 letter rejected the notice of intent to remediate, remedial investigation report, cleanup plan, and therefore is governed by Section 6026.308 and is appealable. Since Section 6026.304(l) of Act 2, 35 P.S. §6026.304(l), requires the Appellant to submit specific reports and evaluations to the Department for review, including a remedial investigation report and a cleanup plan, the rejection of them along with the notice of intent to remediate makes this an appealable action. Therefore the Appellant had 30 days from March 16, 1998, to appeal the Department's rejection of the NIR.

The Appellant contends that the March 16, 1998 letter is a non-appealable action because it contains conditional language and fails to inform the Appellant of its appeal rights. In support of its position the Appellant cites two Commonwealth decisions: *Lehigh Township v. Department of Environmental Resources*, 624 A.2d 693 (Pa. Cmwlth. 1993), and *Soil Remediation Systems, Inc. v. Department of Environmental Protection*, 703 A.2d 1081 (Pa. Cmwlth. 1997). Both cases involved communications from the Department which the Commonwealth Court determined were non-appealable actions. *Lehigh* involved an exchange of letters with the Department, regarding reimbursement of expenses under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.2a (Sewage Facilities Act), for 1987 and 1988. In the Department's letter it denied reimbursements for 1987 and 1988 and closed advising the

Township of a person at the Department to speak to if there were any remaining questions. The Department and the Township then corresponded for the next ten months. Almost a year after the initial denial letter from the Department the Township appealed. The Township in *Lehigh* contended that those letters were "informational and interlocutory"and therefore, non-appealable actions. The Commonwealth Court stated that "if the DER considers an internal decision final and non-negotiable, it is incumbent upon it to clearly and definitively so inform the affected parties." *Lehigh*, 624 A.2d at 695. Since the Department's letter in *Lehigh* contained the name and telephone number of a person at the Department to direct questions regarding its decision and the Department then corresponded with the Township for 10 months regarding that decision, the Commonwealth Court determined that was conditional language because it "indicated that the agency's determination could be questioned." *Id.* The Commonwealth Court also noted that the Department's letters failed to advise the Appellant of their appeal rights. The Commonwealth Court held that the Department's letters were not appealable actions.

Similarly in *Soil Remediation Systems, Inc. v. Department of Environmental Protection*, 703 A.2d 1081 (Pa. Cmwlth. 1997), the Department sent a facsimile of a final order which was labeled "advanced copy." The fax was sent in advance of the Department's certified copy of the final order. The court determined that since the facsimile was labeled "advance copy" the appellant did not have to rely on that as "operative notice for purposes of the 30 day appeal period." *Id.* at 1084. The Commonwealth Court held that "inclusion of conditional language in and of itself made the notice defective," and therefore the time period for the appeal did not begin to run until the appellant received the certified letter from the Department. *Id.* at 1084.

By contrast, the March 16, 1998 letter is an appealable action because it did not contain

conditional language. First, the Department's March 16, 1998 letter stated clearly "the Department will no longer consider any NIR for the Quakertown Site." (Department's Motion, Exhibit B page 2) The Department's March 16, 1998 letter was clear that its determination was final, in that no additional NIR would be accepted for the Quakertown Site. *See Soil Remediation Systems*, 703 A.2d at 1084 (stating that "inherent in this appeal process is the fact that a determination must be final before it can be appealed, and the finality of the decision must be communicated to the affected parties.")

The Appellant contends that the inclusion of the offer to participate in settlement discussion under HSCA was conditional language similar to the offer in *Lehigh Township v. Department of Environmental Resources*, 624 A.2d 693, (Pa. Cmwlth. 1993), to direct questions to the Department regarding its decision. However, the *Lehigh* letter is distinguishable. That letter advised the Township of who to speak to if they had any questions involving the Department's decision regarding reimbursements and the Department then corresponded with the Township for 10 months regarding its decision. The Department's letter in this case did not advise the Appellant of anyone to speak to regarding the rejection of the NIR, nor did the Department continue to negotiate with the Appellant regarding its decision. The settlement discussions were under HSCA which is a completely different process and does not involve submitting an NIR. The Department's March 16, 1998 letter unconditionally informed the Appellant that the Act 2 process had ended.

Second, the Appellant contends that the March 16, 1998 letter was deficient because it failed to inform the Appellant of its appeal rights. The Board has held that the Department is not obligated to inform the appellant of its appeal right. *Grand Central Sanitary Landfill, Inc. v. DER*, 1993 EHB 20. Therefore, the lack of specific language does not affect the appealablity of the March 16,

1998 letter. The March 16, 1998 letter was an appealable action. The Appellant had 30 days to file a timely appeal, in order to gain jurisdiction of this Board. *Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976).

The Appellant next argues that Act 2 does not contain any provision restricting the number of NIRs it may file for a site, and therefore it could appeal the April 16, 1998 letter because it was a new NIR submission. Assuming the April 16, letter was an appealable action of the Department,[2] it is crucial to recognize that the Appellant did not submit a new NIR; no new information was contained in the second submission which might require the Department to act on the second NIR based on that new information.[3] The Appellant in its April 13, 1998 letter to the Department stated that it was *resubmitting* the notice of intent to remediate and proposed cleanup plan for review, not that it was submitting a *new* notice of intent to remediate and cleanup plan for review. (Department's Motion, Exhibit D) Once the NIR was rejected on March 16, 1998, the Appellant had 30 days to file an appeal with the Board. The Appellant asked for reconsideration of the March NIR in April, and that request for reconsideration did not stop the 30 day appeal period, nor did it begin a new 30 day appeal period.

Further, the doctrine of administrative finality bars the Appellant from appealing the April letter. In *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d

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[2] The Board held in *Franklin Township Municipal Sanitary Authority v. DEP*, 1996 EHB 942, that "a letter from the Department which merely reaffirms and refuses to reconsider a decision set forth in an earlier letter is not an appealable action." Therefore the April 16 letter which merely restates the Department's position articulated in March, is not an appealable action.

[3] The presentation of new information not previously considered by the Department might required it to fully consider a new submission. *See Bethlehem Steel Corp. v. Department of Environmental Resources*, 309 A.2d 1383 (Pa. Cmwlth. 1978).

765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977), the Commonwealth Court explained the doctrine as follows:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealable order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law.

In short, where a party fails to pursue its statutory appeal rights, neither the content nor the validity of either the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *Kennametal, Inc v. DER*, 1990 EHB 1453. The Appellant in this case chose not to take advantage of its appeal rights once the Department rejected its NIR in March. Since, the March 16, 1998 letter was the appealable action, the Appellant had 30 days to appeal it, and the doctrine of administrative finality bars the Appellant's appeal of the subsequent letter.

For the foregoing reasons, the Board holds that the Department's March 16, 1998 letter is an appealable action because it was a final decision made by the Department from which the Appellant had 30 days to appeal. Its failure to do so deprives the Board of jurisdiction in this matter.

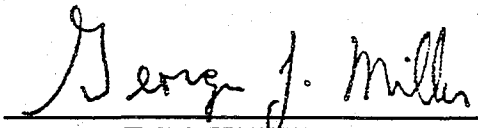
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

OLYMPIC FOUNDRY, INC.	:	
	:	
v.	:	**EHB Docket No. 98-085-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

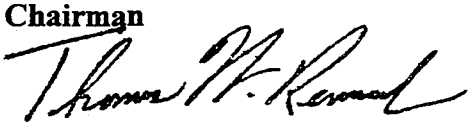
ORDER

AND NOW, this 5th day of October, 1998, the Department of Environmental Protection's motion to dismiss in the above-captioned matter is hereby **GRANTED** and the appeal of Olympic Foundry, Inc. is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

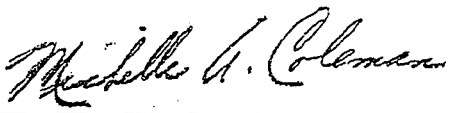


GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-085-MG



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: October 5, 1998

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

For the Commonwealth, DEP:
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Southeast Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THOMAS F. WAGNER,	:	
THOMAS F. WAGNER, INC., d/b/a	:	
BLUE BELL GULF and	:	**EHB Docket No. 98-184-MG**
BLUE BELL GULF	:	**(consolidated with 98-133-MG**
	:	**and 98-164-MG)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	**Issued: October 9. 1998**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

The provision of a Department Order requiring the Appellants to close the operation of gasoline dispensing facilities as a result of a past release of gasoline to the ground water is superseded based on evidence that there is no ongoing release from these facilities and that Appellants have met the requirements of the Department's order relating to the reopening of Appellants' facilities.

OPINION

Background:

These are appeals filed by Thomas F. Wagner and Thomas F. Wagner, Inc., d/b/a Blue Bell Gulf and Blue Bell Gulf (Appellants) which relate to a leak of petroleum products from Appellants' gasoline facilities on Skippack Pike in Blue Bell, Pennsylvania. The appeals relate to an order issued on July 2, 1998 by the Department to the Appellants with respect to remediation of the leak as well as an Amended Order issued on August 18, 1998 which required the Appellants to shut down its facilities

until such time as the Department is assured that there is no ongoing leak at its facilities in accordance with the requirements of the Department's regulations. These orders were issued pursuant to the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021-2104 (the Storage Tank Act). Paragraph 3 of the Amended Order provides as follows:

> In the event that the leak detection records demonstrate that the UST systems are operating outside the allowable leak rate as set forth in 25 Pa. Code §§ 245.444 and 245.445, the [sic] Thomas F. Wagner and Thomas F. Wagner Inc shall perform the following: a) cease operation of all UST systems, until such time as the Facility can conduct a suspected release investigation in accordance with 25 Pa. Code § 245.304, b) demonstrate to the satisfaction of the Department that the UST systems are tight, c) demonstrate to the satisfaction of the Department that the Facility is conducting leak detection in compliance with the requirements of 25 Pa. Code §§ 245.444 and 245.445, and d) if they are unable to demonstrate to the satisfaction of the Department that the UST systems at the Facility are tight and that the Facility can conduct leak detection in compliance with the regulatory requirements, immediately empty the UST systems at the Facility. (Yannessa Affidavit.)

As a result of the Department's orders, the Appellants closed the operation of their gasoline dispensing facilities and took steps to comply with these requirements with a view toward reopening these facilities.

On October 7, 1998, the Appellants filed both a Petition for Temporary Supersedeas and a Petition for Supersedeas (Petition for Supersedeas) and related affidavits claiming that the Appellants have met the requirements of the Amended Order, but that the Department takes the position that Appellants still may not reopen the operation of its gasoline dispensing equipment. The affidavit of Thomas F. Wagner states that the closing of its facilities pursuant to the Department's order has resulted in severe financial hardship and irreparable injury consisting, among other things, the loss of revenue and the loss of customers to other competitors, their inability to sell food products which are becoming

outdated and unsaleable, the risk of Appellants having their lottery ticket sales license suspended and the loss of opportunity to purchase gasoline at lower costs which are currently prevailing.

The affidavit of Mary Elizabeth Yannessa states that appropriate leak detection records from the station have been submitted to the Department and that those leak detection records show that there is no ongoing leak of petroleum products at its facilities. The affidavit of Steven J. Wezel states that additional tightness tests performed on August 21, 1998 establish that the tanks are tight and that all of the related dispensers and ancillary equipment are in good condition and functioning properly. In addition, he states that seven Veeder Route Mag 1 probes have been installed which will assure that any leak will be detected immediately in satisfaction of all regulatory requirements. He also states that his review of the inventory records indicate that there is no ongoing leak at Appellants' facilities.

In a conference call held yesterday with counsel for the Appellants, counsel for the Department and members of the Department's staff, the Department representatives acknowledged that there was no evidence of any ongoing leak at its facilities. However, the Department strenuously contends that Appellants should not be permitted to continue the operation of their gasoline station facilities because of the Department's concerns that the Appellants are financially unable to perform the required remediation resulting from the prior leak at the gasoline station facilities.

DISCUSSION

The Board's review of the affidavits submitted with the Petition for Supersedeas and the information provided by the Department in the conference call indicates that the Appellants have met the requirements of the last sentence of paragraph 3 of the Amended Order as set forth above. Accordingly, there is nothing in the present order as amended which would preclude the Appellants from again operating their gasoline dispensing facilities. We also conclude that preventing Appellants

from operating their business indefinitely in the absence of any present threat of leaks of petroleum products from their facilities would subject them to irreparable harm.

The Board has great sympathy with the position of the Department that a gasoline station operator who has caused damage to the surrounding environment as a result of petroleum leaks from his facilities should not be permitted to operate again in the future if he is unable to perform the remediation required by a Department order. However, there is nothing in the Department's current order which would require the Appellants to keep its facilities closed until it can demonstrate financial responsibility for remediating the results of the prior leak or any future leaks. In addition, there may be some question as to whether the Storage Tank Act or the Department's regulations would authorize the Department to prevent Appellants' operation of its business based only on the Department's belief that Appellants' are not financially responsible. The Storage Tank Act does address financial responsibility for remediation of petroleum products by requiring every owner of an underground storage tank to demonstrate financial responsibility by participating in the Underground Storage Tank Indemnification Fund. This fund presumably will provide a substantial portion of the fund necessary for the required remediation. *See* 35 P.S. §§ 6021-701-6021-709. The Department has cited no authority in the applicable statutes, its regulations or its order which would require that the facility remain closed until after proof of financial responsibility is presented. However, the Department reserves the right to issue all appropriate orders with respect to the continued operation of the Appellants' facilities in the future.

Based on all of these factual circumstances, the petition for a temporary and a permanent supersedeas will be granted. However, Appellants must understand that they remain financially responsible for performing the remediation in accordance with the Department's outstanding orders. In addition, the Department is free to enter any further order that it may choose to enter with respect to the continued operation of Appellants' facilities.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS F. WAGNER,	:	
THOMAS F. WAGNER, INC., d/b/a	:	
BLUE BELL GULF and	:	
BLUE BELL GULF	:	
	:	
v.	:	**EHB Docket No. 98-184-MG**
	:	**(consolidated with 98-133-MG**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 98-164-MG)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER GRANTING PETITION FOR SUPERSEDEAS

AND NOW, this 9th day of October, 1998, following a conference call hearing with counsel for the parties and the Department's technical staff, it appearing that the Department is satisfied that there is no ongoing leak of petroleum product from the Appellants' facilities, the Department has approved the Appellant's protocol for leak detection and that the Department will not require that the Board hold a hearing on the Petition for a Temporary Supersedeas and the Petition for Supersedeas (Petition for Supersedeas) of the Department's order as a result of the views expressed by the Presiding Board Member in the conference call yesterday, IT IS HEREBY ORDERED as follows:

1. The Board finds based on the affidavits attached to the Petition for Supersedeas and the representations made by the Department in the conference call today that the Appellants have met the requirements of paragraph 3 of the Amended Order.

2. Under these circumstances the Board determines that the Appellants are now legally free to resume the operation of their gasoline dispensing facilities, and that they would be subjected to irreparable harm if they were required to close their business for the indefinite future.

3. The Board hereby supersedes the Department's application of paragraph 3 of the Amended Order as a basis for prohibiting Appellants from operating their dispensing facilities to the extent that it relates to the previous leak at these facilities in view of the present absence of any ongoing leak from Appellants' gasoline dispensing facilities.

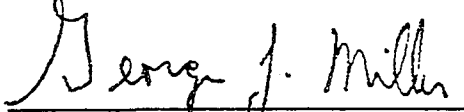
4. This order is conditioned on the Appellants' full and complete implementation of procedural protocol approved by the Department for leak detection. In the event the Appellants do not promptly implement the procedural protocol or should it appear that the tanks or related dispensing equipment may be leaking, the Department should promptly request that this supersedeas be vacated.

5. Paragraph 3 of the Amended Order will continue in effect with respect to any future event that might indicate that the requirements of that paragraph are not being met by Appellants.

6. Appellants remain financially responsible for the required remediation studies and other requirements of the Department's existing orders.

7. This order is without prejudice to any further order that the Department may issue with respect to the operation of Appellants' gasoline dispensing facilities.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 9, 1998

EHB Docket No. 98-184-MG
(Consolidated Docket)

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

For the Commonwealth, DEP:
Wm. Stanley Sneath, Esquire
Southeast Region

For Appellant:
Scott J. Schwarz, Esquire
MATTIONI, MATTIONI & MATTIONI, Ltd.
Philadelphia, PA

rk/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
v.	:	**EHB Docket No. 97-039-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	**Issued: October 15, 1998**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO IMPOSE SANCTIONS AND DISMISS THE APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

Where the Appellants ignored two Board Orders directing them to file a pre-hearing memorandum and they instead filed three packets of documents on the morning of the pre-hearing conference, the Appellants have failed to file a proper pre-hearing memorandum in accordance with 25 Pa. Code § 1021.82. The Appellants' failure to file a proper pre-hearing memorandum demonstrating that there are factual issues to be determined at a hearing, after having been given ample opportunity to demonstrate that there are factual issues requiring a hearing in connection with prior motions for summary judgment, results in the dismissal of their appeal.

BACKGROUND

This appeal was originally filed on February 10, 1997 by the filing of a *pro se* notice of appeal by Myron A. Yourshaw and Charles J. Yourshaw (Appellants) from the Department of

Environmental Protection's (Department) second renewal on January 10, 1997 of a surface mining permit to Reading Anthracite Company (Reading). In response to the Board's Order, the Appellants filed additional information to perfect their appeal on February 21, 1997.

Promptly after this appeal was filed, Administrative Law Judge Miller, in a letter to the Appellants dated March 19, 1997, recognized the Appellants' constitutional right for self-representation but stressed the importance of obtaining counsel to assist the Appellants in this appeal due to the highly technical nature of the issues and the formal atmosphere of hearings before the Board. In the letter Judge Miller also warned that "[f]ailure to obey Board orders issued during the course of these proceedings may require sanctions . . . which may result in the dismissal of your appeal." A copy of the Board's Practice and Procedure Manual was attached to the letter.

The Board issued an Opinion and Order on February 4, 1998, granting in part Reading's motion for summary judgment, or in the alternative to limit issues. Although the Appellants failed to contest the motion with affidavits or other evidence of record, we permitted the appeal to continue based on assertions made in their briefs, but limited the issues to those relating to a claimed unsafe highwall, an alleged absence of sediment traps, and alleged improper blasting. Reading sought and was granted leave to file a renewed motion for summary judgment, which the Board denied in an Opinion and Order issued on August 18, 1998. The Board again ignored the failure of the Appellants to respond to the motion with affidavits or other evidence of record, and afforded them a third opportunity to demonstrate that factual issues remain for the hearing on the merits, including the identification of competent expert testimony in their pre-hearing memorandum and at a pre-hearing conference.

On May 1, 1998, the Board issued Pre-Hearing Order No. 2 which scheduled a hearing for

October 5-7, 1998, designated August 31, 1998, as the filing deadline for the Appellants' pre-hearing memorandum, and warned the Appellants that failure to meet this requirement would result in dismissal of their appeal.[1] The Appellants failed to file a pre-hearing memorandum by the August 31, 1998 deadline. Therefore, the Board issued an Order on September 15, 1998, giving the Appellants yet another opportunity to file a pre-hearing memorandum on or before September 18, 1998. The Appellants again failed to file their pre-hearing memorandum in accordance with the Board's Order. A pre-hearing conference was held on September 25, 1998 before Administrative Law Judge George J. Miller to determine whether there were factual issues which required a hearing on the merits of the appeal. Currently before the Board is the Department's motion filed September 11, 1998, to impose sanctions by dismissing the above-captioned appeal for the Appellants' failure to file a pre-hearing memorandum.[2]

DISCUSSION

On the morning of the pre-hearing conference, September 25, 1998, the Appellants submitted three packets of documents to the Board and parties' counsel. The cover page of the first packet indicated that the Appellants intended to call two expert witnesses. The second page was entitled "Yourshaws' Pre-Trial Memorandum" and simply re-stated the three issues which remained to be decided at the hearing. The packet also contained the resumes of the two expert witness: Charles J. Yourshaw, a Professional Engineer, and Dr. Richard D. Woods, a Professional Engineer. Only Dr. Woods' resume was supplemented with a summary of his evaluation of the site and his opinion

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[1] The Board issued an amended Pre-Hearing Order No. 2 rescheduling the hearing for October 6-8, 1998 but maintaining the August 31, 1998 deadline for the Appellants' pre-hearing memorandum.

[2] By letter dated September 15, 1998, Reading joined the Department's request.

that "the damage . . . is typical of that caused by surface mining blasting operations. . . . [and] was indeed caused by surface mine blasting." The second packet included Part C of the permit and bond information. The third packet included letters and investigation reports from the Department sent in response to the Appellants' complaints concerning alleged heavy blasting at the mine site.

The required contents of the pre-hearing memoranda are set forth in the Board's rules, which were sent to the Appellants. *See* 25 Pa. Code § 1021.82. In addition, Pre-Hearing Order No. 2, which the Appellants admit receiving, explicitly states:

> [A] pre-hearing memorandum . . . shall contain the following:
>
> A. A statement of the facts in dispute and the facts upon which the parties agree.
> B. A statement of the legal issues in dispute, including citations to statutes, regulations, and case law supporting the party's position.
> C. A description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use.
> D. A list of all expert witnesses and indicate whether their qualifications will be challenged. As to those who will not be challenged it is the Board's intent to enter their statement of qualifications in an unchallenged exhibit.
> E. A summary of the testimony of each expert witness.
> F. The proposed order of witnesses.
> G. A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. Copies of these exhibits shall be attached. All documentary evidence shall be numbered and marked in order to allow for expeditious offering into evidence.
> H. Signed copies of any stipulations reached by the parties.

The requirements for pre-hearing memoranda are quite detailed, and the documents filed by the Appellants clearly fall short of the required contents for a pre-hearing memorandum. The Appellants failed to include a statement of the legal issues in dispute, a description of scientific tests, the order of witnesses, or a list of exhibits. While the Appellants submitted the resumes of two experts, they provided a summary of only one of the expert's proposed testimony. And although Dr. Woods' summary attributes damage to the Appellant's home to blasting, nothing in his opinion

addresses whether the permit's requirements relating to blasting are insufficient to protect the Appellants in the future. No mention is made of either expert testimony relating to the alleged unsafe highwall or any testimony or documents with respect to the claimed absence of sediment traps.

The Board's rules provide that the Board may impose sanctions upon a party for failure to abide by a Board Order or Board rule of practice and procedure. 25 Pa. Code § 1021.125; 1 Pa. Code §§ 31.27-31.28. Moreover, the Board may specifically impose sanctions on a party which does not comply with the requirements of the pre-hearing memorandum. 25 Pa. Code 1021.82(b). The sanctions may include the dismissal of an appeal. 25 Pa. Code §§ 1021.82(b), 1021.125; *Hapchuk v. DER*, 1990 EHB 1189. Despite numerous opportunities, the Appellants failed to file a proper pre-hearing memorandum or otherwise demonstrate that there are factual issues to be determined at a hearing.

While we appreciate the Appellants' frustration at not being able to participate in a hearing on the merits, we can no longer permit them to pursue their appeal in violation of the Board's rules and Orders. The Appellants' failure to properly proceed has been at significant expense to both the permittee and the Department. Permitting the Appellants to proceed with the hearing now would prejudice both the Department and the permittee and would further result in unnecesssary expense to them. Since the Appellants have failed to demonstrate in a pre-hearing memorandum that there are factual issues to be decided at a hearing, we have no choice but to dismiss their appeal. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
v.	:	**EHB Docket No. 97-039-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	

ORDER

AND NOW, this 15th day of October, 1998, the motion to impose sanctions is GRANTED and the above-captioned appeal is DISMISSED.

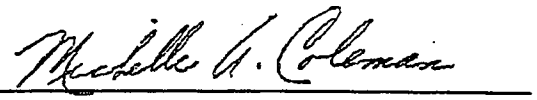
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: **October 15, 1998**

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

For the Commonwealth, DEP:
Charles Haws, Esquire
Southcentral Regional Counsel

For Appellant:
Myron A. Yourshaw
Charles J. Yourshaw
St. Clair, PA

For Permittee:
James Wallbillich, Esquire
CERULLO DATTE & WALLBILLICH
Pottsville, PA

jlp/bl

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ENVIRONMENTAL HEARING BOARD
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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION, Permittee	:	**Issued: October 16, 1998**

OPINION AND ORDER ON PETITION FOR AWARD OF COSTS AND ATTORNEY FEES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A permittee's petition for award of costs and attorney's fees is granted. Where an appeal is filed in bad faith, a permittee is entitled to recover costs and attorney's fees pursuant to Section 4(b) of the Surface Mining Act and Section 307(b) of the Clean Streams Law.

OPINION

On January 31, 1997, this Board dismissed for lack of standing an appeal filed by George M. Lucchino. *Lucchino v. DEP*, 1997 EHB 123. The appeal challenged the Department of Environmental Protection's (Department) issuance of authorization to Luzerne Land Corporation (Luzerne) to remove a small amount of coal incidental to a construction project. Luzerne filed a petition to recover costs and attorney's fees pursuant to Section 4(b) of the Surface Mining Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 *et seq.*, at § 1396.4(b), and Section 307(b) of the Clean Streams Law, Act

of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.*, at § 691.307(b). Subsequent to the filing of the petition for attorney's fees by Luzerne, the Board issued an Opinion in another appeal which addressed the question of when attorney's fees could be recovered by a permittee against a third-party appellant. *See Alice Water Protection Association v. DEP*, 1997 EHB 840. In that Opinion, we held that a permittee seeking to recover costs and attorney's fees from a third-party appellant must meet the four-part test set forth in *Big B Mining Co. v. Commonwealth, Department of Environmental Resources*, 624 A.2d 713 (Pa. Cmwlth. 1993)[1] *and* demonstrate that the appeal was brought in bad faith. *Alice Water Protection*, 1997 EHB at 851.

In an Opinion issued on May 27, 1998, we determined that Luzerne met the four-part test set forth in *Big B Mining*, but since Luzerne's petition had been filed prior to the decision in *Alice Water Protection*, it did not address the issue of bad faith. While the record contained evidence that Mr. Lucchino may have acted in bad faith when he filed this appeal, we granted the parties an opportunity to supplement their petition and response to address this issue. This Opinion rules on Luzerne's petition as supplemented.[2]

We first address Mr. Lucchino's contention that Luzerne's supplemental petition is untimely and, therefore, should be rejected by the Board. By Order of July 24, 1998, Luzerne was granted an extension of time until August 11, 1998 in which to file its supplemental petition. Luzerne filed its supplemental petition on August 14, 1998. We note that extensions of time were

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[1] *appeal denied*, 633 A.2d 153 (Pa. 1993).

[2] By letter dated August 19, 1998, the Department of Environmental Protection (Department) advised the Board that it did not intend to file a response to Luzerne's supplemental petition.

requested by and granted to both Mr. Lucchino and Luzerne in this matter. Mr. Lucchino alleges no prejudice by the filing of Luzerne's supplemental petition three days later than the date set forth in the Order, and we find none. Dismissing Luzerne's supplemental petition on the basis of untimeliness, without addressing its merits, strikes us as "a drastic and punitive step not warranted by the facts." *People United to Save Homes v. DEP*, EHB Docket No. 97-262-R (Opinion issued March 13, 1998), p. 4. *See also, Goetz v. DEP*, EHB Docket No. 97-226-C (Consolidated) (Opinion issued July 24, 1998) (Judge Coleman denied a motion to quash an appellant's late-filed post-hearing memorandum, noting it "would be too draconian a sanction under the particular circumstances here."), p. 4. We, therefore, decline to quash Luzerne's supplemental petition on the basis that it was filed three days after the date set forth in the July 24, 1998 Order.

It is Luzerne's contention that Mr. Lucchino's appeal was filed in bad faith with the intent to harass Luzerne. As examples of Mr. Lucchino's bad faith, Luzerne points to the following:

1) At his deposition taken prior to the dismissal of his appeal, Mr. Lucchino stated that he would not personally be affected by the action being appealed and that the purpose of his appeal was not to stop the incidental removal of coal but to insure that the Department follow its own regulations. (Lucchino Deposition)

2) As a township supervisor for Robinson Township, Mr. Lucchino voted to approve the very action which he later appealed to the Board. (Lucchino Deposition)

3) At a meeting of the Township Board of Supervisors, Mr. Lucchino stated that so long as Luzerne obtained a conditional use permit from the Township, he did not care what kind of permit Luzerne obtained from the Department. (Lucchino Deposition)

4) Mr. Lucchino lives approximately two miles from the site of incidental coal removal. (Lucchino Deposition) At this distance, Luzerne contends it is inconceivable that Mr. Lucchino could be affected by the challenged activity.

5) During a meeting with David Aloe, the president of Luzerne and a related coal company, Mr. Lucchino stated that bringing *pro se* litigation against Mr. Aloe's companies gave him satisfaction because he could litigate for free while it cost Mr. Aloe money to defend the actions. (Aloe Affidavit, Exhibit A to Supplemental Petition)[3]

Mr. Lucchino denies making the aforesaid statements to Mr. Aloe and further contends that Luzerne is pursuing attorney's fees against him as retaliation for Mr. Lucchino's numerous appeals against Mr. Aloe's companies.

In determining what constitutes "bad faith," Mr. Lucchino asserts that we should be guided by the legislative history of the attorney's fees section of the Federal Surface Mining Control and Reclamation Act (Federal Surface Mining Act), 30 U.S.C. at § 1275(e).[4] Indeed, in *Alice Water Protection,* we held "it is appropriate for the Board to look to the Federal Surface Mining Act for guidance in determining when a permittee may recover attorney's fees from an unsuccessful appellant under Section 4(b) [of the Pennsylvania Surface Mining Act] and Section 307(b) [of the Clean Streams Law]," and we adopted the bad faith standard required under the

---

[3] Mr. Aloe's affidavit also discusses statements allegedly made by Mr. Lucchino to a Department mine inspector. Since such statements constitute hearsay, we may not consider them. *Franklin Plastics Corporation v. Department of Environmental Resources*, 657 A.2d 100, 102 (Pa. Cmwlth. 1995).

[4] Although Mr. Lucchino acted *pro se* in his appeal against Luzerne, he is represented by counsel in his opposition to Luzerne's petition for attorney's fees.

Federal Surface Mining Act and regulations. *Alice Water Protection*, 1997 EHB at 850. Section 525(e) of the Federal Surface Mining Act, which governs the award of attorney's fees in actions brought under that act, states as follows:

> Appropriate costs and expenses including attorneys' fees may be awarded...
>
> (d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 525 of the Act or participated in such a proceeding *in bad faith for the purpose of harassing or embarrassing the permittee.*

43 C.F.R. § 4.1294 (Emphasis added).

Adopting the bad faith standard of the Federal Surface Mining Act, we held in *Alice Water Protection*, "Where it is clear that there is no basis for an appeal or that the intent of the appeal is to harass or embarrass, a permittee will be entitled to recover attorney's fees and costs, provided that the remaining criteria for an award have also been met." *Alice Water Protection*, 1997 EHB at 852.

Because there is no case law addressing the issue of what constitutes "bad faith" for purposes of awarding attorney's fees under either the Federal Surface Mining Act or Pennsylvania's Surface Mining Act and Clean Streams Law, we agree with Mr. Lucchino that it is appropriate to look to the legislative history of Section 525(e) of the Federal Surface Mining Act in making a determination of whether an appeal was brought in bad faith. The April 22, 1977 Report of the Committee on Interior and Insular Affairs of the U.S. House of Representatives (Exhibit A to Lucchino Supplemental Response) states in pertinent part as follows:

> [I]t is the Committee's intention that this provision [the attorney's fee provision of the Federal Surface

> Mining Act] be construed consistently with the general principle that an award may be made to a defendant only if the plaintiff has instituted the action solely "to harass or embarrass" the defendant. . . If the plaintiff is "motivated by malice and vindictiveness" then the court may award counsel fees to the prevailing defendant. . .Thus, if the action is not brought in bad faith, such fees should not be allowed. . . .

Id. at 90 (citing *United States Steel Corp. v. United States*, 519 F.2d 354, 364 (3rd Cir. 1975) ; *Carrion v. Teshiva University*, 535 F.2d 722 (2d Cir. 1976), and *Wright v. Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975)).

The Report further states "it is the committee's intention that this section be construed consistently with the history of similar Federal statutes providing for award of attorneys' fees in citizen suit actions." *House Report*, at 90.

Likewise, the Senate Committee on Energy and Natural Resources stated in its May 10, 1977 Report (Exhibit A to Lucchino Supplemental Response), "Under this section [the attorney's fee provision of the Federal Surface Mining Act], a defendant can be awarded reasonable fees from the citizen only if he can show that the citizen brought the action in "bad faith." This is similar to other citizen suits provisions involving the award of attorney's fees." *Id.*at 88.

The intent behind requiring a showing of bad faith before attorney's fees may be awarded against an individual or citizen's group which has brought an unsuccessful appeal is to insure that the possibility of such an award will not have a chilling effect on a citizen's right to file an appeal in good faith. As we stated in *Alice Water Protection*, "In the case of an appeal brought by a private individual or citizens' group, we believe that the intent of Section 4(b) of the Surface Mining Act and Section 307(b) of the Clean Streams Law is not to punish those who ultimately

fail in their appeal, but to limit the award of costs and attorney's fees to those cases where such an appeal is brought in bad faith." *Alice Water Protection*, 1997 EHB at 845.

A similar concept has developed in the area of antitrust litigation. A series of decisions in that area have carved out an exemption to the antitrust laws in order to preserve one's constitutional right to petition the government. Pursuant to this doctrine, courts have ruled that collective efforts to obtain legislation or lobby the government do not violate the antitrust laws.[5] However, baseless claims, or "sham litigation," do not enjoy this protection. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

The sham exception in antitrust litigation has succeeded most frequently where the challenged conduct involves the alleged misuse of the adjudicatory process. *See, e.g., CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (Despite knowledge that it lacked a valid trade secret claim, defendant filed a trade secret infringement suit to impede new entrant); *Clipper Express v. Rocky Mountain Tariff Bureau*, 690 F.2d 1240, 1253-54 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983) (Defendant, without regard to the merits of its actions, consistently and automatically opposed its rival's rate filings with an administrative body.) Of particular note is *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir., 1981), where the defendants, despite their lack of standing, brought actions against a competing real estate developer, and after being dismissed, continued to fund litigation against the plaintiff. In

---

[5] This is known as the "Noerr - Pennington Doctrine" derived from two Supreme Court decisions of the 1960's: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *UMW v. Pennington*, 381 U.S. 657 (1965).

ruling that the defendant's action fell within the scope of sham litigation, the Court of Appeals held as follows:

> The right to petition the courts for the redress of grievances does not protect abuse of the judicial process through the institution and subsidization of baseless litigation and delay of its final resolution, solely to harass and hinder a competitor.

Id. at 896-97.

Another area in which a plaintiff may be penalized for bringing sham litigation is in the field of civil rights. The Civil Rights Attorney's Fees Awards Act, 42 U.S. C. § 1988, authorizes federal district courts to award reasonable attorney's fees to the prevailing party in civil rights litigation. The United States Supreme Court has held that in order for a plaintiff to recover under this act, it must simply be a prevailing party. In order for a defendant to recover costs and fees, however, it must demonstrate that "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

This standard has been applied by the Court of Appeals for the Third Circuit in *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3d Cir. 1991), involving a petition for attorney's fees under the Civil Rights Act. The court of appeals affirmed the holding of the district court that the plaintiff's claim was frivolous and, therefore, attorney's fees were warranted. In reaching this conclusion, the court agreed with the findings of the district court that the plaintiff's claims were "utterly without basis in law or in fact" and "preliminary investigation would have shown this to [the plaintiff and his attorney] as they prepared their action." *Id.* at 503.

In *Lacy v. General Electric Co.*, 558 F. Supp. 277 (E.D. Pa. 1982), the United States District Court for the Eastern District of Pennsylvania awarded attorney's fees in a civil rights

action, having found four of the plaintiff's six claims, comprising ninety percent of the case, to be frivolous. The court noted the plaintiff was no stranger to litigation and had been engaged in an "adversary atmosphere" with his employer on many occasions over a span of several years. The court found that the plaintiff's cause was undertaken as "an insensitive personal experiment intended to harass an employer that was wholly blameless of the charges levied against it." *Id.* at 279.

Having considered how Congress and the courts have defined various types of litigation brought in bad faith, we turn to the particular circumstances surrounding this appeal. Because Mr. Lucchino disputes the statements made by Mr. Aloe in his affidavit regarding their conversation, and we are unable to assess the credibility of Mr. Lucchino's and Mr. Aloe's competing affidavits on this subject, we shall not base our decision on these portions of Mr. Lucchino's and Mr. Aloe's affidavits. *Travelers Indemnity Co. v. DER*, 1990 EHB 979, 982. In determining whether this appeal was brought in bad faith, we shall consider the remaining portions of the Mr. Aloe's and Mr. Lucchino's affidavits, all properly-supported exhibits attached to Luzerne's petition and Mr. Lucchino's response, and statements made by Mr. Lucchino in his deposition.

In his deposition, Mr. Lucchino freely admitted that he was not impacted by the matter being appealed. *Lucchino v. DEP*, EHB Docket No. 96-114-R (Opinion issued May 27, 1998), p. 6. He readily admitted that he had no evidence that either he or his property were in any way affected by the incidental coal removal. *Lucchino v. DEP*, 1997 EHB 212, 213. When asked if he would be affected by dust or noise from the coal removal operation, he answered, "No."

(Lucchino Deposition, p. 31) He testified "there's nothing to say that there's any pollution that I could be affected by." (Lucchino Deposition, p. 32)

Although Mr. Lucchino's appeal stated he was challenging the Department's authorization for incidental coal removal, Mr. Lucchino testified that the purpose of his appeal was *not* to stop the incidental removal of coal. (Lucchino Deposition, p. 31, 43) Rather, he admitted that his appeal was directed at personnel within the Department whom Mr. Lucchino accused of violating the law and "writ[ing] their own legislation." (Lucchino Deposition, p. 20, 31, 43) However, in his capacity as township supervisor, Mr. Lucchino voted in favor of the very same action for which he later accused the Department of acting illegally. *Lucchino*, 1997 EHB at 213.

Mr. Lucchino's allegations were not supported by any of the materials he submitted to the Board. *Lucchino*, 1997 EHB at 213, n. 1. Based on the statements made in his deposition, it is apparent that Mr. Lucchino had no basis for his appeal, but used the appeal process as a means of harassing the Department. At his deposition, Mr. Lucchino compared Department employees to Saddam Hussein. He alleged the Department had "come into the township . . . [and] broken all these regulations . . . ." (Lucchino Deposition, p. 20) In short, Mr. Lucchino's appeal was not a challenge of a particular action of the Department but a harangue on Department employees.

The Environmental Hearing Board provides a forum by which any person -- an individual or organization, citizen's group or coal company -- may challenge any action of the Department which they believe to be a violation of law or an abuse of the Department's discretion. Citizen participation in the appeal process is especially important as we recognized in *Alice Water Protection*, 1997 EHB at 845. Where a citizen believes that the Department has taken an action

which conflicts with the law and which directly affects that individual, he has a constitutional right to challenge that action.

However, we will not tolerate an abuse of this process. Where an appeal is filed, not to challenge the specific action stated on the face of the appeal, but merely as an attack on Department employees or officials, such an appeal is filed in bad faith and is a misuse of the administrative judicial system.

In the affidavit attached to his supplemental response, Mr. Lucchino presents a number of reasons why he believes the Department's action was contrary to its regulations. Even if we accept these statements as true, they do not demonstrate that Mr. Lucchino had a basis for bringing this appeal. While Mr. Lucchino may indeed believe that the Department has acted improperly, he has not demonstrated that *he* has any basis for challenging the Department's action. Moreover, although Mr. Lucchino claims that the Department's action was illegal, he admitted that the purpose of his appeal was *not* to stop the end result of that action, i.e. the coal removal. Indeed, as noted above, he himself had approved the action in question.

Mr. Lucchino also states that he contacted the federal Office of Surface Mining (OSM) to determine if pursuit of this appeal was proper and he was advised that it was the proper procedure. Mr. Lucchino does not provide us with any details of his conversation with OSM, specifically what was asked of OSM and what OSM's response was. Since the Environmental Hearing Board has jurisdiction over appeals of actions taken by the Department, it is certainly conceivable that OSM may have advised Mr. Lucchino that if he wished to challenge an action of the Department, he should file an appeal with the Board. In that case, Mr. Lucchino cannot rely on such general advice from OSM to provide a basis for his appeal. However, Mr. Lucchino

provides us with no further detail of his conversation with OSM, and we will not speculate as to its content. Moreover, regardless of the conversation Mr. Lucchino may have had with a representative of OSM, that does not cure the fact that he lacked standing to bring this appeal. Finally, OSM has various mechanisms to insure that the Department complies with any federal programs. These mechanisms do not include encouraging *pro se* appellants to challenge Department actions.

In his supplemental response, Mr. Lucchino says it would be inappropriate to impose attorney's fees on him as a *pro se* appellant whose appeal was dismissed for lack of standing. Stating that he is neither college educated nor trained in the law, he argues that he did not commence this appeal with an understanding of the concept of standing. To this argument, we have two responses. First, Mr. Lucchino is no stranger to litigation, having filed numerous appeals with the Board over the past several years.[6] The argument that he is untrained in the law and, therefore, should be accorded special treatment when his appeals are dismissed, is not acceptable. An appellant understands the risk he faces when he chooses to engage in litigation unrepresented by counsel. As the Board noted in *Santus v. DER*, 1995 EHB 897, "We have previously warned appellants opting to appear before this Board *pro se* that a lay person assumes the risk that his lack of legal expertise could prove to be his 'undoing'." *Id.* at 923. Mr. Lucchino has been made aware of this risk every time he proceeds with litigation before the Board which is ultimately unsuccessful. Second, we do not find bad faith here solely because Mr. Lucchino lacked standing to bring this appeal. We find bad faith because Mr. Lucchino engaged

[6] Mr. Lucchino acted *pro se* throughout most of these appeals.

in sham litigation, with the intent to harass. Borrowing language from the District Court's opinion in *Lacy v. General Electric Co.*, 558 F. Supp. 277 (E.D. Pa. 1982), Mr. Lucchino has been engaged in an "adversary atmosphere" with the Department over a span of several years, and this latest appeal was undertaken as "an insensitive personal experiment intended to harass. . . ." *Id.* at 279.

We note that Mr. Lucchino's counsel filed an excellent, persuasive, and well-researched response on his behalf. Had Mr. Lucchino been represented by counsel when he was contemplating this appeal, he might not be in the position he is now facing. However, the commendable work done by his attorney at this stage of the proceeding cannot cure the bad faith exhibited by Mr. Lucchino at the time he filed his appeal and throughout this action.

Based on the above, we find that the actions of Mr. Lucchino in filing this appeal fall within the meaning of "bad faith" envisioned by the Board when we issued our decision in *Alice Water Protection.*

In his supplemental response, Mr. Lucchino argues that even if we determine that his appeal was filed in bad faith, we may exercise our discretion to order a reduced fee or dismiss the fee award against him. The Board certainly has the discretion to determine what is an appropriate fee amount. *Township of Harmar v. DER*, 1994 EHB 1107. *See also, Kwalwasser v. Department of Environmental Resources*, 569 A.2d 422, 424 (Pa. Cmwlth. 1990) (Section 4(b) of the Pennsylvania Surface Mining Act "vests broad discretion in the board in awarding costs and attorney's fees.") At the oral argument on this matter, the Department urged the Board to adopt the analysis used in our review of civil penalty assessments, where we insure that the penalty "fits" the violation, rather than applying a mechanical rule in calculating fee awards against a

citizen or citizen's group. We agree with the Department, and in determining the proper amount of costs and fees to be awarded Luzerne, we have carefully considered the invoices and affidavit submitted by Luzerne's counsel, affidavits by Attorneys Klodowski and Birsic with regard to the reasonableness of the fees, and Mr. Lucchino's response. After a careful and painstaking review, we find the costs and fees requested by Luzerne to be entirely appropriate and in accordance with costs and fees charged in the legal community for such work. That the fees accrued in filing this petition are slightly greater than those for the underlying work reflects the fact that the filing of various briefs and an oral argument before a three-judge panel were required in this case of first impression. Nor are we swayed by Mr. Lucchino's argument that counsel for Luzerne charged an hourly rate in the *Alice Water Protection* case which was $25 less than in this case. We have carefully reviewed the fees in this case and we find them to be reasonable.

Mr. Lucchino argues that Luzerne did not need to retain an attorney of Mr. Geary's level of expertise, but should have hired a less skilled and experienced lawyer. Just as Mr. Lucchino's able counsel points out the constitutional right of citizens to petition the government for redress of grievances, a party's selection of an attorney is not normally challenged, and we find no cause for it to be challenged here. Moreover, who is to say that a less skilled or experienced attorney would have succeeded in having the case dismissed as quickly as Mr. Geary. It would not be appropriate to penalize a successful party for employing a competent attorney.

Mr. Lucchino also contends that because the Department did not vigorously defend its decision to grant Luzerne authorization for coal removal, it should bear the fees incurred by Luzerne. First, we do not necessarily agree with Mr. Lucchino's contention that the Department's defense of its decision was not adequate. Motions to dismiss are properly filed by either the

Department or the permittee. Second, in the past it has been a common practice for the Department to require the permittee to take an active role in defending a third-party appeal. Third, Mr. Lucchino's argument loses sight of the fact that it was not the Department's action (or inaction) which caused Luzerne to incur fees in this matter. It was Mr. Lucchino's filing of this appeal in bad faith which resulted in Luzerne incurring costs and attorney's fees in defending the appeal.

Finally, Mr. Lucchino contends that we should take into account his financial situation in determining the amount of the award. While we sympathize with Mr. Lucchino's alleged financial predicament outlined in his supplemental response, we have scant evidence of his financial resources. He filed no tax returns or financial statements with the Board. More important, this argument unfairly attempts to shield someone who acts in bad faith from being assessed attorney's fees because of a lack of financial resources.

Based on the above, we decline to adjust the amount sought by Luzerne in its petition.

As a final note, our decision to award costs and attorney's fees in this case was not entered into without some concern as to the effect our decision might have on citizen appeals. We wish to emphasize that our decision to award costs and fees herein was based on a careful consideration of the unique facts of this case. We believe that the large majority of appeals filed in this Commonwealth by individual citizens and citizen groups are filed in good faith and, as such, will not result in an assessment of attorney's fees even where the appeal is unsuccessful.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION	:	

ORDER

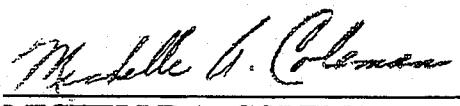
AND NOW, this 16th day of October, 1998, the Appellant, George M. Lucchino, is ordered to pay costs and attorney's fees to Luzerne Land Corporation in the amount of $6,987.50.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 96-114-R



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 16, 1998

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

For the Commonwealth, DEP:
Diana J. Stares, Esq.
Southwest Region

For Appellant:
Richard S. Ehmann, Esq.
Pittsburgh, PA

For Permittee:
Stanley R. Geary, Esq.
Pittsburgh, PA

mw

COMMONWEALTH OF PENNSYLVANIA
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 97-002-MG** **97-009-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 16, 1998

OPINION AND ORDER ON MOTION TO SEAL HEARING TRANSCRIPT AND EXHIBITS

By George J. Miller, Administrative Law Judge

Synopsis:

A motion to seal portions of the transcript of testimony and of exhibits presented at a supersedeas hearing is granted in part to protect confidential information from disclosure to appellant's competitors. The motion is denied in part because much of the information which appellant seeks to protect are public records under the Right-To-Know Act.

BACKGROUND

These two appeals were filed in early January, 1997 by Horsehead Resource Development Company, Inc. (Appellant) from enforcement orders issued by the Department of Environmental Protection (Department) to Towamensing Township and Tuthill Corporation d/b/a Blue Mountain Ski Area (Blue Mountain). These enforcement orders required those customers for the Appellant's iron rich material (IRM) to treat the material as a waste by removing it from township roads and

from the parking area at Blue Mountain's ski area. Appellant had sold the IRM to these two customers for use as a product for road and parking lot paving. Each of those customers filed separate appeals docketed with the Board at EHB Docket No. 97-001-MG and EHB Docket No. 96-279-MG. Those appeals have recently been settled through separate Consent Orders and Agreements between the Department, Blue Mountain and Towamensing Township.

Promptly after the Department issued its enforcement orders to Towamensing and Blue Mountain, the Appellant sought an order from the Board superseding the orders entered against these two customers based on the claim that these orders had the effect of depriving Appellant of two valuable customers and would do irreparable harm to the Appellant's sales and marketing of IRM for use in paving with respect to other existing and potential customers. A hearing on Appellant's motion for supersedeas was held on March 10-12, 1997.

The central issue in this appeal and in the supersedeas hearing is whether or not IRM as used for paving is a "product" or a "waste" under the Department's residual waste regulations. A "product" is defined by 25 Pa. Code § 287.1 as follows:

> A commodity that is the sole or primary intended result of a manufacturing or production process. The term does not include materials that do not meet industry or manufacturing quality specifications or are otherwise off specification; the materials may be co-products.

If the material does not meet the definition of a product, it is, by way of oversimplification, a waste unless the Department determines that it is not a waste pursuant to its beneficial use regulations at 25 Pa. Code § 287.7. Appellant's claim in this appeal is that IRM is a product so that it has an

absolute right to sell it for paving use and its customers have an absolute right to use it for that purpose. The Department's position, by contrast, has been that IRM is a waste unless and until it approves the use of IRM for paving purposes as a beneficial use.

The evidence at the hearing disclosed that IRM is a recycled material. The raw material for Appellant's processes, which are claimed to be trade secrets, is a particular type of waste from industrial or manufacturing processing. Appellant contends that its recycling processes converts this waste to a "product" which is free of adverse environmental impact.

The Board did not issue a final order with respect to these conflicting contentions at the hearing on the petition for supersedeas but left the parties free to engage in further settlement discussions before a final hearing in this appeal would be resumed. This included the further processing of Appellant's application then pending before the Department for the use of IRM for paving as a beneficial use.

During the course of the supersedeas hearing, the Board closed the hearing room to the public for the presentation of certain testimony and exhibits which Appellant claimed would be confidential business information pursuant to the Board's ruling prior to the hearing. This was done in part because one or more competitors of the Appellant were said to be in the hearing room. *Horsehead Resource Development Co., Inc. v. DEP,* 1997 EHB 260. Much of the testimony offered during these closed sessions turned out to be so general in nature that it would not qualify as confidential business information.

Following the suspension of the supersedeas hearing, Appellant submitted a motion to seal much of the hearing transcript and exhibits which it contended constituted confidential business information relating to Appellant's financial data, customer identity and relationships, marketing, and

composition of Appellant's IRM. The motion claims that disclosure of this testimony and exhibits would irreparably harm Appellant by revealing closely-held business and financial information and trade secrets. It also states that these materials are not "public records" under the Pennsylvania Right-To-Know Act, Act of June 21, 1997, P.L. 390, *as amended*, 35 PS §§ 66.1 - 66.4, so that Act does not limit the Board's authority to seal the hearing transcript and exhibits. The Board permitted the Department to delay its response to this motion to enable the parties to engage in settlement discussions in an effort to resolve all of the issues outstanding between them with respect to the use of IRM for paving material and the disposition of the motion to seal.[1]

The Department's response opposed the Appellant's motion for the following reasons:

(1) the interests of public access and openness, particularly under the Pennsylvania Right-To-Know Act, outweigh HRD's interests in sealing the record;

(2) the information presented at the hearing is not of the type, or lacks sufficient specificity, to warrant protection; and

(3) HRD's request to seal the record responding to the periods in which the courtroom was closed is entirely overbroad in its scope.

Finally, the Department claims that the transcript and exhibits are "public records" under the Right-To-Know Act and that this limits the Board's authority to seal those records.

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[1] This delay was permitted in part because the Commonwealth Court then had before it a significant issue with respect to the interpretation of the Right-To-Know Act involving transcripts of proceedings before the Pennsylvania Public Utility Commission. The Commonwealth Court resolved that issue by deciding that the Pennsylvania Public Utility Commission's regulation requiring parties to obtain transcripts from the court reporter was a valid regulation even though the court held the transcripts were public records. *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131 (Pa. Cmwlth. 1997) (*en banc*). The Pennsylvania Supreme Court has accepted a petition for review of the Commonwealth Court's decision. *Sierra Club v. Pennsylvania Public Utility Commission*, 992 M.D. Alloc. Dkt. 1997 (Pa. May 29, 1998).

Appellant's statement in reply filed on July 29, 1998, presents a more limited statement of the specific items which it believes should be sealed. Accordingly, we will deal with the Appellant's request as set forth in this statement.

DISCUSSION

Resolution of the contentions of the parties involves the relative importance of two competing public policies. The first of these is the strong policy that all courts shall be open and all public records shall be available for examination and inspection by any citizen of the Commonwealth. As indicated in the Board's prior Opinion on the Appellant's motion to close the supersedeas hearing, this strong presumption is supported by Article 1, Section 11 of the Pennsylvania Constitution and the Pennsylvania Right-To-Know Act. The Constitution provides that all courts shall be open. The Right-To-Know Act provides that "every public record of an agency shall, at all reasonable times, be open for examination and inspection by any citizen of the Commonwealth."[2] The countervailing consideration is the importance of protecting trade secrets of commercial concerns so as to foster fair competition in the marketplace. The importance of this countervailing consideration is fully expressed in numerous court decisions.[3]

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[2] The importance of this public policy has been emphasized by the federal courts. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *United States v. Smith*, 787 F.2d 111 (3d Cir. 1986); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).

[3] *DENTAL-EZ, Inc. v. Siemens Corp.*, 566 A.2d 1214 (Pa. Super. 1989); *see also, Press Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866, 890 (E.D. Pa. 1991).

The Transcript of the Hearing is a Public Record

The Right-To-Know Act provides in relevant part that "[e]very public record of an agency shall. . .be open for examination and inspection by any citizen of the Commonwealth. . . ." 65 P.S. § 66.2, and that those persons "shall have the right to. . .make copies of public records. . . ." 65 P.S. § 66.3. For a document to be a public record, the document must be one that: (1) is generated by an agency covered by the Right-To-Know Act; (2) is a minute, order or decision of an agency or an essential component in the agency arriving at its decision; (3) which fixes the personal or property rights or duties of any person or group of persons; and (4) is not protected by a statute, order or decree of court. 65 P.S. § 66.1; *Gutman v. Pennsylvania State Police,* 612 A.2d 553, 558 (Pa. Cmwlth. 1992).

In this case, the Board could decide the question of whether IRM is a product or a waste only by reference to the transcript of the hearing and the documents introduced into evidence. Accordingly, the transcript and the exhibits admitted into evidence fit the definition of a public record because the transcript is an essential element of the Board's reaching a decision in this appeal. Any such decision would fix the rights and duties of both Appellant and the Department. Accordingly, the contents of the evidence presented to the Board must be available to the public unless it is protected either by statute, order or decree of court. This is in accord with the Commonwealth Court's square holding that hearing transcripts are public records. *Sierra Club v. Pennsylvania Public Utility Commission,* 702 A.2d 1131, 1135 (Pa. Cmwlth. 1997), *petition for allowance of appeal granted,* 992 M.D. Alloc. Dkt. 1997 (Pa. May 29, 1998).

Confidential Business Information Protection

The General Assembly has recognized the need to balance the citizens' right to access to

information against a business' need to keep certain information confidential. Many environmental statutes permit the Department to treat certain information as confidential and not subject to public review. *E.g.*, Hazardous Sites Clean Up Act, Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. § 6020.503(h)(Department may treat as confidential information in the nature of trade secrets and confidential business records so long as it does not relate to the health or safety effects of a hazardous substance); Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. § 4013.2 (the Department may designate information as confidential except emission data); Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.1713(b)(information may be designated confidential if it does not relate to the public health, safety or welfare).

Most closely related to our review here is section 502 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.502(c), which provides:

> All records, reports, or information contained in the hazardous waste storage, treatment or disposal facility permit application submitted to the Department under this section shall be available to the public; except that the department shall consider a record, report or information or a particular portion thereof, confidential in the administration of this act if the applicant can show cause that the records, reports or information, or a particular portion thereof (but not emission or discharge data or information concerning solid waste which is potentially toxic in the environment) if made public, would divulge production or sales figures or methods, processes or production unique to such applicant or would otherwise tend to affect adversely the competitive position of such applicant by revealing trade secrets.

While this provision does not expressly apply to this Board and this case involves what is either product or waste under the Department's residual waste regulations, rather than the Department's hazardous waste program, the Board will look to this statutory provision in this case as a guide to

resolving the conflicting interest of the public's right to know with the interests of business organizations in protecting their trade secrets. We think that the same privilege must be applied to confidential business information of the same character presented to the Board in an appeal from action by the Department.

We agree with the Department that much of the testimony offered during the course of the closed sessions of the hearing was not of a sufficiently confidential nature to deserve protection. However, some of the information designated in the Appellant's most recent Statement Regarding Appellant's Motion to Seal is of such a nature as to deserve protection. Further, this Board's order sealing this material will exempt the material from public disclosure under the Right-To-Know Act.

Financial Information

We will grant the motion to seal with respect to certain financial information even though that information is somewhat general because its release to competitors would tend to affect adversely Appellant's competitive position. We believe that the following items are entitled to protection as confidential business information:

Page	Lines	Description
29	14-22	Percentage of total sales to Blue Mountain and Towamensing Township
36	10-25	Net income and gross receipts
37	14-22	Net ton profit
38	14-16	Net financial effect of Department's orders on the Palmerton facility
45	13-end	Annual production of IRM
61	17-25	Price per ton on invoice to Blue Mountain

62	1-4	Price per ton on invoice to Blue Mountain
68	8-19	Estimate of gross revenues for certain materials
69-70	entire pages	Estimate of revenue and profit
71	1-9	Estimate of revenue and profit
300	11-18	Estimate of profit per ton
310	1-25	Total sales to Blue Mountain and Towamensing Township and loss of revenue from suppliers
311	6-9	Loss of revenue
544 545	20-end and to 2	Annual sales for sub-base and identification of customers

Appellant also requests that Commonwealth Exhibits 1 and 2 be sealed. These exhibits were only identified in testimony but were never offered for admission into evidence and are not part of the Board's record. Therefore they will be returned to the Department and not included in the Board file.

Constituents of IRM

During the course of the testimony and in certain exhibits, either identified for the record or introduced into evidence, the specific component chemicals of IRM were revealed. Appellant claims that this is trade secret information because competitors might use that information to reverse engineer and therefore discover the recycling processes used by Appellant. Accordingly, Appellant contends that this is trade secret information which is entitled to protection.

There is also testimony of record with respect to the potential for leaching of certain specified chemicals when IRM is used for paving. Appellant does not seek protection with respect to that

testimony. Much of the exhibit material which was either admitted into evidence or marked for identification had been submitted to the Department under a claim of business confidentiality which, as far as the record shows, the Department did not challenge when those submissions were made.

If the Board were to reach a conclusion in this litigation that the IRM is a waste, it could not give protection to the identity of the chemical components of that waste. However, the issue of the litigation was whether it was a product which has no adverse effect on the environment, an issue which the Board never resolved. The Board believes the public has a strong interest in whether or not IRM contains harmful chemicals which might be released to the environment. There is ample evidence in the record, particularly in the testimony of Steven Machmer, indicating that IRM contains materials which might be released into, and adversely affect, the environment. That information will not be sealed and will continue to be available to the public. However, since the Board never reached a conclusion as to whether or not IRM is a product or a waste, we think it would be unjust to require the Appellant to divulge the exact chemical components of IRM as a cost of asserting a claim that IRM is a product and not a waste. Such a requirement would stifle the exercise of rights by the regulated community to appeal to this Board if it knew that the result of an appeal, whatever its outcome, would be a release of confidential information to their competitors.

Accordingly, the Board will seal seal column 2 in Appellant's Exhibits 8 and 9 and in Commonwealth Exhibits 14 and 16. Commonwealth Exhibits 5 and 6 will be returned to the Department because they were never offered for admission into the record.

In addition, the Board will direct the Secretary to seal the following portions of the transcript because they tend to reveal the exact constituents of IRM:

Page	Line
394	9-25
395	1-24
397	3-25
398	1-2
400	1-10
412 413	24 to 17

The other matters which Appellant seeks to have sealed do not fall within the classification of information which may be withheld from the public. For example, the alternate cost of aggregate material from other suppliers is information in the public domain. Similarly, the fact that shipping costs increase with distance is no secret to any one. The general effect of the Department's orders on Appellant's marketing of IRM and on its customers is something that anyone can surmise with the same generality as is contained in the transcript. Finally, we are not granting the motion to seal with respect to testimony concerning the Appellant's source of raw material because the Appellant failed to demonstrate how such general statements could harm its business interests, and it is not evident from the testimony itself.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 97-002-MG**
	:	**97-009-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of October, 1998, the Appellant's motion to seal certain portions of the transcript of the supersedeas hearing and certain exhibits introduced or identified during the course of the hearing on Appellant's petition for a supersedeas, IT IS HEREBY ORDERED as follows:

1. The portions of the transcript of the hearing set forth below are to be placed under seal by the Secretary of the Board by removing from the Board's copy of the transcript the original pages indicated and substituting therefore a copy of those pages with the lines as set forth below obliterated:

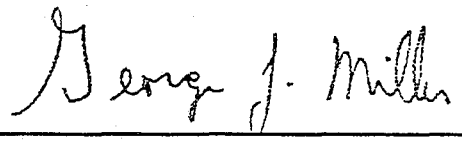
Page	Line
29	14-22
36	10-25

37	14-22
38	14-16
45	13-end
61	17-25
62	1-4
68	8-19
69-70	entire pages
71	1-9
300	11-18
310	1-25
311	6-9
394	9-25
395	1-24
397	3-25
398	1-2
400	1-10
412 413	24 to 17
544 545	20-end and to 2

2. The Secretary of the Board is directed to place under seal Commonwealth Exhibits 14 and 16 and Appellant's Exhibits 8 and 9. In the case of Appellant's Exhibits 8 and 9 and

Commonwealth Exhibits 14 and 15, the Secretary will place in the record copies of those exhibits with the information contained in column 2 of those exhibits obliterated.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 16, 1998

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

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

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 97-002-MG** **97-009-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 16, 1998

OPINION AND ORDER ON MOTION TO DISMISS and MOTION TO RESCHEDULE THE MERITS HEARING

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a motion to dismiss an appeal for mootness and the absence of jurisdiction even though the Department has withdrawn compliance orders entered against two customers of the appellant for their use of materials which had been sold to them by the appellant. Since the appellant may still be significantly aggrieved by the action of the Department, the Board continues to have the authority to review the Department's action in issuing the orders in the first instance. However, the Board will abstain from hearing this appeal now that the Department has withdrawn the orders because the appellant has already commenced proceedings with the Department which are likely to resolve the same issues as a practical matter and we believe the Department should be afforded the opportunity to complete its review now that there is less urgency in resolving the appellant's dispute with the Department concerning these two customers. Accordingly, the Board will dismiss the

appeal as a matter of discretionary abstention to permit the Department to complete its full administrative review. In view of the Board's disposition of the motion to dismiss, a motion to reschedule the merits hearing filed by the Appellants is denied.

OPINION

The Department moves to dismiss the appeal of Horsehead Resource Development Co. (Appellant) on the grounds that its appeals of two compliance orders issued against third parties are now moot and the Board has no jurisdiction because those orders have been withdrawn by the Department. Also before the Board is a motion by the Appellant to reschedule a hearing on the merits even though it failed to file its prehearing memorandum for the hearing originally scheduled in July.

The relevant facts are not in dispute. In December 1996 the Department issued compliance orders to Tuthill Corporation, d/b/a Blue Mountain Ski Area (Blue Mountain) and Towamensing Township to cease the use of iron rich material, known as IRM, sold the them by the Appellant for paving projects and to submit a plan for removal of the IRM. Both Blue Mountain and Towamensing Township appealed these orders. The Appellant also appealed these orders because as the manufacturer of IRM it objected to the Department's characterization of the material as a "waste" under the solid waste regulations rather than a "product" which it contends it may market free of regulation by the Department. A more detailed explanation of this issue is provided in the Board's opinion on the Appellant's motion to seal the supersedeas transcript, issued concurrently with this opinion.

While the Appellant and the Department attempted to settle the issue in the Appellant's appeal, the Township and Blue Mountain also entered into settlement discussions with the

Department. The Township ultimately complied with the compliance order to the Department's satisfaction and on October 24, 1997, the Department informed the Township that the compliance order was rescinded. (Motion to Dismiss, Exhibit B) Hence, the Township withdrew its appeal docketed at EHB Docket No. 96-279-MG. Similarly, Blue Mountain and the Department entered into a consent order and agreement dated May 14, 1998. (Motion to Dismiss, Exhibit C) As agreed in the consent order the Department rescinded the compliance order and Blue Mountain shortly thereafter withdrew its appeal docketed at EHB Docket No. 97-001-MG. The Appellant's negotiations with the Department are thus far unsuccessful.

Because the compliance orders have been withdrawn, the Department argues that the Appellant's appeal should be dismissed because it is moot and the Board can no longer grant effective relief to the Appellant.

A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Power Operating Company, Inc. v. DEP*, EHB Docket No. 97-212-C (Opinion issued May 14, 1998). In this case the Department contends that the Board can no longer provide effective relief and it therefore lacks jurisdiction in this matter. The Appellant takes the position that the Board can provide effective relief by resolving the marketability of IRM for paving uses. Moreover, the Board is not divested of jurisdiction merely because the Department withdrew its orders. We will address the question of jurisdiction first.

It is a well-settled tenet that once the jurisdiction of a tribunal attaches it is not divested of that jurisdiction by the ordinary occurrence of subsequent events. The jurisdiction is the power of a tribunal to enter upon an inquiry; it is not a question of whether the tribunal is able to grant relief

in a particular case. *Get Set Organization v. Philadelphia Federation of Teachers, Local No. 3*, 286 A.2d 633 (Pa. 1971). Therefore, our adjudicatory power is not lost simply because the Department has changed its position and our ability to grant relief may be more limited by the scope of the remaining issues.

However, our ability to grant relief in this case has not been negated by the Department's withdrawal of the compliance orders. The Appellant claims that Department's action in issuing the compliance orders is still causing significant harm to the Appellant by severely impairing its ability to sell and market IRM to other customers. The withdrawal of the orders may not remedy this situation and the Department has not offered any statement in its motion that it is unlikely to issue similar compliance orders against existing or future customers of IRM. Although we can not order the Department to withdraw orders which have already been withdrawn we can still determine that the Department abused its discretion in issuing them in the first instance.

The Department suggests that such a ruling by the Board would be a declaratory judgment, a remedy the Board is not authorized to provide. We agree that we have no authority to issue a declaratory judgment, but any determination that we might make that the Department abused its discretion in the exercise of the Board's adjudicatory power is not the same as a declaratory judgment because such a ruling would be a determination of the Appellant's initial claim for relief. Once our adjudicatory power attaches, it is well within our authority to review Department actions, to state what the law is and determine whether or not the Department complied with that law. *See Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 1067, 1069 (once the Board's jurisdiction attaches, that jurisdiction extends to all matters in connection with the appeal).

Even though we have jurisdiction to continue this appeal, in this particular instance we

decline to do so because the Appellant has already instituted administrative proceedings within the Department to secure a beneficial use determination from the Department. A favorable determination by the Department would, as a practical matter, resolve its dispute as to the marketability of IRM as a paving material. Moreover, we would not ordinarily review the status of IRM for paving uses until after such a determination by the Department is made.

We are persuaded by cases in the federal courts where those tribunals have abstained from hearing cases in federal court where proceedings in state court are pending or in progress, as first announced by the U.S. Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). The doctrine has also been applied where there are ongoing state administrative proceedings. *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982). The purpose of abstaining in these circumstances is to avoid friction between the federal and state systems and to allow the state to exercise a function which is legitimately within their authority to control. *O'Neill v. City of Philadelphia*, 32 F.3d 785 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 1355 (1995).

We believe these principles apply in this case between the Department and the Board. The Board has the jurisdiction to determine the marketability of IRM within the scope of the appeal currently before it. However, the Department has already expended significant resources reviewing the same issue in the context of the concurrence request which was initiated pursuant to a consent agreement between it and the Appellant in the United States District Court for the Middle District of Pennsylvania. We believe that the Department has the greater expertise in delineating the scientific issues on which a product or beneficial use determination might be made to resolve the issue of the marketability of IRM. We would benefit from full and complete consideration by the Department in any review we might make of the Appellant's desire to market IRM for paving

purposes. In addition, the withdrawal of the Department's compliance orders alleviates the urgency of resolving the question as to the two specific customers of the Appellant. Therefore, out of respect for the function and expertise of the Department and to avoid duplicating administrative and judicial resources, we will abstain and dismiss the Appellant's appeal. In the event that the Department's decision is not favorable to the Appellant, it is free to appeal that action.

In view of our decision to dismiss the Appellant's appeal, we also deny the Appellant's request to reschedule the hearing on the merits.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
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	:	**97-009-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of October, 1998, it is ordered as follows:

1) The motion of the Department to dismiss these appeals is hereby **granted.**

2) The Appellant's motion to reschedule the merits hearing is hereby **denied.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 97-002-MG and
EHB Docket No. 97-009-MG

DATED: October 16, 1998

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

For the Commonwealth, DEP:
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COMMONWEALTH OF PENNSYLVANIA
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HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
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	:	**97-009-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

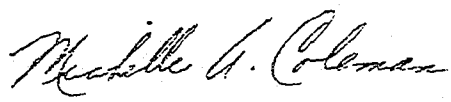
CONCURRING OPINION OF MEMBER MICHELLE A. COLEMAN

I agree with the result in this case--that Appellant's appeals should be dismissed--but respectfully disagree with the majority's reasons for dismissal. The majority concludes that the appeals of the two compliance orders are not moot. Nevertheless, because the Department is currently considering a beneficial use determination involving the IRM, the Board dismisses them for reasons grounded in the equitable abstention doctrine. I would hold that the appeals of the compliance orders are moot and dismiss them for that reason.

As the majority notes in its opinion, a matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Power Operating Company, Inc. v. DEP,* EHB Docket No. 97-212-C (Opinion issued May 14, 1998). Where, as here, the Department issues a compliance order, the relief the Board can grant is limited to revoking, sustaining, or tailoring the order. If the Department withdraws the order, we cannot provide effective relief in regard to the matter before us--the propriety of the order--even if it may be advantageous to one or more of the parties to have

the Board resolve some of the collateral issues involved in their appeal.[1] The mere fact that it may be inconvenient for one or more of the parties to litigate the issues in another proceeding does not bring them within one of the recognized exceptions to the mootness doctrine. *See, e.g., Empire Sanitary Landfill, Inc. v. DEP,* 1991 EHB 66 (holding that an appeal of a solid waste permit modification became moot when the Department issued a subsequent permit modification--notwithstanding the fact that the subsequent modification contained many of the same provisions appellant objected to in the first modification).

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 16, 1998

[1] Oftentimes, for instance, land ownership is a subsidiary issue involved in Board appeals. The fact that it may be advantageous to the parties to have the Board resolve contentious land ownership issues does not give the Board jurisdiction to do so, if the Department withdraws the underlying action.

COMMONWEALTH OF PENNSYLVANIA
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

AMBER ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-086-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 16, 1998**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the terms of a Consent Order and Agreement are in effect and a Department action which formed the basis for appeal was rescinded by the Department, the appeal is rendered moot and the Department's motion to dismiss is granted.

BACKGROUND

This matter involves the appeal filed April 14, 1997, by Amber Energy, Inc. (Amber) of the Department of Environmental Protection's (Department) March 13, 1997, Administrative Order. The Order required the plugging of approximately 280 oil and gas wells located on leases in Warren and Venango Counties.[1] Amber is a Pennsylvania corporation which has experienced a complex

[1] A related appeal was filed by different parties at EHB Docket No. 97-085-C. The Board issued an Opinion and Order granting the Department's motion for judgment on the pleadings and dismissed the appeal. *See* 1997 EHB 723.

legal history in several jurisdictions. At some point during the various proceedings, Amber was placed in liquidating receivership and was appointed a Receiver by the Court of Common Pleas of Venango County (Court).[2]

The Department filed a motion for summary judgment with the Board on December 12, 1997. Subsequently, the Department and Amber reached an agreement regarding a Consent Order and Agreement (COA). In April 1998, the Receiver filed motions with the Court seeking its approval of both the plugging contract and the COA in order to proceed with the plugging of the wells. After having granted several of Amber's motions for extension for the filing of Amber's response to the Department's motion for summary judgment, the Board stayed the appeal to allow for the Court to approve the COA negotiated between the Department and the Receiver.

On June 3, 1998, the Court held a hearing on the Receiver's motions and issued an Order on August 4, 1998 authorizing the Receiver to execute the COA on behalf of Amber. Under the terms of the COA, Amber is required to completely plug the wells that are the subject of the Department's Order within two years and the Receiver consequently entered into contracts for the well plugging work. Pursuant to Paragraph 3.c.(1) of the COA, the Department rescinded its Order on June 23, 1998. Several *pro se* shareholders filed a motion for reconsideration of the Court's August 4, 1998 Order. The Court granted the motion and scheduled a hearing for September 22,

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[2] *See Hudock v. Fry,* Eq. D. No. 4-1991, issued November 22, 1994, as amended by the Court's Order dated January 24, 1995. In addition, Amber filed a voluntary Chapter 11 bankruptcy petition with the United States Bankruptcy Court for the Western District of Pennsylvania, which was dismissed. Additionally, a Suggestion of Bankruptcy was filed with the Board. Although the decision of the Bankruptcy Court has been appealed to the United States District Court, the Receiver has proceeded to act on behalf of Amber subject to the supervisory authority of the Court of Common Pleas of Venango County.

1998.

DISCUSSION

Currently before the Board is the Department's motion to dismiss. We must assess a motion to dismiss in the light most favorable to the non-moving party. *Tinicum Township v. DEP*, 1996 EHB 816. In its motion, the Department contends that since it rescinded the Order in accordance with the terms of the COA, Amber's appeal is now moot. A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *New Hanover Corporation v. DER*, 1991 EHB 1127.

In response to the Department's motion, Amber filed a motion to stay the proceedings before the Board in deference to the Court scheduling a second hearing on September 22, 1998.[3] However, Amber did not comply with the Board's rules of practice and procedure regarding responses to dispositive motions. Therefore, the Board issued an Order dated August 20, 1998, directing that Amber's motion shall be treated as a response to the Department's motion to dismiss and affording the Department an opportunity to file a reply. *See* 25 Pa. Code §§ 1021.64(e), 1021.70(e). The Department in turn filed a reply.

In its response, Amber admits that the Receiver is continuing to plug the wells in accordance with the terms of the COA. Amber asserts that any action by the Receiver concerning the appeal before the Board would be premature pending a final decision by the Court and contends that it is therefore justified in not withdrawing the appeal before the Board pursuant to Paragraph 3.c.(2) of

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[3] The Board has learned that although the hearing occurred as scheduled on September 22, 1998, it did not conclude on that date and is presently scheduled for yet another day.

the COA. Amber seemingly overlooks the fact that the Court specifically ordered that the scheduling of the hearing was not intended as a stay and directed the plugging of the wells, and thus the COA, to remain in effect. *See Hudock v. Fry*, Eq. D. No. 4-1991, issued August 4, 1998 (Amber Response, Exhibit A). Even if the Court were to vacate its Order of August 4, 1998, the COA is now a final order of the Department and the shareholders who filed the motion for reconsideration would be required to avail themselves of any administrative remedies. Since the Department has rescinded the action which formed the basis for this appeal and because Amber no longer has any stake in the outcome of this appeal, the Board cannot provide effective relief.

Accordingly, we order the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMBER ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 98-086-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 16, 1998**

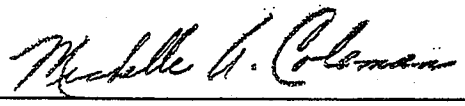
ORDER

AND NOW, this 16th day of October, 1998, it is hereby ordered that the Department's motion to dismiss is **granted**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **October 16, 1998**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 97-219-CP-MG**
v.	:	
	:	**Issued:** October 20, 1998
JEFFREY CLARKE	:	

OPINION AND ORDER ON MOTION IN LIMINE

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part a motion in limine of the Department of Environmental Protection which seeks to preclude the defendant in a civil penalty proceeding from offering evidence on two issues. The motion is granted as to the issue of whether criminal proceedings involving the same misconduct preclude the Department from proceeding against the defendant for civil penalties. Civil penalties are separate and distinct from criminal proceedings therefore the Department is not estopped from pursuing civil penalties by a prior criminal complaint. The motion is denied as to the defendant's desire to present testimony concerning a pond on the site as it is unclear that such evidence is irrelevant to the resolution of the Department's complaint.

OPINION

Before the Board is a motion in limine of the Department of Environmental Protection which seeks to exclude evidence at hearing on its complaint for civil penalties for violation of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1-691.1001, and its regulations. On October 14, 1997, the Department filed a complaint for assessment of civil penalties against Jeffrey Clarke arising out of earthmoving activities at a site in Quakertown, Bucks County, Pennsylvania.

The Department first seeks to exclude evidence of an affirmative defense raised by Clarke in his Answer and New Matter which argues that the Department is estopped from pursuing civil penalties against him because it first instituted criminal proceedings which were subsequently withdrawn. Clarke asserts that the matter was withdrawn "with prejudice," therefore principles of res judicata apply. The Department contends that the matter was not withdrawn with prejudice, therefore there was no final judgment and res judicata does not apply.

Both arguments miss the point. It is well settled law that criminal proceedings do not bar subsequent civil proceedings for the same underlying misconduct. *Pennsylvania State Police v. Swaydis*, 470 A.2d 107 (Pa. 1983); *Department of Transportation v. Crawford*, 550 A.2d 1053 (Pa. Cmwlth. 1988); *Lowry v. Pennsylvania State Police*, 529 A.2d 589 (Pa. Cmwlth. 1987)(*en banc).* This is true even where the criminal defendant is acquitted or the charges are dismissed. *Swaydis; Lowry*. Therefore the question of whether the criminal charges against Clarke were withdrawn with prejudice or without prejudice is irrelevant. Irrespective of fines which Clarke claims were paid as

part of a criminal sentence,[1] civil penalty proceedings are clearly a civil, not a criminal matter, therefore the Department is not estopped from pursuing civil penalties by the prior criminal complaint. *See Commonwealth v. CSX Transportation*, 708 A.2d 138 (Pa. Cmwlth. 1998)(*citing Hudson v. United States*, 118 S.Ct. 488 (1997)). We therefore grant this portion of the Department's motion and preclude Clarke from offering evidence related to his res judicata defense.

The Department next seeks to preclude testimony of certain witnesses who will testify concerning the state of a pond and/or drainage ditches over time. Clarke suggests that this testimony will lead to evidence related to the reasonableness of the Department's penalty. Additionally, part of Clarke's defense is that there was "no substantial work performed on the pond in question and that the pond has remained virtually unchanged over many years."

We will deny the Department's motion to exclude this evidence. It is unclear to us the relationship between this pond and the waterway identified in the Department's complaint. Therefore the Department has failed to show that Clarke's evidence has absolutely no relevance to these proceedings. We therefore deny this portion of the Department's motion. *See Green Thornbury Committee v. DER*, 1995 EHB 294 (a moving party bears the burden of proving that it is entitled to the relief requested). If at hearing it appears that the evidence which Clarke seeks to introduce is indeed irrelevant the Department may renew its motion at that time.

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[1] Evidently these fines were actually paid pursuant to charges filed by the Pennsylvania Fish and Boat Commission, which makes Clarke's defense even less relevant.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 97-219-CP-MG**
v.	:	
JEFFREY CLARKE	:	

ORDER

AND NOW, this 20th day of October, 1998, the Department's motion in limine is hereby granted in part and denied in part as follows:

1. Jeffrey Clarke is precluded from offering evidence in support of his defense of res judicata as it applies to criminal proceedings related to the above-captioned civil penalty proceedings.

2. Jeffrey Clarke may offer evidence concerning the state of the pond and/or drainage ditches at the site.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 20, 1998

See following page for service list.

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MEINZER LAW OFFICES
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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOA

TOWNSHIP OF UPPER SAUCON, Appellant and UPPER SAUCON TREATMENT AUTHORITY, Intervenor	:	
v.	:	**EHB Docket No. 98-082-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 26, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

A motion to dismiss an appeal for lack of jurisdiction is granted where the Department's letter did not constitute an appealable action. A letter which simply advises the appellants of the Department's interpretation of the law and imposes no obligation on appellants is not an appealable action.

OPINION

This matter was initiated with the Township of Upper Saucon's appeal of a letter from the Department of Environmental Protection dated April 8, 1998. The letter expressed the Department's interpretation of Section 94.21(a)(1) of Title 25 of the Pennsylvania Code. The Township of Upper Saucon is a municipality located in Lehigh County. The Upper Saucon Treatment Authority, an independent municipal authority which holds the NPDES Permit and a construction permit for the

sewage treatment plant located in Upper Saucon Township, intervened on behalf of the Township.[1] Bible Fellowship Church, a non-profit organization, and Basile Corporation, are intervening appellees.

Bible Fellowship Church and Basile Corporation wish to convert the abandoned Pinebrook Junior College located in Coopersburg to an assisted living care residential community. At a special meeting of the Upper Saucon Treatment Authority held on July 1, 1997, Basile Corporation requested that the conversion of Pinebrook Junior College to an assisted care living facility should be exempt from the prohibition on sewage connections. At a regular Sewer Authority meeting on July 21, 1997, Basile's request for municipal sewage service for the proposed facility was denied because of a prohibition on additional sewage source connections pursuant to 25 Pa. Code § 94.21(a)(1). The developers, Bible Fellowship Church and Basile Corporation, asked the Department to clarify its position regarding the Upper Saucon Treatment Authority's prohibition on new connections and its administration of exceptions to such connection prohibitions.

On April 8, 1998, Hugh V. Archer, Deputy Secretary of Water Management, sent a letter to Bernard A. Rodgers, Manager of Upper Saucon Township, in an attempt to clarify the Department's position on sewage connection prohibitions. The Department first states that prohibition is in violation of 25 Pa. Code § 94.21, because prohibitions may only be imposed where the annual report establishes that the sewage facility is hydraulically overloaded. No adequate documentation of such a problem was ever submitted to the Department. Second, the Department states that the Township clearly has the authority to grant an exception to the self- imposed prohibition on connections to an

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[1] The Township and the Authority are hereinafter referred to as "Appellants."

overloaded facility under 25 Pa. Code § 94.21(a)(1), and that an assisted living facility constitutes "a facility of public need" under Section 94.1. At no time in the letter does the Department order Upper Saucon Township to take specific action or impose direct obligations regarding these statements.

On April 27, 1998, Basile Corporation and Bible Fellowship Church appeared for a second time before a meeting of the Upper Saucon Treatment Authority to obtain a decision that their proposed assisted living facility constituted a "facility of public need" thereby making it qualify for an exemption to the prohibition. The Authority listened to the arguments presented by Basile Corporation and Bible Fellowship Church and took the matter under advisement. On May 8, 1998, a notice of appeal of the Department's April 8, 1998 letter was filed before the Environmental Hearing Board by Appellants. At a May 18, 1998 meeting, the Upper Saucon Treatment Authority determined that since the issue was on appeal to the Environmental Hearing Board, it would abstain from taking action on Basile and Bible Fellowship's request. On June 17, 1998, Basile Corporation and Bible Fellowship Church filed a local agency appeal in the Court of Common Pleas of Lehigh County claiming that the Authority's inaction was tantamount to an adjudication to which they are entitled to an appeal.

On August 13, 1998, the Department filed the present Motion to Dismiss and a supporting Memorandum of Law. The Department argues that the letter sent to the Township by the Department in not an appealable action. Rather, the letter merely informs the Township of it's obligations under Pennsylvania law and that the Township is in violation of 25 Pa. Code §94.2. On September 11, 1998, Appellant filed an Answer to the Department's Motion and a Memorandum of Law in opposition thereto. On September 24, 1998, the Department filed a Reply Memorandum of

Law.

The question of appealability is a jurisdictional one. Under Section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §7514(a), the Board has jurisdiction to review orders, permits, licenses or decisions of the Department. Specifically, the Board reviews "actions" of the Department which is defined as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person . . . ." 25 Pa. Code § 1021.2.

The Board and the Commonwealth Court have long held that letters from the Department which require no specific action on the part of appellants are not final actions over which the Board has jurisdiction. *Eagle Enterprises, Inc. v. DEP*, 1996 EHB 1048, 1049. The appealability of a particular Department letter is dictated by the language of the letter itself. *Conrail v. DEP,* Docket No. 97-198-MR (Opinion Issued May 12, 1998). If the letter merely advises the recipient of the Department's interpretation of the law, it is not appealable. *Sandy Creek Forest, Inc. v. Department of Environmental Resources*, 505 A.2d 1091 (Pa. Cmwlth. 1986); *Eagle Enterprises v. DEP*, 1996 EHB 1048; *Chambers Development Co. v. DEP,* 1988 EHB 198. Nowhere in the April 8, 1998 letter does the Department inform the Township that it must perform any obligations or face sanctions. Rather, the letter merely advises the Township of the Department's interpretation of certain regulations.

Appellants contend that the April 8, 1998 letter caused immediate and serious legal consequences. Appellants argue that the Department's conclusion in the letter that assisted living facilities are facilities of public need, and that Appellants have the authority to grant an exception

to the self imposed prohibition on connections caused immediate and adverse effects, specifically, the initiation of a third party lawsuit by Basile Corporation and Bible Fellowship Church. This lawsuit, the Appellants contend, has required them to commit time and resources.

These circumstances do not transform the Department's letter into an appealable action that we have jurisdiction to review. The Appellants rely on *National Forge Company v. DER*, 1993 EHB 1639 and *Costanza v. DER*, 1991 EHB 1132. The circumstances presented by *National Forge* were somewhat unique. After a series of contradictory oral communications with the appellant, a Department letter stated that since appellant's impoundment takes industrial wastewater, it was a residual waste impoundment subject to the residual waste regulations. Because the Department reached that conclusion in it's letter, certain consequences flowed directly from it. Section 287.111 of the residual waste regulations requires that operators of residual waste impoundment submit a "notice," which must contain specific information concerning the impoundment. Moreover, operators who fail to file a "notice" in a timely fashion are mandated to close the impoundment. Even though the letter only asks that the "notice" be submitted, the regulation automatically imposes a requirement of submission of the "notice" by a specific deadline. The obligations in *National Forge* were directly imposed by the nature of the regulations held applicable to the appellant in the Department's letter, therefore the Board concluded it had jurisdiction. In this case and contrary to *National Forge,* the Department does not require the appellant to take any action. Any action Appellants need to take flows from a third party suit and is not a direct result of the Department's April 8, 1998 letter or the regulations.

Appellants also contend that under *Costanza v. DER*, 1991 EHB 1132, the *status quo ante* has been changed by the Department action, therefore, the letter is appealable. We disagree. In

Costanza, the Board concluded that a Department letter could not be appealed which advised the appellant that it was in violation of Section 610(g) of the Solid Waste Management Act[2] and 25 Pa. Code § 275.222(d)(1), because it failed to submit an annual two hundred dollar per site permit fee, failed to submit corrected 1990 reports, and failed to submit 1991 reports on proper forms. The Department's letter then told the appellant that this letter will become a permanent part of its compliance history to be used when future permits are reviewed. Finally, the letter told the appellant how it could correct these violations and that it should do so or it may be assessed civil penalties. The Board concluded the letter was *not* appealable because it imposed no direct obligations or deadlines on the appellant nor did it require compliance with a specific course of conduct. We find the April 8, 1998 letter received by the Appellants much like the letter in *Costanza.* Although the *status quo ante*, as explained by *Costanza*, may be changed for the Appellants, it is not a result of the April 8, 1998 letter. Rather, it is the result of third party litigation which could have been initiated whether the Department had written its letter or not.

Furthermore, Section 7 of the Sewage Facilities Act plainly places responsibility for permitting upon the local agency, not the Department. 35 P.S. § 750.7 (permitting); *see also* 35 P.S. § 750.8(a)(local agencies are responsible for administering Section 7 of the Act). The applicable regulations do the same. In the event that a municipality is suffering from a sewage facility overload where it is prohibited from issuing new permits, the local agency may nevertheless grant an exception as defined by the regulations. 25 Pa. Code § 94.21(a)(1). Standards for granting exceptions are found in 25 Pa. Code §§ 94.55-94.57. A local agency may allow an exception for

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[2] Act of July 7, 1980, P.L. 380, No. 97, *as amended,* 35 P.S. § 6018.610.

sewage connections "which are necessary for the operation of a facility of public need . . . ." 25 Pa. Code § 94.57.

The Department does have some oversight authority over actions taken by local agencies pursuant to their duties under the Act. However, the Department must act within its authority described in Section 10 by issuing an order to a local agency when it determines that the agency is not acting in conformance with the Act or the regulations. 35 P.S. § 750.10(7). In this case the Department has clearly opted not to issue such an order. Hence its letter to Upper Saucon Township is nothing more than legal advice and we have no jurisdiction to grant the relief that the Appellants seek.

Because the Department's April 8, 1998 letter does not constitute a final action on Upper Saucon Treatment Authority's self-imposed prohibition on new connections to its sewage facilities, we grant the Department's Motion to Dismiss the Appellants' appeal for lack of jurisdiction.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF UPPER SAUCON, Appellant and UPPER SAUCON TREATMENT AUTHORITY, Intervenor	:	
v.	:	**EHB Docket No. 98-082-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

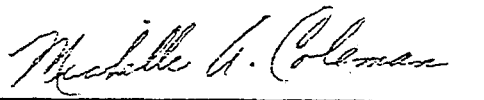
ORDER

AND NOW, this 26th day of October, 1998, the Motion to Dismiss filed by the Department of Environmental Protection is hereby **GRANTED.**

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 26, 1998

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

DONALDSON M. SIMONS, II and J.J.H. MAGUIRE, INC.	:	
v.	:	**EHB Docket No. 98-089-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 26, 1998

OPINION AND ORDER ON
PETITION FOR ALLOWANCE OF APPEAL *NUNC PRO TUNC*
and MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an untimely filed appeal and denies a petition for allowance of appeal. The appeal was filed more than two years after the Department order. The appellant's attempts to settle with the Department do not provide grounds for an appeal *nunc pro tunc*.

OPINION

Before the Board is a petition for allowance of appeal *nunc pro tunc* seeking permission to appeal a civil penalty assessment by the Department of Environmental Protection dated January 23, 1996. Also before the Board is the Department's motion to dismiss this appeal. The relevant facts are as follows.

The Appellants are Donaldson M. Simons, II, who is an individual and President of Appellant

J.J.H. Maguire, Inc, a corporation.[1] The Appellant owns a contaminated property located in Bristol Township, Bucks County which is the subject of an order and civil penalty assessment which was issued by the Department on January 23, 1996. On or about February 15, 1996, the Appellant met with the Department. The Appellant claims that he was advised by Department employees that in the event that the property was "cleaned up" and the environmental violations were remedied, the Department would forgive and/or abate the civil penalties. In the petition to appeal *nunc pro tunc* the Appellant alleges he "was specifically advised that there was no need to appeal in order to effectuate this commitment from the Department employees." (Petition for Allowance of Appeal *Nunc Pro Tunc,* ¶ 4) The Department denies that it advised the Appellant that there was no need to appeal or that it made an offer to forgive or abate the civil penalties, and supports its denial with affidavits of four Department employees who were present at the February meeting. (Department Motion ¶ 23, Exhibit H) The Appellant asserts a different understanding of the discussion at the meeting, but does not provide any affidavits or other evidence to support his assertions.

Well over a year after the February 1996 meeting the Appellant submitted a work plan to the Department. The Department rejected the plan, contending that it was deficient. Several months later, on April 1, 1998, the Department instituted enforcement proceedings against the Appellant in the Commonwealth Court.[2] On May 15, 1998, more than two years after the Department's order was issued, the Appellant filed this petition for allowance of appeal *nunc pro tunc*. The Department seeks to dismiss the appeal as untimely. As explained below, we will grant the Department's

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[1] Although we refer to the Appellant in the singular form throughout this opinion, we recognize that the individual and the corporation are two separate entities.

[2] By order dated June 22, 1998, the court ordered the Appellant to comply with the Department's order and set a schedule for certain work to be done by the Appellant. (Department Motion, Exhibit F)

motion.[3]

We have often explained that the jurisdiction of this Board does not attach unless an appellant files an appeal within 30 days after notice of the Department's action is received; appeals filed after that time must be dismissed as untimely. *Rostosky v. Department of Environmental Protection*, 364 A.2d 761 (Pa. Cmwlth. 1976); *Robachele, Inc. v. DEP*, EHB Docket No. 97-279-MG (Opinion issued July 14, 1998). However, upon written request, the Board may grant leave to file an appeal *nunc pro tunc*. 25 Pa. Code § 1021.53(f). The Board will grant a petition to appeal *nunc pro tunc* "only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." *Falcon Oil v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992).

There is no question that the Appellant's appeal is not timely filed. In its response to the Department's motion to dismiss, the Appellant charges that the appeal cannot be dismissed as untimely because the Department's order did not provide a mailing date to provide notice of the beginning of the appeal period. This argument is completely without merit.

First, the Appellant has acknowledged that his appeal was untimely by requesting *nunc pro tunc* relief with the notice of appeal filed with the Board on May 15, 1998. He further represents to the Board in that petition that he "did not file an appeal within the 30 day appeal period of written notice of the action . . . ." (Petition for Allowance of Appeal *Nunc Pro Tunc*, ¶ 3) He is therefore estopped from arguing that his appeal cannot be dismissed as untimely.

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[3] The Department also filed a motion to strike the Appellant's response to the motion to dismiss because it was filed late with the Board in contravention of 25 Pa. Code § 1021.73(d). While we agree that the response was late and that other Board decisions have disregarded such late responses, because of our disposition of the Department's motion we decline to strike the Appellants' response here.

Second, even if the Appellant had not admitted that his appeal was filed outside the 30-day appeal period, his appeal would still be considered untimely regardless of whether he had notice of the specific day when the Department's order was mailed. All of the cases cited by the Appellant in support of his contention that the Department's order must provide notice of the mailing date are based on appeals under statutes which begin the appeal period from the mailing date of the agency order. *Schmidt v. Commonwealth*, 433 A.2d 456 (Pa. 1981)(Tax Reform Code); *Department of Transportation, Bureau of Driver Licensing v. Walzer*, 625 A.2d 1346 (Pa. Cmwlth. 1993)(Vehicle Code); *Mihordin v. Unemployment Compensation Board of Review*, 471 A.2d 1334 (Pa. Cmwlth. 1984)(Unemployment Act).

The Appellant also cites Sections 5571 and 5572 of the Judicial Code, 42 Pa. C.S. §§ 5571, 5572. These authorities are not applicable to this appeal. First, the Judicial Code applies to procedure before the courts of the Commonwealth, not quasi-judicial agencies such as the Board. Second, these sections refer to appeals from government agencies to the courts and are not applicable to practice before the Board

In contrast, the Board's rules provide that the appeal period begins within 30-days of when "the person to whom the action of the Department is directed or issued . . . has *received* written notice of the action." 25 Pa. Code § 1021.52(a)(1)(emphasis added). The mailing date is immaterial. Although we do not know from the record before us when the Appellant received written notice of the Department's action, it is clear that he had such notice at least by the time he met with the Department in February, 1996. Therefore the appeal is clearly untimely.

Nothing in the Appellant's petition qualifies him for *nunc pro tunc* relief. The Appellant seems to take the position that he was somehow misled by the Department into not filing an appeal with the Board because the Department led him to believe that the matter could be settled. We have

held many times that this belief alone is not sufficient to qualify for *nunc pro tunc* relief. The scenario presented here is similar to the Board's decision in *Grand Central Sanitary Landfill v. DER*, 1988 EHB 738. In that case the appellant asserted that because it was attempting to resolve the disputes underlying the appeals, and that the appeal was filed once it became apparent a resolution was not imminent, it should be granted an appeal *nunc pro tunc*. The Board found no fraud or any breakdown of the Board's administrative process, nor the presence of non-negligent circumstances. The Board further stated that it is common practice while trying to settle with the Department to first file a "protective appeal."

More recently, the Board held in *Johnston Laboratories, Inc. v. DEP*, EHB Docket No. 98-098-MG (Opinion issued July 1, 1998), that the appellant's hope that the matter could be settled quickly with the Department does not lead to circumstances which justify *nunc pro tunc* relief. In that case the appellant claimed the Department "fraudulently induced it not to appeal in exchange for false promises that it made concerning the timeliness in which it could consider appellant's application for recertification." The Board reiterated its holding that attempts to negotiate the settlement of a dispute with the Department are not grounds for a *nunc pro tunc* appeal.

The Appellant also argues that he should be afforded relief because at the time he was negotiating with the Department he was without counsel. The Board has also held many times that appellants assume the risk of their lack of legal expertise when they opt to proceed without the advice of an attorney. *See Santus v. DER*, 1995 EHB 897. The failure to secure counsel also cannot provide unique circumstances establishing a non-negligent failure to file a timely appeal.

In sum, the Appellant has not alleged any unique circumstances which establish a non-negligent failure to file a timely appeal. We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALDSON M. SIMONS, II and J.J.H. MAGUIRE, INC.	:	
v.	:	**EHB Docket No. 98-089-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of October, 1998, the petition for allowance of appeal *nunc pro tunc* of Donaldson M. Simons, II and J.J.H. Maguire, Inc. in the above-captioned matter is hereby **DENIED**. The motion to dismiss of the Department of Environmental Protection is **GRANTED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 26, 1998

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

For the Commonwealth, DEP:
Peter Yoon, Esquire
Southeast Region

For Appellants:
Douglas C. Maloney, Esquire
BEGLEY, CARLIN & MANDIO
Langhorne, PA

ml/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAWN M. ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO III	:	
v.	:	**EHB Docket No. 98-074-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	**Issued: October 27, 1998**

OPINION AND ORDER ON MOTION FOR STAY OF PROCEEDINGS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion to stay proceedings is denied where a stay would prejudice the appellants and would not serve to further judicial economy.

OPINION

This appeal was filed on April 24, 1998 by Dawn M. Ziviello, Angela J. Ziviello, and Archimede Ziviello, III (the Ziviellos), challenging the approval of a nutrient management plan submitted by Ting-Kwang Chiou and Chiou Hog Farm, LLC (Chiou), the owners and operators of a hog farm located in Bedford County. On October 6, 1998, Chiou filed a motion seeking a stay of proceedings on the basis that it intends to submit an amended nutrient management plan to the Bedford County Conservation District, which is charged with reviewing such plans. Chiou contends a stay will further judicial economy and avoid undue time and expense for the parties and

the Board. The Ziviellos filed a response to the motion on October 20, 1998, objecting to a stay. The State Conservation Commission, the appellee in this matter, filed no response.

The Ziviellos object to the stay for a number of reasons. First, they contend that most of the changes which Chiou intends to make to its plan by means of an amendment are not authorized by the regulations. Second, the Ziviellos assert that while the amendment may eliminate some of the issues they have raised in their appeal, it will not eliminate all of them, and they will be required to bear the burden and expense of filing another appeal. Finally, they assert that there is no guarantee that Chiou will not begin operating under the existing plan while it pursues an amendment.

As noted in *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 925, "a stay is an extraordinary measure" and therefore "the movant must offer some compelling reasons showing that a stay is warranted." *Id.* at 930 (citing *Stadler v. McCulloch*, 882 F. Supp. 1524 (E.D. Pa. 1995) Relevant factors to be considered are the appellant's interest and potential prejudice, the burden on the appellee agency and the permittee, the burden on the Board, and the public interest. *Id.* (citing *In re Residential Doors Antitrust Litigation*, 900 F. Supp. 749 (E.D. Pa. 1995) Also to be considered are "the time and effort of counsel and litigants with a view toward avoiding piecemeal litigation." *Id.*

Based on their response, the Ziviellos have a substantial interest in moving forward with this appeal. As they note in their response, there is no supersedeas in place, and Chiou may begin operating under its existing permit at any time. There is no way to predict when or if the Bedford County Conservation District will approve the amended plan. Were we to grant a stay at this time, the Ziviellos would have no means of challenging Chiou's operation under the existing plan.

Moreover, Chiou indicates in its motion that the amended plan will not resolve all of the issues raised by the Ziviellos in their appeal, but will address only the "non-substantive non-issues" raised by the Ziviellos. By this, Chiou appears to mean "non-technical" matters. Since it is clear these changes will not eliminate the basis for the Ziviellos' appeal, a stay would not serve to avoid unnecessary litigation in this matter.

Moreover, with regard to the "non-technical" matters which Chiou intends to revise with its plan amendment, these matters could be resolved much more efficiently by means of a stipulation entered into by the parties, rather than the more drastic step of staying the entire appeal.

Finally, in the event a plan amendment is approved and the Ziviellos also file an appeal from the amendment, that appeal may be consolidated with the present one, if consolidation would be in the interest of the parties and judicial economy.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAWN M. ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO III	:	
v.	:	EHB Docket No. 98-074-R
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	

ORDER

AND NOW, this 27th day of October, 1998, the Permittee's Motion for Stay of Proceedings is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 27, 1998

Service list attached.

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

For the Commonwealth, State Conservation Commission:
Mary Martha Truschel, Esq.

For Appellant:
Terrance Fitzpatrick, Esq.
David DeSalle, Esq.
Ryan, Russell, Ogden & Selt

For Permittee:
Mark Stanley, Esq.
Stacey L. Morgan, Esq.
Hartman, Underhill & Brubaker, LLP

mw

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

ALFRED GUERRIERI, JR. and ANNE GUERRIERI	:	
v.	:	**EHB Docket No. 98-146-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BULLDOG EXCAVATING, Permittee	:	**Issued: October 27, 1998**

OPINION AND ORDER ON MOTION TO STRIKE AND MOTION TO GRANT LEAVE TO AMEND APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where a third party appellant fails to file an amendment to its Notice of Appeal within the 20 day period for amendment as of right, the appellant must seek leave of the Board to amend its Notice of Appeal. Under 25 Pa. Code § 1021.53(b)(2), an appellant is permitted to amend its Notice of Appeal to plead facts that were discovered in preparation of the appellant's case that could not have been reasonably discovered through the exercise of due diligence.

OPINION

This matter involves a third party appeal of a Stage I bond release. On April 15, 1995, the Department of Environmental Protection (Department) issued surface mining permit No. 65940108 (permit) to Bulldog Excavating. The permit authorized surface mining activities at the Andrews Mine located in Sewickley Township, Westmoreland County. Bulldog Excavating obtained bonds

in the amount of $30,700. On July 16, 1998, the Department granted Bulldog Excavating's request to release a portion of the bond held for the permit in the amount of $19,700 (Stage I bond release).

Alfred Guerrieri, Jr. and Anne Guerrieri (collectively, Appellants) filed, on August 12, 1998, a timely appeal containing 26 objections to the Department's Stage I bond release. On September 4, 1998, the Appellants filed an amended Notice of Appeal with six additional objections, identified as objections 27-33.

On October 1, 1998, the Department filed a motion to strike the Appellants' amended Notice of Appeal arguing that the amended Notice of Appeal was untimely filed and should be struck from the Notice of Appeal. The Appellants filed a motion for grant of leave to further amend their Notice of Appeal on October 8, 1998 and filed a response to the Department's motion on October 13, 1998. The Department in turn filed a response to the Appellants' motion on October 19, 1998.

We agree with the Department that the Appellants filed an untimely amended Notice of Appeal. Under the Board's rules, an appeal may be amended as of right within 20 days after the filing of the appeal with the Board. 25 Pa. Code § 1021.53(a); *Caernarvon Township Supervisors v. DEP*, 1997 EHB 60. The Appellants filed their amendment 23 days after the original Notice of Appeal was filed with the Board.[1] We therefore grant the Department's motion to strike the amended Notice of Appeal.

Since the Appellants missed their window of opportunity to file as of right by three days, they

---

[1] In their response to the Department's motion, the Appellants contend that "[t]he Board never notified the [A]ppellants . . . as to the date their appeal was filed. A Pre-Hearing Order #1 was dated August 19, 1998, and the [A]ppellants' attorney assumed that was the date the appeal was filed." (Appellants' Response, ¶ 5) This assumption was incorrect. We caution that it is not the Board's responsibility to notify counsel regarding dates documents are filed with the Board. The docket and the official file are available for inspection by the public in accordance with 25 Pa. Code § 1021.41(c), and could easily have been checked in this case.

are governed by 25 Pa. Code § 1021.53(b).

Under this rule, subsequent to the 20 day period for amendment as of right, the Appellants must, by motion, seek leave of the Board to amend their Notice of Appeal. The Board may grant leave to amend the appeal based upon a showing that the objections: (1) were discovered during discovery of hostile witnesses or Department employees; (2) are based on facts discovered in preparation of the appellant's case that could not have been reasonably discovered through the exercise of due diligence; or (3) include alternate or supplemental legal issues, the addition of which will cause no prejudice to any other party or intervenor. 25 Pa. Code § 1021.53(b); *Reinert v. DEP*, 1997 EHB 442. As required by 25 Pa. Code § 1021.53(d), the Appellants verified and supported their motion by affidavits. In addition, the Board has not decided any dispositive motion in this case and has not yet assigned the case for hearing. 25 Pa. Code § 1021.53(c).

In the Department's response to the Appellants' motion to grant leave to amend their appeal, it asserts that only objections 31 and 32 of the amendment, which relate to events which occurred after the appeal was initially filed, fall within the parameters for amending appeals under 25 Pa. Code § 1021.53(b)(2). The Appellants' response to the Department's motion to strike candidly admits that objection 27, which asserts that the Department did not hold a public hearing prior to the Stage I bond release, was known to the Appellants' attorney prior to the filing of the appeal and therefore there is no request to add this objection to the amended appeal.

The remaining objections which the Appellants seek to add are as follows:

28. The front to the middle of the site has only 3 to 4 inches of top soil.
29. There were never big rocks in the stream before Bulldog Excavation stripped and the bank on the side of the stream is washing into the stream.
30. The top soil was poorly spread on the site. There are still rocks and bumps and erosion on the site.

33. Bulldog created a steep hill in front of the site and made a diversion ditch that no machinery (including farm vehicles) can cross.

We conclude that it is likely that the Appellants would not have discovered the objections listed above previous to the preparation and filing of the initial Notice of Appeal because work was on-going at the mine site and such objections could have been corrected by Bulldog Excavating after the Appellants' filed their appeal. Since the objections were obviously not corrected to the Appellants' satisfaction prior to the deadline for filing the appeal and they are based on facts discovered in preparation of the Appellants' case that could not have been reasonably discovered through the exercise of due diligence, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALFRED GUERRIERI, JR. and ANNE GUERRIERI	:	
	:	
v.	:	**EHB Docket No. 98-146-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BULLDOG EXCAVATING, Permittee	:	**Issued: October 27, 1998**

ORDER

AND NOW, this 27th day of October, 1998, the Department's motion to strike is **granted**. The Appellants' motion for leave to further amend their Notice of Appeal is **granted** so that objections 28-33 may be added. The Appellants shall file their amended Notice of Appeal on or before **November 30, 1998**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 27, 1998

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

For the Commonwealth, DEP:
Barbara J. Grabowski, Esq.
Southwest Region

For Appellants:
Robert M. Stefanon, Esq.
Herminie, PA

For Permittee:
Bull Dog Excavating
Chalk Hill, PA

jlp

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PAUL L. WASSON	:	
	:	
v.	:	**EHB Docket No. 97-136-C**
	:	**(Consolidated with 97-222-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 28, 1998

OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion for summary judgment and dismisses an appeal of a Department declaration of bond forfeiture and a related order directing the owner/operator of oil wells to plug the wells and reclaim the pits where he discharged production fluids. The order and declaration did not amount to takings where the appellant had preexisting duties to plug the wells and reclaim the pits, and the Department's actions did not affect the fair market value of the appellant's property interest or any reasonable investment backed expectations he may have had in it. The appellant could not prevail on his claims that the Department's actions violated his rights to due process and equal protection because he was physically and financially unable to comply with the reclamation and plugging requirements, since the appellant's ability to comply is irrelevant in appeals of orders and declarations of forfeiture.

OPINION

This matter was initiated with the June 30, 1997, filing of a notice of appeal by Paul L. Wasson (Appellant), challenging a May 30, 1997, order issued by the Department of Environmental Protection (Department). The order pertained to certain lands leased for oil production in Foster and Lafayette townships in McKean County, and it directed Appellant and Wasson Drilling Company, Inc. (Wasson Drilling) to reclaim unlined pits used for the disposal of brine and other production fluids, and to plug the 41 wells on the property. Appellant averred in his notice of appeal that:

> (1) the Department does not have the authority under the Oil and Gas Act[1] or any other statute or regulation to order Appellant to reclaim the pits;
>
> (2) the order was based on incorrect information;
>
> (3) the order amounted to a "taking" of Appellant's property without just compensation because it required Appellant to plug wells that still have economic value; and,
>
> (4) the order violated Appellant's rights to due process and equal protection under the United States and Pennsylvania Constitutions because Appellant is physically and financially unable to comply with the order's requirements.

Appellant filed another appeal relating to the same property on October 21, 1997. Originally docketed at EHB Docket No. 97-222-R, the appeal challenged a declaration of bond forfeiture (declaration) which the Department issued on September 19, 1997. The declaration informed Appellant and Wasson Drilling that $3,000 phased deposit of collateral bond #9017067228 had been forfeited because they failed to comply with a May 23, 1996, consent order (consent order).[2] Among

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[1] Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S.§§ 601.101-601.605.

[2] Where an owner or operator of 200 wells or less has insufficient financial resources to obtain a bond for a well drilled prior to April 18, 1985, he may collateralize a bond with phased deposits to the State Treasurer. *See* 58 P.S. § 601.215(d)(1)(ii), and 25 Pa. Code § 78.309. Where,

other things, the consent order required that Appellant and Wasson Drilling reclaim the pits and bond the wells. In his notice of appeal, Appellant objected to the declaration for the same reasons that he previously had raised regarding the order. In addition, Appellant asserted that the Department erred by declaring the bond forfeit because: (1) he is destitute and cannot complete the bond payments; (2) he complied with many provisions of the consent order; (3) an appeal is already pending seeking the forfeiture of the $3,000 paid toward the phased deposit bond.[3]

Appellant's appeal of the declaration at EHB Docket No. 97-222-R was reassigned from Administrative Law Judge Thomas Renwand to Administrative Law Judge Michelle Coleman on November 11, 1997. On November 19, 1997, we consolidated both appeals at EHB Docket No. 97-136-C.

We have issued one previous decision in this appeal: a February 17, 1998, opinion and order granting in part and denying in part a Department motion for summary judgment. We granted the Department's motion to the extent that Appellant averred that the Department lacked the authority under the Oil and Gas Act to order him to reclaim the pits and plug the wells or to declare his bond forfeit. However, we denied the Department's motion to the extent it sought summary judgment on Appellant's claims that (1) the order and declaration amounted to takings of Appellant's property without just compensation because they required Appellant to plug wells that still have economic value, and (2) the order and declaration violated Appellant's right to due process and equal

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as here, between 26 and 50 wells are involved, the owner or operator must make an initial payment of $3,000 and at least $1,300 annually. *See* 58 P.S. § 601.215(d)(1)(ii)(B).

[3] It is unclear to what "pending appeal" Appellant is referring. The appeal of the declaration identified only one related appeal--the appeal of the order--and the order did not address forfeiture of the bond. Furthermore, since the appeal of the declaration of forfeiture and the appeal of the order are now consolidated, any problems which might have arisen from separate appeals of the order and declaration have been cured.

protection rights under the United States and Pennsylvania Constitutions because Appellant is physically and financially unable to comply with the order's requirements.

The Department filed a second motion for summary judgment on August 31, 1998, seeking summary judgment on the remaining issues in the appeal. Appellant failed to file a response or request an extension to respond.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record, and affidavits show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party, *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995), and will enter summary judgment only where the right is clear and free from doubt. *Hayward v. Medical Centre of Beaver County*, 608 A.2d 1040 (Pa. 1992).

For purposes of its motion for summary judgment, the Department has established the following facts: Appellant and Wasson Drilling are the owners and operators of the wells on the leases. (Motion, Exhibit 2, paragraph E.) Appellant has not produced, extracted, or injected any gas, petroleum, or other liquid from the wells in at least a year. (Motion, Exhibit 1, Answers to Requests for Admissions, Paragraph 4.) Although Appellant did not have a permit to place brine or other production fluids into the pits associated with the wells, Appellant and Wasson Drilling did just that. (Motion, Exhibit 2, paragraph F.) Furthermore, although Appellant had agreed in a previous consent order that he and Wasson Drilling would submit a plan and schedule for reclamation of the pits by July 31, 1996, Appellant and Wasson Drilling have not reclaimed the pits. (Motion, Exhibit 3, paragraphs 6-7.)

Given these facts, the Department is entitled to prevail on the two remaining issues in Appellant's appeal.

(1) the order and declaration amounted to takings of Appellant's property without just compensation because they required Appellant to plug wells that still have economic value

The Department argues that it is entitled to summary judgment with respect to Appellant's takings argument because the order and declaration are in the public interest, the means are necessary to achieve the purpose of the order and declaration, and the means do not impose an undue burden on Appellant. We agree that Appellant's takings argument has no merit.

The takings clauses in the United States and Pennsylvania Constitutions are virtually identical. Both provide that "private property may not be taken" by the state "without just compensation." Article 1, Section 10, of the Pennsylvania Constitution and the Fifth Amendment of the United States Constitution. To decide whether a taking has occurred under the Pennsylvania Constitution, Pennsylvania courts apply the same test used to determine whether a taking has occurred under the United States Constitution. *Mock v. Department of Environmental Resources*, 623 A.2d 940 (Pa. Cmwlth. 1993).

To satisfy that test, an individual claiming that the government has taken his property through regulation must first establish that he has a compensable property interest. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). If he can meet this threshold, courts then apply a well-established three-prong test--looking to the "character of the governmental action, its economic impact, and its interference with reasonable, investment-backed expectations"--to decide whether a regulatory taking has occurred. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984) (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)).

1. The order

Appellant cannot prevail on his claim that the order was a taking, because the order did not reduce the fair market value of Appellant's wells or associated realty. The value of a taking is ordinarily equal to the difference between the fair market value of the property before and after the government action constituting the taking.[4] *Mazur v. Commonwealth,* 134 A.2d 669 (Pa. 1957); *Westinghouse Air Brake Co. v. Pittsburgh*, 176 A.13 (Pa. 1934). The Department's order is not a taking under this analysis because it did not affect the fair market value of Appellant's property.

The order directed Appellant to do two things: reclaim the pits and plug the wells. The requirement that Appellant reclaim the pits did not affect Appellant's interest in the property because Appellant had a preexisting duty to reclaim the pits: He agreed to do so in a consent order he signed a year-and-a-half before the Department issued the order at issue here. Similarly, Appellant's interest was not affected by the Department ordering him to plug the wells because Appellant had a preexisting duty to do so. Section 210 of the Oil and Gas Act provides that well owners and operators must plug wells not used to produce, extract, or inject any gas or other liquid in the preceding 12 months--unless the wells are orphan wells or have inactive status. As we noted in our February 17, 1998, opinion and order on the Department's first motion for summary judgment, Appellant's wells had not been used to produce, extract, or inject any gas or other liquid in at least 12 months, and the wells were neither orphan wells nor had inactive status. Therefore, Appellant had a duty to plug the wells independent of the Department's order, and the order did not affect Appellant's interest in his property.

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[4] Exceptions exist where the fair market value would be difficult to ascertain or its application would result in manifest injustice to the owner or the public. *See U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.,* 441 U.S. 1 (1979); *U.S. v. 50 Acres of Land*, 469 U.S. 24 (1984). Those exceptions, however, do not apply here.

Because Appellant had preexisting duties to reclaim the pits and plug the wells, the Department did not reduce the fair market value of Appellant's property by ordering him to do either one. Indeed, the fair market value of Appellant's property will, if anything, *increase* if he reclaims the pits and plugs the wells. As we noted in our previous opinion and order, the pits are public nuisances under Section 502 of the Oil and Gas Act,[5] Section 307(c) of the Clean Streams Law,[6] and Section 601 of the Solid Waste Management Act.[7] Furthermore, since under Section 602(a) of the Oil and Gas Act[8] the duty to plug abandoned wells runs with ownership of the property, anyone who might purchase Appellant's property would have a duty to plug the wells if Appellant did not do so himself beforehand. Therefore, if Appellant plugs the wells, the property will become more attractive to potential purchasers, likely resulting in an increase in the fair market value.[9]

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[5] 58 P.S. § 601.502.

[6] 35 P.S. § 691.307(c).

[7] 35 P.S. § 6018.601.

[8] 58 P.S. § 601.602(a).

[9] For purposes of our takings analysis, we have assumed that Appellant owns the wells and associated realty in fee simple. This is not necessarily the case, however. Appellant refers, without explanation, to certain "leases" in his notice of appeal, and while Appellant concedes that he is the "owner" of the wells within the meaning of the Oil and Gas Act, the definition of "owner" at Section 103 of the Act, 58 P.S. § 601.103, includes lessors, as well as those who own property in fee simple.

A lessor who has had his leasehold taken by the government is entitled to compensation for the taking. *See, e.g., U.S. v. General Motors Corporation*, 323 U.S. 373 (1945). However, even assuming Appellant has a leasehold interest, rather than an interest in fee simple, our takings analysis would not change significantly. Appellant would still have had a duty to reclaim the pits and plug the wells even before the Department issued the order which is the subject of this appeal. Furthermore, since the definition of "owner" under Section 103 of the Act includes lessors, anyone who succeeded to Appellant's leasehold interest would have a duty to plug the wells if Appellant does not do so beforehand. Therefore, the fair market value of the leasehold interest would be lower if the wells remain unplugged than if the Appellant plugs them.

2. Declaration of forfeiture

Appellant also cannot prevail on his claim that the declaration is a taking without just compensation. Even assuming Appellant has a compensable property interest in the bond, the declaration of forfeiture is a reasonable exercise of the police power.

As noted above, once an individual alleging a taking shows he has a compensable property interest, courts look to the "character of the governmental action, its economic impact, and its interference with reasonable, investment-backed expectations" to decide whether a regulatory taking has occurred. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)). Consideration of those factors here shows that the declaration of forfeiture is not a taking.

Bonding is a routine part of many Federal and state programs.[10] Yet we are unaware of any instance where the United States or a state has been held to have worked a compensable taking simply because they forfeited a bond for failure to comply with the conditions of the bond.

Under the circumstances, the Department's declaration of forfeiture was not a taking but a reasonable exercise of the Commonwealth's police power. The Department did not force Appellant to tap the oil reserves on his property. Appellant willingly chose to do so, and, as a result, he had to submit a bond as a condition of securing a permit. The purpose of the bonding requirement in the Oil and Gas Act is to ensure that those who profit from tapping oil and gas reserves also bear the costs of their activities. The extraction of oil and gas poses several threats to the public and the

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[10] *See, e.g.,*Sections 509 and 715 of the Federal Surface Mining Conservation and Reclamation Act, 30 U.S.C.A. §§ 1259 and 1305 (West 1986); Sections 28 and 30a of the Mineral Lands Leasing Act, 30 U.S.C.A. §§ 185 and 187a (West 1986); Section 4(d)-(j) of the Pennsylvania Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.4(d)-(j)(Surface Mining Conservation and Reclamation Act); and Section 4 of the Underground Storage Act, Act of November 26, 1978, P.L. 1300, *as amended*, 58 P.S. § 454.

environment. If it did not require those engaged in such activity to submit a bond beforehand, the Department would frequently be unable to recoup sufficient funds from them to cover the harm they may cause to the public or natural resources.[11] The threat of forfeiture not only gives the Department useful leverage in getting permittees to comply with the regulatory framework, it ensures that the Department will have resources to prevent harm to the public or environment--even if the permittee does not have the resources to do so himself.

In this sense, the Department's use of the bonding requirement to further its interest in the welfare of the public and environment is a classic example of an exercise of the state's police power. "The very essence of the police power . . . is that the deprivation of individual rights and property without compensation cannot prevent its operation, so long as its exercise is proper and reasonable." *Commonwealth v. Barnes & Tucker*, 371 A.2d 461, 467 (Pa. 1977) (quoting *People v. K. Sakai Co.*, 56 Cal.App.3d 531, 538 (1976)). "To permit appellant to avert responsibility for abating a nuisance that it created under the proposition that it may abandon its enterprise, rather than operate such enterprise within the parameters of the environmental regulations, would nullify the environmental policy of this Commonwealth." *Commonwealth v. Barnes & Tucker Co.*, 371 A.2d at 467.

Significantly, while "reasonable investment-backed expectation" is one factor considered when determining whether a taking has occurred, Appellant had no *reasonable*, investment-backed expectation that the Department would refrain from declaring his bond forfeit if he failed to comply

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[11] The problem is even more severe in the context of oil and gas extraction than in other areas of environmental regulation. Few sectors of the market are more prone to speculation or susceptible to the vagaries of the business cycle. As a result, profits associated with oil and gas production are notoriously volatile, and, even where enterprises are involved instead of individuals, the enterprises are often short-lived.

with the conditions of the bond. Section 215(a)(1) of the Oil and Gas Act[12] provides, "Any . . . bond filed with the [D]epartment for a well . . . shall be payable to the Commonwealth and conditioned that the operator shall faithfully perform all of the water supply replacement, restoration and plugging requirements of this act." Section 215(c),[13] meanwhile, provides, "If the well owner or operator fails . . . to comply with the applicable requirements of this act identified in subsection (a), the regulations promulgated hereunder or the conditions of the permit relating thereto, the [D]epartment may declare the bond forfeited. . . ." As we held in our February 17, 1998, opinion and order, the Department has established that Appellant violated Sections 207(a) and 210(a) of the Oil and Gas Act,[14] Section 307 of the Clean Streams Law,[15] Section 301 of the Solid Waste Management Act,[16] Sections 78.54 and 78.57 of the Department's regulations,[17] and the consent order. Given the conditions of the bond and Appellant's failure to comply with them, any expectation that Appellant may have had that the Department would release his bond was, by definition, *unreasonable*.

(2) the order and declaration violated Appellant's right to due process and equal protection under the United States and Pennsylvania Constitutions because Appellant is physically and financially unable to comply with the reclamation and plugging requirements

Appellant also cannot prevail on his claim that the Department violated his rights to due

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[12] 58 P.S. § 601.215(a)(1).

[13] 58 P.S. § 601.215(c).

[14] 58 P.S. §§ 601.207(a) and 601.210(a).

[15] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.307.

[16] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.301.

[17] 25 Pa. Code §§ 78.54 and 78.57.

process and equal protection because he is physically and financially unable to comply with the reclamation and plugging requirements. As the Department argues in its motion for summary judgment and supporting memorandum of law, Appellant's financial and physical condition is irrelevant in an appeal of a Department order or declaration of forfeiture.

In *Ramey Borough v. Commonwealth, Department of Environmental Resources*, 351 A.2d 613 (Pa. 1976), the Supreme Court held that whether one can comply with a Department order is irrelevant in an appeal of the order. The Court explained that, while the ability to comply may be relevant in a proceeding to *enforce* the order, "The appeal from the issuance of the order serves only to determine the validity and content of the order." 351 A.2d at 615.

Ramey Borough involved an order issued pursuant to the Clean Streams Law directing a municipality to construct and operate a wastewater treatment plant. However, the Board has held that the same reasoning extends to other Department orders.[18] Therefore, Appellant cannot prevail on his argument that the Department's order violated his due process and equal protection rights because he lacked the financial resources to comply with the Department's order.

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[18] *See, e.g., Mt. Thor Minerals, Inc. v. DER*, 1986 EHB 128 (appellant cannot raise the issue of its ability to comply with a Department order, issued under the Surface Mining Conservation and Reclamation Act, directing appellant to replace or restore residential water supply); *Altoona City Authority v. DEP*, 1991 EHB 1381 (appellant cannot raise the issue of its ability to comply with a Department order, issued under the Clean Streams Law, requiring appellant to clean up waste disposal pits); *Fulkroad v. DER*, 1993 EHB 1232 (appellant cannot raise issue of his ability to comply with a Department order, issued under the Solid Waste Management Act, directing him to excavate and properly dispose of waste he had disposed of unlawfully); *Tranguch v. DEP*, 1997 EHB 201 (appellant cannot raise the issue of his ability to comply with a Department order, issued under the Storage Tank and Spill Prevention Act, directing him to submit reports and undertake certain remedial measures with respect to contaminated real property he owned); *Heidelberg Heights Sewerage Company v. DEP*, EHB Docket No. 97-150-C (Opinion issued May 19, 1998) (appellant cannot raise the issue of its ability to comply with a Department order, issued under the Clean Streams Law, requiring that appellant implement certain measures necessary for its privately owned sewage system to operate in compliance with its permits).

Our reasoning with respect to the declaration of forfeiture is similar. We have previously held that lack of funds is no defense to an action for bond forfeiture. *See, e.g., Martin v. DER*, 1987 EHB 408, and *Richter v. DER,* 1984 EHB 43. As we noted in *Richter*, the whole purpose behind a bonding requirement is to ensure that funds are available for reclaiming the site in the event the owner/operator lacks sufficient resources to do so himself. 1984 EHB at 55. Were we to interfere with bond forfeitures where the owner/operator lacked the resources required to comply with Department orders, we would effectively eviscerate the central purpose behind the bonding requirement. Consequently, Appellant cannot prevail on his argument that the Department violated his due process and equal protection rights by declaring Appellant's bond forfeit despite Appellant's alleged financial situation.

In addition to arguing that he is financially unable to comply with the Department's order and declaration of forfeiture, Appellant also argues that he is physically unable to do so. Both *Ramey Borough v. Commonwealth, Department of Environmental Resources*, 351 A.2d 613 (Pa. 1976), and the Board's case law previously discussed concern the *financial* ability--not *physical* ability--to comply with the Oil and Gas Act and its accompanying regulations. As a practical matter, however, we need not distinguish between the two. Even assuming an appellant was otherwise qualified to plug the wells and reclaim the pits, his physical ability to do so would only become an issue only if he lacked the resources to hire others to do the work for him. (Otherwise, the appellant could simply hire the work out.) We have already rejected Appellant's argument with regard to his financial ability to comply. Since he can only raise the issue of his physical ability to comply in tandem with his financial ability to do so, we must reject Appellant's physical argument as well.

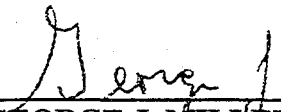
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL L. WASSON	:	
	:	
v.	:	**EHB Docket No. 97-136-C**
	:	**(Consolidated with 97-222-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

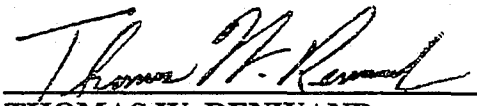
ORDER

AND NOW, this 28th day of October, 1998, it is ordered that the Department's second motion for summary judgment is granted and Appellant's appeal is dismissed.

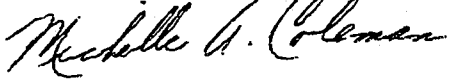
ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 28, 1998

EHB Docket No. 97-136-C
(Consolidated with 97-222-C)

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ALLEGRO OIL & GAS, INC.	:	
	:	**EHB Docket No. 98-021-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 28, 1998

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for summary judgment is granted. Under the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101-601.605 (Oil and Gas Act), the Department has the authority to declare a bond forfeit where the operator refuses to comply with a Department order directing it to submit a plan for plugging abandoned wells and restoring the well sites.

OPINION

This matter was initiated with the February 6, 1998, filing of a notice of appeal by Allegro Oil & Gas, Inc. (Allegro) of Jamestown, N.Y. The notice of appeal challenges a declaration of bond forfeiture the Department issued to Allegro on December 26, 1997. The Department declared the bonds forfeit because Allegro allegedly failed to comply with a Department order directing it to plug certain wells (wells) it owned and operated in Sharon Township, Potter County, PA. In its notice of appeal, Allegro asserts that the Department erred by declaring the bonds forfeit because it refused

to plug the wells or allow James Lee and Lee Oil Company (collectively, "Lee Oil") to plug them. Allegro requests that the Board return the bond money to Lee Oil.[1]

We have issued one previous decision in this appeal. On July 29, 1998, the Board denied a Department motion for judgment on the pleadings.

On September 16, 1998, the Department filed a motion for summary judgment and a supporting memorandum of law. The Department argues that Allegro cannot prevail on its appeal because Allegro is the owner/operator of the wells; Allegro abandoned the wells; Allegro had a duty to plug the wells under section 210 of the Oil and Gas Act, 58 P.S. § 601.210, and an October 22, 1996, Department order; Allegro failed to plug the wells; and, the Department has the authority to declare a bond forfeit under "section 215(3)(c)" of the Act, where an owner/operator fails to comply with the plugging requirements in the Act.[2]

Appellant failed to file an answer or memorandum in opposition to the Department's motion for summary judgment. While we could grant the Department's motion for summary judgment based solely on Allegro's failure to respond to the Department's motion,[3] we will refrain from doing

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[1] It is unclear from the parties' filings what relationship, if any, exists between Allegro and Lee Oil.

[2] There is no "section 215(3)(c)" of the Oil and Gas Act. From the Department's argument, however, it is clear the Department is referring to section 215(c) of the Act, 58 P.S. § 601.215(c).

[3] When ruling on motions for summary judgment, the Board looks to Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure. *See, e.g., Tranguch v. DEP*, EHB Docket No 95-255-C (Opinion issued February 25, 1997). Pa.R.C.P. 1035.3(a) provides that, in response to a motion for summary judgment, "[t]he adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within 30 days after service of the motion . . . ." Pa.R.C.P. 1035.3(d), meanwhile, provides, "Summary judgment may be entered against a party who does not respond." The explanatory comment accompanying Rule 1035.3 explains, "The rule permits entry of judgment for failure to respond to the motion . . . ."

so here. However, Allegro fares no better on the merits of the Department's motion.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record, and affidavits show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party, *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995), and will enter summary judgment only where the right is clear and free from doubt. *Hayward v. Medical Centre of Beaver County*, 608 A.2d 1040 (Pa. 1992).

For purposes of its motion for summary judgment, the Department has established the following facts, which it averred in its motion and supported with affidavits: Allegro is the registered operator of the wells. (Motion, para. 2; Ex. B in support, para. 5.) On January 15, 1986, it submitted a bond for $25,000 to the Department in association with its permit application to operate the wells. (Motion, para. 3; Ex. B in support, para. 4.) On October 22, 1996, the Department issued an order that stated that Allegro had abandoned the wells and directed Allegro to submit a plan within 30 days explaining how it would plug the wells and restore the sites. (Motion, para. 4; Ex. C in support, para. 4.) The order also required that Allegro's plan provide for the completion of all well plugging activities by December 1, 1997. (Motion, para. 5; Exhibit C, para. 4, Attachment 1.) Later, on February 13, 1997, the Department issued Allegro a "Notice of Intent to Forfeit Bond" (notice of intent), which stated that the Department intended to declare Allegro's bond forfeit unless Allegro restored the sites or submitted a restoration plan within 30 days. (Motion, para. 7; Ex. C. in support, para. 5 and Attachment 2.) Despite the order and notice of intent, however, Allegro never

plugged the wells, attempted to restore the sites, or submitted a restoration plan. (Motion, para. 6 and 9; Ex. C in support, para. 7; and Ex. D in support, para. 6.)

In addition to the averments it supported with affidavits, the Department's motion asks the Board to take judicial notice that Allegro failed to appeal the October 22, 1996, order. The Board has previously held that we can take judicial notice of our own records. *See Pagnotti Enterprises, Inc. v. Department of Environmental Protection*, 1993 EHB 919 n. 3. Since we have no record of Allegro appealing the October 22, 1996, order, we will take judicial notice of this fact, as the Department requests.

The Department has the authority to forfeit Allegro's bond under section 215(c) of the Oil and Gas Act, 58 P.S. § 601.215(c), because Allegro failed to faithfully perform its plugging requirements under the Act, as required by section 601.215(a)(1), 58 P.S. § 601.215(a)(1). Section 215(a)(1) provides that bonds for oil and gas wells must be conditioned on the operator's "faithfully perform[ing] all of the drilling, water supply replacement, restoration and plugging requirements of [the A]ct."[4] Since Allegro failed to appeal the Department's October 22, 1996, order, Allegro had a duty to comply with the order and submit a plan by November 21, 1996, for plugging the wells and restoring the sites. By failing to do so, Allegro violated section 215(a)(1).

And, because Allegro violated section 215(a)(1), the Department had the authority to declare Allegro's bond forfeit. Section 215(c) of the Act, provides, "If the well owner or operator fails . . . to comply with the applicable requirements of this act identified in [section 215(a)] . . . or the

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[4] Allegro's bond contained just such a provision. It reads, in pertinent part, "Permittee shall faithfully perform all of the requirements of (1) the Oil and Gas Act, (2) the applicable rules and regulations promulgated thereunder, (3) the provisions and conditions of the permits issued thereunder and designated in this Bond; and (4) such amendments or additions to the Oil and Gas Act as may hereinafter be lawfully made. . . ." (Motion, Exhibit B, Attachment 1, p. 2.)

conditions of the permit relating thereto, the Department may declare the bond forfeited."

The arguments Allegro raises in its notice of appeal do not alter our conclusion. Allegro argues that the Department should have plugged the wells itself or allowed James Lee or Lee Oil Company to plug and abandon them.[5] There is no merit to either argument, however. If Allegro believed it had no duty to plug the wells or restore the sites, it should have appealed the Department's October 22, 1996, order directing it to submit a plan for plugging the wells and restoring the sites. Having failed to appeal the order, Allegro cannot raise those issues in this appeal. Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue that could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Coal Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *affirmed* 375 A.2d 320 (Pa. 1977) (quoting *Philadelphia v. Sam Bobman Department Store Company*, 149 A.2d 518, 521(Pa. Super. 1959)).

Based on the above, the Department is clearly entitled to judgment as a matter of law. Accordingly, the Department's motion is granted, and Allegro's appeal is dismissed.

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[5] The context surrounding "abandon" in Allegro's notice of appeal suggests that Allegro attributes a different definition to the word than that set forth in the Oil and Gas Act. The Oil and Gas Act defines an "abandoned well" as

> [a]ny well that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months, or any well for which the equipment necessary for production, extraction or injection has been removed, or any well, considered dry, not equipped for production within 60 days after drilling, redrilling or deepening, except that it shall not include any well granted inactive status.

And the Act imposes *additional* duties with respect to abandoned wells. *See, e.g.*, section 210 of the Oil and Gas Act, 58 P.S. § 601.210 (requiring that owner/operators plug wells they abandon).

Allegro, meanwhile, seems to use the word "abandon" ro refer to an owner/operator *winding up* duties with respect to a well, hence Allegro's argument that the Department should not forfeit the bond because the Department prevented Lee Oil from "abandoning" the wells.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALLEGRO OIL & GAS, INC.,	:	
	:	**EHB Docket No. 98-021-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of October, 1998, it is ordered that the Department's motion for summary judgment is granted, and Allegro's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 28, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JAMES B. TORTORICE AND VICKY JERENKO	:	
	:	**EHB Docket No. 98-110-R**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 29, 1998**

OPINION AND ORDER ON PETITION TO INTERVENE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A Petition to Intervene is granted where the Petition establishes that the Petitioners have a substantial, direct, and immediate interest in the subject matter of the appeal.

OPINION

This appeal was filed with the Board by Mr. James B. Tortorice and Mrs. Vicky Jerenko (Appellants) on June 22, 1998. It challenges the Department of Environmental Protection's (Department) May 27, 1998 Order requiring the Appellants to remove a culvert from their property and to restore the area to its original state. The Department's Order referred to several complaints of flooding by the upstream property owner allegedly caused by the construction of

Mr. Kenneth Dale and Mrs. MaryAnn Dale, the upstream and adjacent property owners, filed a Petition to Intervene with the Board on October 5, 1998. In their petition, Mr. and Mrs. Dale assert the following basis for intervention:

> [S]ince it is their property that is directly involved in this matter, they wish to ensure prompt compliance to the Order in order that their property be protected, and that the continued damage to their property over the last eighteen years caused by the flooding precipitated by the unpermitted culvert cease. Said damage due to the continued flooding has adversely affected the value of their property.

On October 22, 1998, Appellants filed their Reply to the Petition which opposes the intervention. Appellants aver that the Dales' property would continue to be damaged from 100 year floods even if the culvert were removed. In addition, Appellants argue that the Dales do not have a substantial, direct, or immediate interest in the appeal. The Department did not respond and does not oppose the petition.

A party may intervene in a Board proceeding if the party's interests are "substantial, direct, and immediate." *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 233 (Pa.Cmwlth. 1992). For an interest to be considered "substantial," the interest must "surpass the common interest of all citizens seeking obedience to the law." *Darlington Township Board of Supervisors v. Department of Environmental Protection,* 1997 EHB 934, 945 (citing *General Glass Industries Corporation v. Department of Environmental Resources,* 1995 EHB 353, 356). A "direct" interest articulates a harm caused by the action of a named party. *Id.* An "immediate" interest must demonstrate a "causal connection, not remote in nature," between the named party action and the alleged harm. *Id.*

Applying these concepts here compels us to grant Kenneth and MaryAnn Dales' petition. The Dales' unique position as an adjacent, upstream property owner gives them a substantial

interest that surpasses a public interest. The construction of the Appellants' culvert has allegedly caused eighteen years of flood damage to the Dales' property, giving the Dales a direct and immediate interest in this appeal.

Appellants also object to the timeliness of the intervention. We find that intervention does not prejudice the Appellants because a hearing has not been scheduled and the discovery period has not expired. To accommodate the parties, the discovery period will be further extended to January 18, 1999.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

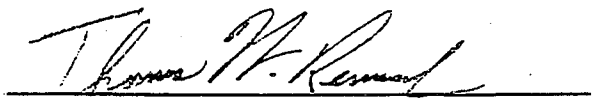
JAMES B. TORTORICE AND VICKY JERENKO	:	
	:	**EHB Docket No. 98-110-R**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of October, 1998, it is ordered that Kenneth and MaryAnn Dales' Petition to Intervene is **granted**. The discovery period is extended sixty days, expiring January 18, 1999. Henceforth, the caption shall read as follows:

JAMES B. TORTORICE and VICKY JERENKO	:	
v.	:	**EHB Docket No. 98-110-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KENNETH DALE and MARY ANN DALE, Intervenors	:	

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 29, 1998
EHB Docket No. 98-110-R

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

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For Intervenors:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 30, 1998

OPINION AND ORDER ON MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

by George J. Miller, Chairman

Synopsis:

The Department's motion to compel answers to interrogatories and production of documents by the Appellant is granted. The Department issued an Order for Access and Right of Entry to a certain property. The Appellant claimed that he was not the owner of the property but, rather, the attorney for clients who had asked him to bid on the property for them at a tax sale. The Department served interrogatories requesting the identity of the clients. The Appellant refused to identify his clients and asserted the attorney-client privilege. The attorney-client privilege applies only where there exists an attorney-client relationship, *i.e.*, where the attorney actually performs legal services for the client. Bidding on property at a tax sale is not a legal service.

In addition, the identity of a client is not normally protected by the attorney-client privilege. However, some courts have made an exception to this general rule where special circumstances exist

to justify nondisclosure of the client's identity. In each case, the court balances those special circumstances against the public's interest in disclosure of the client's identity. Here, the clients sought anonymity because they had not yet formed an appropriate entity for ownership of the property. Such a circumstance does not outweigh the public's interest in the Department's work on the property under the Hazardous Sites Cleanup Act.

OPINION

I. Background

On May 18, 1998, Ronald L. Clever (Appellant) filed a Notice of Appeal challenging the Department of Environmental Protection's (Department) April 16, 1998 Administrative Order for Access and Right of Entry (Administrative Order). The Department issued the Administrative Order pursuant to the Hazardous Sites Cleanup Act[1] (HSCA). HSCA authorizes the Department to enter a property in order to determine the need for a response to a hazardous substance or contaminant. 35 P.S. § 6020.503. The property in question here is located in the Borough of Marcus Hook, Delaware County, Pennsylvania (Marcus Hook Property).

In the Notice of Appeal, Appellant maintains that he is not the owner of the Marcus Hook Property. Rather, he is only the attorney for clients who were the successful bidders for the property at a tax sale. In addition, Appellant questions whether there is evidence showing that there has been a hazardous substance release on the property, or that there is the threat of such a release.

On July 22, 1998, the Department filed a discovery motion asking the Board to compel answers to interrogatories and the production of documents. Some of the interrogatories sought the identity of Appellant's clients. Appellant objected to those interrogatories and asserted the attorney-

[1] Act of October 18, 1988, P.L. 756, 35 P.S. §§ 6020.101-6020.1305.

client privilege. The Board held a conference call on the Department's motion on July 28, 1998, and, the next day, issued an Opinion and Order. The Board resolved many of the issues raised in the Department's motion but reserved judgment on the propriety of Appellant's objections based on attorney-client privilege. The Board ordered a 60-day extension of the discovery period to allow the Department to conduct discovery on Appellant's claim of attorney-client privilege and to file an appropriate motion.

On October 8, 1998, the Department took Clever's deposition. On October 14, 1998, the Department filed a Second Motion to Compel Answers to Interrogatories and Production of Documents (Second Motion), which is presently before the Board. The Department claims therein that Clever failed to provide sufficient facts at his deposition to support his assertion of the attorney-client privilege with respect to the identity of his clients. In its request for relief, the Department asks the Board to order Clever to reveal the name and address of the clients for whom he purchased the Marcus Hook Property.

The Board held a conference call on the Department's Second Motion on October 15, 1998. On that same date, the Board issued an Order requiring that Clever file a response to the Department's Second Motion on or before October 26, 1998. The Order specifically required that Clever's response include affidavits containing a full and complete statement of the circumstances of his representation and the nature of the services requested by his clients. On October 26, 1998, Clever filed a brief and an affidavit in response to the Department's Second Motion. On October 29, 1998, the Department filed a Reply Memorandum of Law.

II. Discussion

The attorney-client privilege is codified at Section 5928 of the Judicial Code, 42 Pa.C.S. §

5928. This section states that an attorney is not permitted to testify to confidential communications made to the attorney by the attorney's client, unless the attorney-client privilege is waived by the client. Courts have noted that the attorney-client privilege obstructs the truth-finding process and runs counter to the aims of the law; therefore, it should be construed narrowly. *The Barnes Foundation v. Township of Lower Merion*, 1997 U.S. Dist. LEXIS 5202 (E.D. Pa., 1997); *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975).

In a discovery dispute, the party asserting the attorney-client privilege has the burden of showing by affidavit or record evidence that precise facts exist as to bring the communication at issue within the narrow confines of the privilege.[2] *Maleski v. Corporate Life Ins. Co.*, 646 A.2d 1 (Pa. Cmwlth. 1994); *Maleski v. Corporate Life Ins. Co.*, 641 A.2d 1 (Pa. Cmwlth. 1994); *Kocher Coal Company v. DER*, 1986 EHB 945; *The Barnes Foundation v. Township of Lower Merion*, 1997 U.S. Dist. LEXIS 5202 (E.D. Pa., 1997); *see also In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (party claiming privilege bears burden of proving a communication is protected); *Hawkins v. Stables*, 148 F.3d 379 (4th Cir. 1998) (law of attorney-client privilege places burden of proof on proponent of the privilege); *FDIC ex rel. Heritage Bank & Trust v. United Pac. Ins. Co.*, 152 F.3d 1266 (10th Cir. 1998) (party seeking to invoke attorney-client privilege has burden of establishing its applicability); *U.S. v. Bauer*, 132 F.3d 504 (9th Cir. 1997); *U.S. v. International Brotherhood of Teamsters*, 119 F.3d 210 (2d Cir. 1997). The factual circumstances of the attorney-client relationship, the occasion and circumstances of privileged communications, and the general nature of privileged matter are discoverable even when the communication itself is protected. *Dipalma v.*

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[2] Some cases place the burden of proof on the party asserting that disclosure would not violate the attorney-client privilege. *See, e.g., Brennan v. Brennan* 422 A.2d 510 (Pa. Superior 1980). However, those cases do not involve a discovery dispute in a civil matter.

Medical Mavin, Ltd., 1998 U.S. Dist. LEXIS 1747 (E.D. Pa. 1998).

The attorney-client privilege protects confidential communications between the client and the attorney only in cases where the attorney is acting in his capacity as an attorney. *Dipalma v. Medical Mavin, Ltd.*, 1998 U.S. Dist. LEXIS 1747 (E.D. Pa. 1998). Indeed, the protected communication must relate to a fact of which the attorney was informed for the purpose of securing either a legal opinion, legal services, or assistance in some legal proceeding. *Brennan v. Brennan*, 422 A.2d 510 (Pa. Superior, 1980). An attorney who acts in a particular situation as something other than a legal advisor is not within the privilege. *In re Ford Motor Co.*, 110 F.2d 954 (3d Cir. 1997). Thus, the Board will ordinarily deny protection where a client uses a lawyer to perform an act simply as the client's agent, *e.g.*, where a client uses a lawyer to transmit money from the client to someone else. *See McCormick on Evidence*, § 90, n. 14 (4th ed. 1992).

Clever asserts in his affidavit that he was hired in May 1997 to represent certain clients at a judicial tax sale by bidding on "possibly tainted property" in his own name. (Affidavit at paras. 6, 7, 14, 24, 27; Clever Deposition at 86.) The clients hired *him* because of his knowledge and experience in the area of Pennsylvania tax sales. (Affidavit at para. 8.) Clever states in his affidavit that his clients asked him to keep their identities and their "entity status" confidential because of the need to "ensure that the entity status of the entities owning the real estate would be legally structured in such a manner as to protect, in a legal manner, any individuals from personal liability for any possible pollution that might already exist on the property." (Affidavit at paras. 10, 11.)

Any further details of the hiring are unclear. At his deposition, Clever was not forthcoming about the underlying facts. Clever testified: "The facts are [that] I'm the attorney, [and] they are the client." (N.T. at 90.) Nevertheless, we learn from Clever's deposition that Michael Foster, another

attorney, referred the tax sale matter to him less than a month before the sale. (N.T. at 15, 56.) At the time of the referral, Foster did not tell Clever any of the names of the "approximately ten" clients. (N.T. at 17, 56.) Clever mentioned that some of his clients are corporations; however, Clever does not know the identity of any of the officers, directors, or shareholders of those corporations. (N.T. at 86-87.) On the day of the sale, Clever knew who his clients were, but he did not know what organizational form, or what name, the entities would have as owners of the property. (N.T. at 31, 33.) While at the tax sale, Clever was able to get authorization to bid on the property on behalf of *all* clients by making one phone call and speaking to only one person. (N.T. at 16.) Clever also testified that he received no pay for representing his clients at the tax sale, and that he is not authorized to accept service of process for his clients in connection with the property. (N.T. at 57, 61-62.)

Clever knew before the tax sale that the property had been investigated by the Department, but Clever did nothing about it. (N.T. at 20-21.) Near the time of the sale, someone in the tax assessment office told Clever that the property had problems. (N.T. at 80.) Immediately after the sale, the former owner of the property told Clever that the property was polluted. (N.T. at 81-83.) Clever also learned at some point that the Environmental Protection Agency had investigated the property. (N.T. at 20.) Despite receiving such information, Clever made no further inquiries on behalf of his clients about possible environmental problems on the property. (N.T. at 74-75, 92-93, 96, 100-01.)

Clever's affidavit is insufficient to establish anything other than the fact that the only service provided by Clever to his clients was his bidding on the property at the tax sale. He was hired specifically because of his expertise with regard to tax sales. Clever did not concern himself with

any potential environmental problems on the property. The clients wanted the property, even with the pollution, but they wanted ownership in a legal form that would protect them from personal liability for the pollution. The clients needed to have Clever bid on the property because they had not yet established an appropriate legal form for ownership. The affidavit does not state that Clever played any role as advisor to his clients with respect to the form of ownership; indeed, Clever knew nothing about the form of ownership or the name of the entity at the tax sale. (*See* Affidavit at paras. 24, 26; N.T. at 30-33.)

We do not believe that the attorney-client privilege applies to an attorney's bidding on property at a tax sale. Bidding on property at a tax sale is not providing a legal service and is not enough to establish a professional attorney-client relationship. Accordingly, the identity of the clients for whom Clever is asserting the attorney-client privilege is not protected. Clever maintains that tax sale bidding is a duty that attorneys normally perform for their clients. (Affidavit at paras. 18-23.) Clever may be correct. However, that does not make tax sale bidding a legal service.

The Rules of Professional Conduct for attorneys recognize that lawyers sometimes provide nonlegal services. *See* Rule 5.7. The Comment to Rule 5.7 states: "Nonlegal services are those that are not prohibited as unauthorized practice of law when provided by a nonlawyer. Examples of nonlegal services include providing ... real estate counseling ... or environmental consulting." The Comment to Rule 5.7 also states:

> Whenever a lawyer directly provides nonlegal services, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the protection normally afforded by the client-lawyer relationship. The recipient of nonlegal services may expect, for example, that the protection of client confidences ... apply to the provision of nonlegal services when that may not be the case. The risk of such confusion is especially acute when

the lawyer renders both types of services with respect to the same matter.

Certainly, nonlawyers may bid at a tax sale, and those who do are *not* thereby practicing law. Clever himself admits that bidders do not *always* have an attorney representing them at tax sales.[3] Thus, tax sale bidding is a nonlegal service.[4] As such, it does not trigger the attorney-client privilege.

Moreover, we note that the identity of a client is not normally within the attorney-client privilege. *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). It is true that some courts have carved out an exception to this general rule, but the exception is a limited and rarely available sanctuary. *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). In order for the exception to apply, there must be special circumstances which justify nondisclosure of the client's identity. *Lefcourt v. U.S.*, 125 F.3d 79 (2d Cir. 1997). In each case, the special circumstances must be balanced against society's interest in full disclosure of the client's identity. *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

We find no special circumstance in this case to justify nondisclosure of client identities. The fact that the clients may not yet have established an appropriate legal structure for ownership of the

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[3] Clever asserts that attorneys have bid for clients at "almost every" tax sale he has attended, and that banks "often" bring an attorney to a tax sale. (Affidavit at paras. 18, 21.)

[4] The attorney-client privilege may protect communications made when an attorney provides nonlegal services if the attorney actually uses his legal knowledge and legal skills in performing the services. *In re Colton*, 201 F. Supp 13 (S.D. N.Y. 1961.) Clever suggests in his affidavit that an attorney *might* have to draw on his knowledge of tax sale law during the tax sale bidding process. (Affidavit at para. 22.) However, Clever does not indicate that he had to do so in this case.

property is not such a circumstance. We have no way of knowing how much time will pass before Clever's clients create an ownership entity that accomplishes their purposes. Whatever that amount of time might be, the Department should not have to wait to begin investigating the release of hazardous material on the Marcus Hook Property. By contrast, the circumstances which require protection of the public health in this case weigh heavily in requiring the attorney to reveal the identity of the person who authorized him to bid for his clients at the tax sale. The Legislature has directed the Department to take such action as is needed to protect the public from possible adverse effects from the pollution. The importance of this task certainly outweighs the concern of Clever's clients for possible personal liability. As the court said in *Baird v. Koerner*, 279 F.2d 623, 631 (9th Cir. 1960), "the objection of one real client, though valid, must yield to any great interest of that body of clients, the public. There is no question but that it is at times vital to the administration of justice to require disclosure of a client's name." We believe that this is such a case.

Accordingly, we grant the Department's Second Motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of October, 1998, the Department of Environmental Protection's Second Motion to Compel Answers to Interrogatories and Production of Documents is granted. Appellant is directed to file full and complete answers to the Department's interrogatories 11(e), 11(f), 12(e), 12(f), 19, 20, 21, 22(a)-(d) and 29 by **November 13, 1998**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 30, 1998

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

For the Commonwealth, DEP:
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Southeast Regional Counsel

For Appellant:
Ronald L.Clever, Esquire
Allentown, PA

ri/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STANLEY T. PILAWA AND DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 96-108-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 2, 1998**

OPINION AND ORDER
ON MOTION FOR RECONSIDERATION

by The Board

Synopsis:

A Motion for Reconsideration of a final order establishing that both appellants are liable for a civil penalty assessed by the Department is denied where the petitioner asserts that one of the appellants was dropped as a party to the appeal, but the petitioner failed to show that this assertion is true. A request to reconsider the amount of the civil penalty is denied because the petitioner failed to show compelling and persuasive reasons for reconsideration.

OPINION

On April 19, 1996, the Department of Environmental Protection (Department) issued an Assessment of Civil Penalty (Assessment) for $21,400.00 against Stanley T. Pilawa (Pilawa). The Assessment alleged the following four violations of the Storage Tank and Spill Prevention Act[1] (Storage Tank Act): (1) Pilawa removed underground storage tanks at an abandoned gasoline station

[1] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104.

in Mountaindale, Cambria County (Site) without a current installer certification, (Assessment, para. N; Violation No. 1); (2) Pilawa caused or assisted in the handling of tanks by three uncertified persons, (Assessment, para. P; Violation No. 2); (3) Pilawa and Disposal, Inc. allowed a release of kerosene to the soil while removing an underground storage tank, (Assessment, para. Q; Violation No. 3); and (4) Pilawa caused or assisted in the improper storing of contaminated soil, (Assessment, para. S; Violation No. 4).

On May 17, 1996, Pilawa and Disposal, Inc. (Appellants) appealed the civil penalty assessment. Initially, the Board dismissed the appeal for failure to pre-pay the penalty or to post an appeal bond. However, the Commonwealth Court reversed that ruling and remanded the case for a hearing on the Appellants' ability to pre-pay the civil penalty assessment. After examining appropriate documents, the Board allowed Appellants to proceed with the appeal.

At a hearing on the merits before the Honorable Robert D. Myers, the Department withdrew its allegation with respect to Violation No. 1. The following exchange took place at the hearing.

> JUDGE MYERS: Are there any ... preliminary matters before we begin?
>
> [COUNSEL]: Yes, Your Honor. In the Department's civil penalty issued against Mr. Pilawa and Disposal, Incorporated, that civil penalty was based on four separate violations. The Department this morning is prepared to withdraw what is identified as violation number one.
>
> JUDGE MYERS: And which is that?
>
> [COUNSEL]: It was a violation based on Stanley Pilawa performing tank handling activities without being certified.

(N.T. at 9.) Thus, the Board proceeded to hear evidence only with respect to Violation Nos. 2, 3, and 4.

On September 25, 1998, the Board issued an Adjudication drafted by Judge Myers,

concluding that the Department met its burden of proving by a preponderance of the evidence that Pilawa had committed Violation Nos. 2, 3, and 4. However, the Board reduced the civil penalty assessed for Violation No. 2 because, although it was a high risk violation, it was not deliberate. The Board reduced the civil penalty assessed for Violation No. 3 because, contrary to the Department's determination, Pilawa had not been negligent or reckless with respect thereto. The Board did not disturb the penalty assessed by the Department for Violation No. 4. The Board ordered the Appellants to pay a total civil penalty of $9,600.00 for violations of the Storage Tank Act.

On October 6, 1998, Appellants filed the present Motion for Reconsideration. Appellants assert therein that Pilawa was not a party defendant with respect to Violation Nos. 2, 3, and 4; therefore, the Board should not have ordered Pilawa to pay the civil penalty. Appellants also ask the Board to reconsider whether Violation No. 2 was a high risk violation, whether the Department proved that there was a kerosene spill that contaminated the soil, and whether the Department proved that a contaminated soil pile was left uncovered.

On October 19, 1998, the Department filed a Response to Appellants' Motion for Reconsideration. First, the Department contends that Appellants' Motion for Reconsideration was filed one day late and, as a result, should be dismissed.[2] Second, the Department maintains that Pilawa and Disposal, Inc. are the same entity for purposes of this appeal because Pilawa conducted business as Disposal, Inc. and because Pilawa performed the improper tank removals involved here at a time when Disposal, Inc. did not even exist as a corporation. Indeed, Disposal, Inc. was not incorporated until November 1995, two months after the occurrence of Violation Nos. 2, 3, and 4.

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[2] The Department is correct in asserting that Appellants' Motion for Reconsideration was filed one day late. *See* 25 Pa. Code § 1021.124(a). However, because the violation is *de minimis*, we will not dismiss the motion.

Third, the Department argues that, even if Pilawa was acting as an officer of Disposal, Inc. during the tank removals, Pilawa is personally liable for the actions of Disposal, Inc. because he participated in or directed the activities which gave rise to Disposal, Inc.'s liability. *See Herzog v. Department of Environmental Resources*, 645 A.2d 1381 (Pa. Cmwlth. 1994). Finally, the Department asserts that Appellants have not given the Board compelling and persuasive reasons to reconsider the penalty amount for Violation Nos. 2, 3, and 4.

Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. Such reasons include the following: (1) the final order rests on a legal ground or a factual finding which has not been proposed by any party; and (2) the crucial facts set forth in the petition are inconsistent with the findings of the Board, are such as would justify a reversal of the Board's decision, and could not have been presented earlier to the Board. 25 Pa. Code § 1021.124(a).

I.

Appellants first ask the Board to modify its order to remove all reference to Pilawa because he was deleted as a party defendant when the Department withdrew Violation No. 1 at the hearing. This is a crucial fact that, if true, would justify a change in the Board's decision. Appellants refer the Board to page nine of the hearing transcript. However, we have examined that page and, while it is clear that the Department withdrew Violation No. 1 at that point in the proceedings, the Department did *not* ask the Board to delete Pilawa as a party defendant with respect to Violation Nos. 2, 3, and 4.[3]

[3] Appellants also cite to the Department's Proposed Conclusions of Law on pages 35-36 of the Department's Post-Hearing Brief. It is true that *some* of the proposed conclusions refer only to Disposal, Inc. However, the Department did not omit Pilawa's name from *every* proposed

Appellants suggest that the deletion of Pilawa as a party defendant was somehow implied by the withdrawal of Violation No. 1 because Pilawa was not named as a potentially liable party in Violation Nos. 2, 3, and 4. We disagree.

With respect to Violation No. 2, the Department's Assessment states that "*Pilawa* caused or assisted in violations of the [Storage Tank Act] ... by employing three persons ... to perform tank handling activities ... without certification." (Assessment, para. P.) (Emphasis added.) As to Violation No. 3, the Assessment of Civil Penalty states that "*Pilawa* and Disposal, Inc. allowed a release of kerosene to the soil while removing an underground storage tank." (Assessment, para. Q.) (Emphasis added.) As to Violation No. 4, the Assessment states that "*Pilawa* did violate or cause or assist in the violation of ... the Department regulations ... by improperly storing contaminated soil." (Assessment, para. S.) (Emphasis added.) In each instance, Pilawa is either the named violator or a named violator with Disposal, Inc. Moreover, the Assessment plainly states that the civil penalty "is hereby assessed against *Stanley T. Pilawa Jr.* for the specific violations of the Storage Tank Act identified above." (Assessment at 6.) (Emphasis added.) The "specific violations ... identified above" obviously include Violation Nos. 2, 3, and 4.

Because Appellants erroneously assert that the Department deleted Pilawa as a party defendant at the hearing and because Appellants erroneously assert that Pilawa had no potential liability for Violation Nos. 2, 3, and 4, we will not reconsider the scope of our September 25, 1998

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conclusion. (*See* Department's Post-Hearing Brief at 35, Proposed Conclusion of Law No. 7.) Even if the Department had done so, it would not prove that Pilawa had been dropped as a party to this appeal.

Order.[4]

II.

Appellants next ask the Board to reconsider its finding that Violation No. 2 was a high risk violation. Appellants contend that, if the handling of tanks by uncertified persons had been a high risk violation, the Department would have paid more attention to the matter. The fact is that, as soon as the Department noticed the manner of tank handling by the uncertified persons, the Department stopped the work until a certified installer was hired. This action by the Department eliminated the possibility of an explosion from improper removal of the tanks. The Department had no reason to do more.

Appellants also argue that this was not a high risk violation because the tanks were empty. It is true that gasoline and water had been removed from the tanks. However, there was still the possibility of explosion from lingering vapors. As we stated in the Adjudication, where there exists the potential for an explosion, the Department may consider the situation to present a high risk.

Appellants also contend that, if this was a high risk violation, the Department would have penalized others involved in the release of gasoline at the site. However, others were not involved in the improper removal of the tanks which gave rise to the possibility of an explosion.[5]

Because Appellants have not provided compelling and persuasive reasons for reconsideration of our finding that Violation No. 2 was a high risk violation, we decline to reconsider the matter.

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[4] To the extent that Appellants contend that Pilawa acted as an officer of Disposal, Inc. with respect to Violation Nos. 2, 3, and 4, we remind Appellants that Disposal, Inc. was not incorporated until November 1995, two months after the violations, and, prior to that time, Pilawa conducted business as Disposal, Inc. (Joint Stipulation Nos. 4, 6.)

[5] In addition, the Board lacks jurisdiction over actions *not taken* by the Department. *Westvaco Corporation v. DEP*, 1997 EHB 275.

III.

Appellants next claim that the Department did not prove that there was a release of kerosene to the soil during a tank removal. However, as noted in the Board Adjudication, Appellants admitted that there was such a release. First, the Board cited Pilawa's own testimony that he showed the Department's inspector the kerosene that came out of the tank and onto the soil. (N.T. at 297-98.) The Board also noted that Pilawa's witness, Matt Lansberry, testified about the amount of kerosene that spilled from the tank when the workers lifted it. (N.T. at 229.) Having presented such testimony, Appellants cannot now deny that there was a release of kerosene onto the soil. Therefore, we will not reconsider our prior determination.

IV.

Finally, Appellants argue that the Department failed to prove that Appellants left a contaminated soil pile uncovered on October 2, 1995. However, Appellants stipulated that, "[o]n October 2, 1995, the Department inspector observed a pile of soil contaminated with gasoline at the Site which was not covered." (Joint Stipulation No. 45.) In addition, the Department presented credible evidence that no work was being done. (N.T. at 113-14, 119; Exhibit C-18.) The Department did not have to prove more. Appellants claimed that the pile was left uncovered for only a short period of time and offered the testimony of Lansberry to support this claim. However, the Board rejected Lansberry's testimony in that regard, and the Board will not reconsider its credibility determination.

Appellants also insist, once again, that the penalty assessed for Violation No. 4 is excessive. Appellants point out that the penalty amount approximates the entire clean up cost for the original release of gasoline. However, this is not relevant here. The Department used a Penalty Assessment

Matrix (Matrix) to arrive at a penalty amount for each violation, and Appellants did not challenge the Department's use of the Matrix. The civil penalty which the Department assessed for Violation No. 4 was within the range allowed by the Matrix for a low risk violation that involved negligence. Therefore, we will not reconsider our decision with respect to the penalty amount for Violation No. 4.

Accordingly, Appellants' Motion for Reconsideration is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY T. PILAWA AND DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 96-108-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of November, 1998, the Motion for Reconsideration filed by Appellants Stanley T. Pilawa and Disposal, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

EHB Docket No. 96-108-MR

DATED: November 2, 1998

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

MICHAEL W. FARMER and M.W. FARMER CO.	:	
v.	:	**EHB Docket No. 98-050-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 3, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS

by Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Motion to Dismiss a revocation order of the Department is denied under 25 Pa. Code § 1021.51(e) because the issues raised by Appellant in the Motion to Dismiss were not raised in the Notice of Appeal and because Appellant failed to show good cause for the Board to consider the issues.

OPINION

On March 12, 1998, Michael W. Farmer (Farmer) and M.W. Farmer Co. (collectively, Appellant) filed a Notice of Appeal[1] challenging the Department's March 4, 1998 issuance of an Order revoking "the certification of Michael W. Farmer, certification ID No. 15, in all categories of

[1] Appellant also filed a Petition for Supersedeas, which the Board denied on April 9, 1998 after a hearing.

installer and inspector, for all storage tank systems and storage tank facilities."[2] (Notice of Appeal, Exhibit A.) The Order was signed by Michael C. Welch, Environmental Protection Manager.

The Department alleged in its Order that: (1) Farmer's certification had been suspended once before; (2) on six occasions, Farmer submitted inspection reports that were either incomplete or contained false and erroneous information; and (3) Farmer violated a conflict of interest regulation by inspecting tanks owned by M. W. Farmer Company while he was employed as a certified inspector by M.W. Farmer Company. Based on these allegations, the Department revoked Farmer's certification under 25 Pa. Code § 245.109.

In the Notice of Appeal, Appellant denies the allegations of the Department. (Objection Nos. 1, 3.) Appellant also claims that: (1) the Order violates his constitutional rights under Article I, Section 8 of the Pennsylvania Constitution because its allegations are generalized, vague, and overbroad (Objection Nos. 2, 3); (2) the Department would not allow him to see the documents containing the alleged false and erroneous information prior to his filing an appeal (Objection No. 4); (3) he has never received a Notice of Violation for improper paperwork (Objection No. 5); (4) the Order was issued because of bias, bad faith, and improper motive by the Department (Objection No. 6); and (5) the Order violates his rights under Article I, Section 1 of the Pennsylvania Constitution because it deprives him of property without due process of law (Objection No. 7).

On September 8, 1998, Appellant filed the present Motion to Dismiss the Department's Order and a supporting brief. On October 5, 1998, the Department filed a Response to Appellant's

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[2] This appeal was originally assigned to Administrative Law Judge Robert D. Myers under EHB Docket No. 98-050-MR. However, on August 14, 1998, due to the pending retirement of Judge Myers, the appeal was reassigned to Administrative Law Judge Michelle A. Coleman under EHB Docket No. 98-050-C.

Motion to Dismiss and a supporting Memorandum of Law. Appellant did not file a reply.

I. Motion to Dismiss

As a preliminary matter, we note that Appellant's Motion to Dismiss is *not* in fact a motion to dismiss this appeal. Indeed, this is Appellant's appeal. Rather, Appellant moves the Board to dismiss the Department's Order revoking his certification. Thus, Appellant's Motion to Dismiss is actually a motion for summary judgment, and the Board will treat it as such.

The Board may grant summary judgment where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2. On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). Summary judgment may be entered only in those cases where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

A. Commingling of Functions

Appellant first argues in the Motion to Dismiss that the Department's Order violates his constitutional right to due process of law because, in issuing the Order, the Department commingled its prosecutorial and adjudicative functions. However, Appellant's Notice of Appeal does not raise a commingling of functions issue. An objection not raised by the appeal or an amendment thereto shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. 25 Pa. Code § 1021.51(e). Good cause includes the necessity for determining through discovery the basis of the action from which the appeal is taken. *Id.* The Department concedes that Appellant might have needed to conduct discovery to determine whether he had reason to raise a

commingling of functions argument. *See* Department's Memorandum of Law. However, Appellant has not set forth this reason, or any other reason, in an effort to persuade the Board to consider his commingling of functions argument. Therefore, the matter is deemed waived.[3]

B. Delegation of Authority

Appellant next argues that the Department's Order is invalid because the Secretary of the Department did not delegate his authority to revoke certifications to Welch, who signed the Order. However, once again, Appellant has failed to raise this issue in his Notice of Appeal. Absent a showing a good cause by Appellant, the matter is deemed waived.

C. Constitutionality of 25 Pa. Code § 245.109

Appellant also argues that the regulation at 25 Pa. Code § 245.109[4] is unconstitutional because it fails to give adequate notice of proscribed activities and because it does not require that the Department give notice of a violation or notice of an intent to revoke a certification before actually revoking a certification. However, Appellant never challenged the constitutionality of 25 Pa. Code § 245.109 in his Notice of Appeal and has not shown the Board good cause to consider that issue here; therefore, the matter is deemed waived.

Accordingly, Appellant's Motion to Dismiss is denied.

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[3] We note that Appellant does raise other due process issues in Objection Nos. 6 and 7. In Objection No. 6, Appellant claims that the Department's Order was issued only to discredit him at an upcoming criminal trial. In Objection No. 7, Appellant claims that it was unreasonable for the Department to revoke Appellant's certification for mere paperwork violations.

[4] To the extent that Appellant questions the constitutionality of the Storage Tank Act, the Board lacks jurisdiction over the matter. *See Empire Sanitary Landfill, Inc. v. Department of Environmental Resources*, 684 A.2d 1047 (Pa. 1996).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL W. FARMER and M.W. FARMER CO.	:	
v.	:	**EHB Docket No. 98-050-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of November, 1998, it is ordered that Appellants' Motion to Dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

Michelle A. Coleman
Administrative Law Judge
Member

DATED: November 3, 1998

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

For the Commonwealth, DEP:
Geoffrey J. Ayers, Esquire
Northcentral Region

For Appellant:
Gregory Barton Abeln, Esquire
ABELN LAW OFFICES
37 East Pomfret Street
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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

M.W. FARMER CO.	:	
	:	
v.	:	**EHB Docket No. 98-055-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 3, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS

by Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Motion to Dismiss a suspension order of the Department is denied under 25 Pa. Code § 1021.51(e) because the issues raised by Appellant in the Motion to Dismiss were not raised in the Notice of Appeal and because the Appellant failed to show good cause for the Board to consider the issues.

OPINION

On March 26, 1998, M.W. Farmer, Co. (Appellant) filed a Notice of Appeal with the Board. challenging the Department of Environmental Protection's (Department) March 24, 1998 Order suspending Appellant's Company Certification ID No. 19 for a period of 90 days pursuant to the Storage Tank and Spill Prevention Act.[1] The Order prohibits storage tank handling and inspection activities during the suspension period by Appellant and by the certified inspectors and installers

[1] Act of July 6, 1989, P.L. 169, *as amended*, 35 P. S. §§ 6021.101-6021.2104.

employed by Appellant.

On September 8, 1998, Appellant filed the present Motion to Dismiss and a supporting brief. On October 5, 1998, the Department filed a Response to Appellant's Motion to Dismiss and a supporting Memorandum of Law. Appellant did not file a reply.

I. Motion to Dismiss

As a preliminary matter, we note that Appellant's Motion to Dismiss is *not* in fact a motion to dismiss this appeal. Indeed, this is Appellant's appeal. Rather, Appellant moves the Board to dismiss the Department's Order suspending its certification. Thus, Appellant's Motion to Dismiss is actually a motion for summary judgment, and the Board will treat it as such.

The Board may grant summary judgment where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2. On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). Summary judgment may be entered only in those cases where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

A. Commingling of Functions

Appellant first argues that the Order violates his constitutional right to due process of law because, in issuing the Order, the Department commingled its prosecutorial and adjudicative functions. However, Appellant's Notice of Appeal does not raise a commingling of functions issue. An objection not raised by the appeal or an amendment thereto shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. 25 Pa. Code § 1021.51(e).

Good cause includes the necessity for determining through discovery the basis of the action from which the appeal is taken. *Id.* The Department concedes that Appellant might have needed to conduct discovery to determine whether he had reason to raise a commingling of functions argument. *See* Department's Memorandum of Law. However, Appellant has not set forth this reason, or any other reason, in his Motion in an effort to persuade the Board to consider his commingling of functions argument. Therefore, the matter is deemed waived.[2]

B. Delegation of Authority

Appellant next argues that the Order is invalid because the Secretary of the Department did not delegate his authority to suspend certifications to Welch, who signed the Order. However, once again, Appellant failed to raise this issue in his Notice of Appeal. Absent a showing a good cause by Appellant, the matter is deemed waived.

C. Constitutionality of 25 Pa. Code § 245.109

Appellant also argues that the regulation at 25 Pa. Code § 245.109[3] is unconstitutional because it fails to give adequate notice of proscribed activities and because it does not require that the Department give notice of a violation or notice of an intent to suspend a certification before actually suspending a certification. However, Appellant never challenged the constitutionality of 25 Pa. Code § 245.109 in his Notice of Appeal and has not shown the Board good cause to consider

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[2] We note that Appellant does raise other due process issues in Objection Nos. 6 and 7 of the Notice of Appeal. In Objection No. 6, Appellant claims that the Department's Order was issued only to discredit him at an upcoming criminal trial. In Objection No. 7, Appellant claims that it was unreasonable for the Department to suspend Appellant's certification for mere paperwork violations.

[3] To the extent that Appellant argues that the Storage Tank Act is unconstitutional, the Board lacks jurisdiction over the matter. *See Empire Sanitary Landfill, Inc. v. Department of Environmental Resources*, 684 A.2d 1047 (Pa. 1996).

that issue here; therefore, the matter is deemed waived.

Accordingly, Appellant's Motion to Dismiss is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.W. FARMER CO.	:	
	:	
v.	:	**EHB Docket No. 98-055-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of November, 1998, the Motion to Dismiss filed by Appellant is **denied.**

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 3, 1998

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

For the Commonwealth, DEP:
Geoffrey J. Ayers, Esquire
Northcentral Region

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
CROWN RECYCLING & RECOVERY, INC., JOSEPHINE BAUSCH CARDINALE, Executrix for the Estate of Phillip Cardinale, NANCY CARDINALE, Executrix for the Estate of Anthony Cardinale, UNIVERSAL MANUFACTURING CORP., MAGNETEK, INC., SCHILBERG INTEGRATED METALS, CORP. and WIRE RECYCLING, INC., Defendants	:	**Issued: November 4, 1998**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

A generator of insulated coated copper wire is jointly and severally liable under the Pennsylvania Hazardous Sites Cleanup Act[1] because it arranged for both the treatment and disposal of hazardous substances at an incineration facility. This defendant failed to prove that the injury caused by its hazardous substances to the soils at the Site is divisible from the harm caused by other defendants. However, this defendant is not liable for the costs of response for the divisible harm done to groundwater at the Site by other generators. The Department presented proof of its response costs

[1] Act of October 18, 1988, P.L. 756, No. 108, *as amended,* 35 P.S. §§ 6021.101-6020.1305.

in the total amount of $3,727,706. This amount must be reduced by giving this defendant credit for $3,165,000 paid in settlement by the other defendants. The resulting amount of $562,706 will also be reduced by the Department's response costs attributable to the damage to the groundwater at the Site, but the Department will be entitled to recover prejudgment interest. Both amounts are to be determined at a further hearing.

BACKGROUND

On September 8, 1992, the Department of Environmental Protection (Department) filed a complaint requesting reimbursement for costs incurred in an interim response action taken under the provisions of the Pennsylvania Hazardous Sites Cleanup Act (HSCA)[2] with respect to a Crown Recycling and Recovery, Inc. (Crown) site (Site) in Lackawaxen Township, Pike County, Pennsylvania. The Department's complaint stated that defendants Crown, Josephine Bausch Cardinale (as executrix for the Estate of Philip Cardinale), Nancy Cardinale (as executrix for the Estate of Anthony Cardinale), Universal Manufacturing Corporation, Magnetek, Inc. (Magnetek), Schilberg Integrated Metals Corporation (SIMCO)[3] and Wire Recycling, Inc. (Wire Recycling) are jointly and severally liable for its interim response costs pursuant to sections 501(a), 505(b), 507(a), 701(a), and 702 of HSCA, 35 P.S. §§ 6020.501.(a), 6020.505(b), 6020.507(a), 6020.701(a), and 6020.702.[4] The complaint asserts that the Cardinales were operators of the Site and that the other

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[2] Act of October 18, 1988, P.L. 756, No. 108, *as amended*, 35 P.S. §§ 6020.101-6020.1305.

[3] SIMCO was formerly doing business as Schilberg Iron and Metal Co., Inc. *Crown Recycling v. DEP*, 1997 EHB 807, 808, n.1.

[4] The Department has since entered into settlement agreements with Universal Manufacturing Corporation, Magnetek and Wire Recycling. *Crown Recycling v. DEP*, 1997 EHB 169, 172 n.1; Joint Stipulation, No.18.

defendants were listed as generators of hazardous waste. In the intervening six years, between the filing of the complaint and the Board's hearing on the liability of the remaining defendants, discovery has taken place, some defendants have settled, and the Department has developed a remedial action plan. The Department's pre-hearing memorandum states that the Department's claimed response costs as of February 6, 1998 are $3,707,309.72. It also claimed $192,883 for bid specifications development for this final remedial action and $170,000 as an estimate of pre-judgment interest. (Defendant's pre-hearing memorandum, ¶ 61)

The Board has already issued four decisions in this appeal. On November 3, 1993, we issued an opinion and order which granted in part and denied in part defendants' preliminary objections. We also denied a Department motion to limit the scope of the Board's review to the administrative record developed under HSCA because the generator defendants had not been given an opportunity to participate in the development of that record. The Board remanded the appeal to the Department and directed it to reopen the administrative record. *Crown Recycling v. DER*, 1993 EHB 1571.

On February 20, 1997, we issued an opinion and order which granted the Department's motion for summary judgment as to liability against the individual defendants, held that SIMCO and Wire Recycling were liable under HSCA for having arranged for the treatment of hazardous substances but left open the issue of whether they were liable for having arranged for the disposal of hazardous substances. The Board also denied motions for summary judgment filed by SIMCO and Wire Recycling. *Crown Recycling v. DEP*, 1997 EHB 169. On May 13, 1997, we issued an opinion and order which granted in part and reserved our decision in part on the Department's motion to preclude proposed expert witness testimony. *See Crown Recycling v. DEP*, 1997 EHB 459.

In response to motions filed by SIMCO and Wire Recycling, the Board ordered the bifurcation

of the hearing on the merits into separate liability and damage phases. Administrative Law Judge George J. Miller presided over both phases of the hearing. The liability phase of the hearing took place on May 20, 1997 and was limited to the issue of whether SIMCO fell within the scrap metal exception contained in section 701(b)(5) of HSCA, 35 P.S. § 6020.701(b)(5). We issued an adjudication on September 9, 1997 and held that SIMCO was not exempt from liability by reason of the scrap metal exception. *Crown Recycling v. DEP*, 1997 EHB 807.

The damage phase of the hearing took place on April 13, 14 and 16, 1998. At the end of the hearing, SIMCO filed a motion for directed verdict which the Department responded to in its post-hearing brief.[5] SIMCO's motion charges that the Department: (1) failed to present evidence sufficient to demonstrate that SIMCO arranged for the disposal of hazardous substances at the Site; (2) is not entitled to a judgment of liability for future response costs because the Board is without authority to issue a declaratory judgment; (3) has not met its burden to prove the amount of its recoverable response costs to the required standard of certainty; (4) has not met its burden of establishing that certain of its response costs were "reasonable, necessary or appropriate"; (5) has presented no evidence as to the amount of recoverable prejudgment interest; and (6) is not able to recover some of the interim response costs since the response actions exceeded certain time and monetary limits which HSCA places on an interim response in absence of any applicable exception to these requirements of section 103 under HSCA, 35 P.S. § 6020.103, which defines an "interim response."

SIMCO filed its post-hearing brief on June 15, 1998 and the Department filed its post-hearing brief on June 16, 1998. The last reply brief was received on July 27, 1998. The Department argues

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[5] SIMCO filed a motion for directed verdict at the conclusion of the Department's case and requested that the Board reserve judgment on the motion. The parties were given an opportunity to address the motion for directed verdict in their post-hearing briefs. (N.T. 471-475, 732-733)

in its post-hearing memorandum that SIMCO is jointly and severally liable for the disposal of copper, lead and dioxin with respect to the harm to the soils at the Site, but it makes no claim for costs associated with harm to the groundwater near the Site. The Department also contends that SIMCO has failed to meet its burden to establish divisibility of harm to the soils at the Site. With respect to damages, the Department asserts that its right to recover response costs should be upheld unless SIMCO meets its burden of proving that the Department's selected response actions were arbitrary and capricious on the administrative record. Finally, the Department argues that SIMCO's motion for directed verdict should be denied.

SIMCO argues that it can only be liable for arranging for the treatment of copper and lead at the Site. SIMCO denies that it arranged for the disposal of any hazardous substances. SIMCO also claims that the harm it caused at the Site is divisible from the harm caused by the hazardous substances of others at the Site. With respect to damages, SIMCO argues that some of the costs incurred by the Department were unnecessary and unreasonable and that the Department's claim for response costs must be adjusted accordingly. SIMCO also contends that the Department has not offered proof relating to the amount of prejudgment interest for which SIMCO might be liable and that the Board has no jurisdiction to issue a declaratory judgment for future response costs. It also contends that some of the response costs are not recoverable because the timing and amount of this incurrence exceeded HSCA's limitations on "interim response costs."

The record in the damage phase of the case consists of the pleadings, a transcript consisting of 735 pages, and over 30 exhibits. After a full and complete review of the record, we make the following Findings of Fact:

FINDINGS OF FACT

Parties

1. The Department of Environmental Protection (Department) is the agency of the Commonwealth with the authority to administer and enforce the Pennsylvania Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. §§ 6020.101-6020.1305 and the regulations thereunder.

2. Defendant Schilberg Integrated Metals Corp. (formerly doing business at various times related to this action as Schilberg Iron and Metal Co., Inc.) (hereinafter referred to as SIMCO) is a Connecticut metals merchant and broker, primarily specializing in the processing of copper scrap, with a business address of 47 Milk Street, Willimantic, Connecticut 06226.

Site Background/ Operations

3. The Crown Industries Site (Site) is approximately 8 acres and is located off Rheingold Boulevard near State Route 590. The Site lies in a relatively remote rural setting with surrounding woods. (N.T. 28-29; Ex. C-2)[6]

4. Since approximately 1965, the operations which took place at the Site involved the salvaging of metals through the open burning and incineration of various electrical paraphernalia, including fluorescent light ballasts, transformers, electrical stripping (consisting of oil soaked paper and copper strips), plastic-coated and polyvinyl chloride (PVC) coated electrical wire and other scrap

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[6] References to the transcript of the hearing held April 13, 14 and 16, 1998 will be denoted as (N.T. __); references to the Commonwealth Exhibits will be denoted as (Ex. C-__); references to the SIMCO Exhibits will be denoted as (Ex. S-__); references to the Joint Stipulation submitted to the Board in this matter will be denoted (JS No. __); and references to the numbered Findings of Fact in the Adjudication issued by the Board in *Crown v. DEP,* 1997 EHB 807 will be denoted (Bd. Adj. No. __).

materials. Diesel oil, hydraulic fluid and a kerosene/ hydraulic fluid mixture were used as a fuel source to burn the materials. (Ex. C-2)

5. During his first Site visit in late 1988 or early 1989, Robert Lewis, Jr., former Project Officer for the Site, observed wooden pallets, automobiles, scrap automobiles, scrap buses, trailer boxes of wire, drums, tires, white goods, a concrete bunker with pallets and wire and ash in it, and a large pile of ash in the rear of the bunker were all located at the Site. (N.T. 29)

6. The concrete bunker was three sided and was approximately 10-12 feet wide, 16-18 feet long, and 7-8 feet high. (N.T. 30)

7. The Site is subjected to precipitation and wind and is located on top of a hill. (N.T. 30, 172, 276)

8. The Site is located on a groundwater divide, and the groundwater flows in more than one direction at the Site. (N.T. 83)

Site Investigations/ Studies

9. In August 1987, a Site inspection was performed by NUS Corporation. A Site inspection report was later submitted to the United States Environmental Protection Agency (EPA) on November 29, 1988. (Ex. C-7)

10. The Site inspection report contained a toxicological evaluation of the Site which revealed, among other things:

> On-site soil sediment samples revealed significant levels of inorganic contaminants, including antimony (up to 4,710 mg/kg), cadmium (up to 485 mg/kg), copper (up to 542,000 mg/kg), lead (up to 21,600 mg/kg), and zinc (up to 53,800 mg/kg). Other contaminants at notable levels in scattered soil samples include selenium (up to 8.1 mg/kg), silver (up to 16 mg/kg), tin (up to 999 mg/kg), and cyanide (at least 1.47 mg/kg). Average upper range soil levels for these inorganics are as follows (mg/kg); antimony, 8.8; cadmium, 0.7; copper, 700; lead,

300; selenium, 3.9; silver, 5; tin, 200; and zinc, 2,900. (Ex. C-7)

11. The remedial investigation report completed by Baker Environmental, Inc. (Baker Environmental) dated June 1993, documented analytical results of samples collected from the field investigation which was conducted in December 1992 and analyzed for contamination, including but not limited to, dioxin, lead, copper and polychlorinated biphenyl (PCB). (Ex. C-12)

12. The purpose of the remedial investigation was to delineate the nature and extent of contamination at the Site. (N.T. 204; Ex. C-12)

13. Concentrations of dioxin at the Site documented in the remedial investigation report range from less than 1 part per billion (ppb) to 16.68 ppb. These concentrations are expressed in Toxicity Equivalency (TE) values. (N.T. 217, 219; Ex. C-12, C-18c)

14. Concentrations of lead at the Site as documented in the remedial investigation report range from approximately 10 parts per million (ppm) to 36,200ppm. (Ex. C-12, C-18b)

15. Concentrations of copper at the Site as documented in the remedial investigation report range from approximately 13.7ppm to 406,000ppm. (Ex. C-12, C-18a)

16. The Department conducted a risk assessment of the Site. The purpose of the risk assessment was to determine whether there was a risk posed by the Site to human health and the environment and also to act as a framework for the development of cleanup standards. (N.T. 194, 224)

17. The following contaminants, among others, were determined to be in the soils at the Site through the implementation of the remedial investigation and risk assessment: metals, predominantly copper and lead, and also PCB and dioxins. (N.T. 264)

18. In 1994, a feasibility study was performed at the Site by Baker Environmental. A

report was later submitted to the Department in June, 1994. (Ex. C-14)

19. The purpose of the feasibility study was to identify and evaluate potential remedial alternatives for the Site. (N.T. 223)

Response Actions/ Response Costs

Prompt Interim Response

20. The prompt interim response included placing a fence around the facility, installation of groundwater monitoring wells, and characterization and removal of the ash pile located at the rear of the bunker. (N.T. 31)

21. Wells were placed at the Site to determine whether perchloroethylene (PCE) and other contaminants, possibly lead, were coming off the Site. (N.T. 71)

22. The six monitoring wells were installed off-site due to difficult accessibility to the Site, the difficult hydrogeology and the need to remove materials, ash or scrap metal at the Site. (N.T. 173-175)

23. Mr. Lewis and others from the Department observed people, footprints, bicycle tracks, and quad tracks at the Site. (N.T. 31)

24. The fence was constructed in part to prevent anybody from placing materials on the Site or from walking the Site and coming into contact with any materials on the Site. (N.T. 58-59)

25. The prompt interim response included characterization of the ash pile located behind the concrete bunker for metals. (N.T. 31-32)

26. To characterize the ash pile next to the concrete bunker, samples were collected and submitted to a laboratory for analysis. (N.T. 32-33)

27. A sample collected from the ash pile located next to the concrete bunker on June 30,

1988 showed lead in EP toxic concentrations of 182ppm. (N.T. 46)

28. EP toxic concentrations of 182ppm lead in the referenced sample was sufficient to classify the ash pile as characteristic of hazardous waste under the Resource, Conservation and Recovery Act (RCRA)[7] (N.T. 47)

29. The Department incurred costs implementing the prompt interim response at the Site. (N.T. 48; Ex. C-22, p. 17)

30. The Department's contracting costs for the prompt interim response are documented on pp. 171-202 of the Department's cost recovery package. (N.T. 49-50; Ex. C-22)

31. As the Project Officer for the Site, Mr. Lewis was responsible for overseeing the Department's contractors and looking at their billings and their invoices for payment. (N.T. 50)

32. Mr. Lewis sometimes rejected a contractor's invoice if the contractor billing was not consistent with a log he kept of the amount of materials used at the Site and the amount of hours logged by a contractor's staff. (N.T. 51)

33. The cost recovery package also documents contractor costs for the installation of groundwater monitoring wells and the work plan for the installation of groundwater monitoring wells. (N.T. 52-53; Ex. C-22, p. 126)

Remedial Investigation/ Risk Assessment/ Feasibility Study

34. Baker Environmental conducted a remedial investigation in December 1992. A remedial investigation report dated June 1993 was subsequently submitted to the Department. (Ex. C-12)

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[7] Act of October 21, 1976, P.L. 94-480, *as amended,* 42 U.S.C. §§ 6901-6992.

35. Baker Environmental conducted a risk assessment in 1993 and 1994. A risk assessment report dated April 1994 was subsequently submitted to the Department. (Ex. C-13)

36. Baker Environmental conducted a feasibility study in 1993 and 1994. A feasibility study report dated June 1994 was subsequently submitted to the Department. (Ex. C-14)

37. The Department incurred costs as a result of the remedial investigation, the risk assessment and the feasibility study. (N.T. 224; Ex. C-22, pp. 95-125)

Scrap Metal Removal

38. From May 1994 through December 1994, the Department implemented the scrap metal removal action which entailed decontaminating and removing the scrap materials remaining on-site, as well as removing residual and municipal waste. These actions were taken in part to prepare for the final remedial response action. (N.T. 276-287; Ex. S-8)

39. The scrap removal was a necessary response because the scrap debris was all over the Site. It was mixed with soil and contaminated ash and it was in the way of areas to be remediated during the final remedial response action. (N.T. 287)

40. Scrap materials had to be segregated from contaminated soil and ash prior to decontamination and removal for salvaging. (N.T. 282)

41. Prior to implementing the scrap removal, the Department conducted a study to determine which scrap materials would require decontamination prior to removal from the Site. The Department tested samples of scrap materials for dioxin and PCBs and determined that the scrap materials that were visibly clean did not need to be decontaminated and scrap materials that were visibly dirty would require decontamination. (N.T. 278-280)

42. The Department also conducted a decontamination pilot study to determine the

effectiveness of the high pressure washing decontamination process with respect to visibly dirty scrap material. (N.T. 280)

43. The rinsate from the decontamination process was recycled on-site by running rinsate through a filter system where it was analyzed for metals, PCBs and dioxin prior to being reused for additional decontamination. (N.T. 284, 285)

44. Recycling the rinsate from the scrap material decontamination process eliminated the need for disposal of such rinsate and the associated disposal costs and limited the cost of a continuous supply of clean water for the decontamination process. (N.T. 285)

45. The Department incurred response costs of approximately $1.7 million during the implementation of the scrap removal. (N.T. 281-282; Ex. C-22, p. 139)

46. The major source of the Department's costs associated with the scrap removal was personnel time required to segregate various waste streams prior to disposal. Disposal costs associated with the scrap removal were a minimal cost of the overall cost of the project. (N.T. 282, 285-286)

Related Costs

47. The Department incurred response costs as a result of the analysis of samples of various media collected at the Site during the remedial investigation. (N.T. 204-205, 224-226; Ex. C-12, pp. 11, 27, 44, Ex. C-22, p. 566)

48. The Department incurred response costs as a result of the analysis of samples of various media collected at the Site during the scrap metal removal response. (N.T. 279, 281, 285-287; Ex. S-8, pp. 6, 12, Ex. C-22, p. 566)

49. The Department incurred response costs as a result of time spent by Department staff

on activities associated with responses to hazardous substances at the Site, including the preparation of a bid package for the final remedial action. (N.T. 51, 228, 293-294; Ex. C-22)

50. The Department incurred response costs as a result of time spent by the Department's Office of Chief Counsel staff on enforcement activities associated with responses to hazardous substances at the Site. (N.T. 291-293; Ex. C-22)

51. The Department will be implementing a final remedial action at the Site. (N.T. 277)

SIMCO Liability

52. SIMCO specializes in copper wire which it obtains from wire manufacturers. (Bd. Adj. No. 4)

53. Bernard Schilberg is the executive vice president of SIMCO. (Bd. Adj. No. 7)

54. The insulated copper wire sent to SIMCO consisted of 50-55% copper and had a steel member to make it rigid. (Bd. Adj. No. 8)

55. The insulation of some of the wire is PVC. (SIMCO pre-hearing memorandum, ¶ 6)

56. Between December 3, 1981 and May 30, 1986, SIMCO had an agreement with Philip and Anthony Cardinale (the Cardinales) that SIMCO would provide them with insulated wire, and the Cardinales would remove the insulation, return the stripped wire to SIMCO and send the remains of the insulation to Franklin Smelting in Philadelphia. (Bd. Adj. No. 15; JS No. 1)

57. The Cardinales removed the insulation by placing the wire, along with wood and fuel oil, in a crude concrete bunker at the Site, then ignited it. (Bd. Adj. No. 16)

58. The combustion of the insulated wire reduced the insulation to ash, but most of the copper remained wire. (Bd. Adj. No. 17)

59. Rather than selling the insulated wire to the Cardinales and buying the stripped wire

back afterwards, SIMCO simply retained ownership of the wire and paid the Cardinales a fee to remove the insulation. (Bd. Adj. No. 18)

60. The Cardinales accumulated ash generated from the burning of the insulated copper wire on an average of six and a half months at a time, and on one occasion for up to 12 months, before shipping ash, or a portion thereof, to Franklin Smelting. (N.T. 199-203, 512; Ex. C-8, C-10)

61. The Site receives an annual average of 45.5 inches of rain per year. (Ex. C-7)

62. Ash generated from the burning of SIMCO's insulated wire probably was exposed to the elements for an average of six and a half months, and on one occasion for up to 12 months, prior to shipment of ash to Franklin Smelting for recovery of copper. (N.T. 199-203, 512; Ex. C-8; C-10)

63. Some of the insulated wire delivered to the Site by SIMCO from December 3, 1981 through May 30, 1986 consisted of PVC insulated wire. (SIMCO pre-hearing memorandum, ¶ 6)

64. Some of the insulated wire delivered to the Site by SIMCO from December 3, 1981 through May 30, 1986 contained lead additives. (N.T. 375-376, 570)

65. SIMCO does not know for certain whether any copper ash residue remained at the Site rather than being shipped to Franklin Smelting. (N.T. 512)

66. About 1.6 million pounds of SIMCO's insulated scrap copper wire was processed by the Cardinales at the Site. (N.T. 572; Ex. C-10)

Lead and Copper

67. At least some of the lead that has been identified in samples of soil collected at the Site originated from the processing of SIMCO's insulated electrical copper wire. (N.T. 398, 570)

68. Dr. Eugene Meyer testified for the Department as an expert in the field of process chemistry. (N.T. 367-368)

69. Dr. Meyer's basis for his opinion with respect to lead at the Site is based on his review of scientific and technical literature regarding the formulations of polyethylene (PE) and PVC jackets used around copper electrical wiring as well as his understanding that ash at the Site was a RCRA regulated hazardous waste due to the toxicity characteristics for lead, as well as his observations in other matters. (N.T. 401)

70. Dr. Meyer's studies reveal that lead compounds, in particular lead carbonate and lead stearate, were added as heat retardants or heat stabilizers in copper wire installation. (N.T. 376)

71. When lead carbonate and lead stearate are subject to combustion during the burning of insulated copper wire, lead oxide is formed as the combustion product. The lead oxide subsequently becomes a component of both the ash and the smoke matter that ejects during combustion. (N.T. 402-403)

72. At least some of the copper that has been identified at the Site originated from the processing of SIMCO's insulated electrical copper wire. (N.T. 404, 570)

Dioxin

73. Dr. Meyer testified that in his opinion at least some of the dioxin that has been identified in samples of soil and ash collected at the Site originated from the processing of SIMCO's insulated copper electrical wire. (N.T. 380-381)

74. Dioxin has been established in various technical and scientific literature articles as a product of the incomplete combustion of PVC. (N.T. 381)

75. Dr. Meyer testified that when chlorinated substances are burned, dioxin may be produced as an incomplete combustion product. Minutely small amounts are also formed, as it turns out, even during the complete combustion, but for the most part, dioxin is a byproduct of the

incomplete combustion of certain chlorinated compounds such as PVC, PCB and chlorinated species. (N.T. 382)

76. When combustion occurs, smoke carrying particulates of ash that are generated during the combustion process are ejected from the burning site. (N.T. 382-383)

77. Ash carried by smoke from combusted materials can end up in areas away from the burn site as a result of wind carrying the smoke and subsequently depositing particulates upon surface soils. (N.T. 383)

78. With respect to ash stored at the Site, water can percolate through such ash and thereby carry the contaminants within the ash down to the soils where they can be further moved by the movement of surficial waters. (N.T. 383)

79. SIMCO's expert, Kelly Meloy, is a chemical engineer with extensive experience in the hazardous waste field both as a representative of the Commonwealth of Pennsylvania and the State of Texas and has extensive experience in the private practice of chemical engineering relating to hazardous materials. (N.T. 533-535)

80. She testified to her opinion that dioxins are not produced during the open burning of PVC wire based on her literature search and general knowledge of the combustion process. (N.T. 544-545)

81. She testified that three factors must be present for dioxins to be capable of being formed from burning. First, particulate carbon such as fly ash must be present in the air as was the case here. (N.T. 551) Second, the temperature must range from 300-400 degrees Centigrade to allow the creation of dioxin. Third, there must be sufficient residence time within the required temperature range in a post-combustion phase to form the complex chemical reaction necessary for the formation

of dioxins to occur. (N.T. 551)

82. Both Ms. Meloy and Dr. Meyer agreed in the case of open burning of SIMCO's wire at the Site that no residence time existed (N.T. 459-460, 552), but Dr. Meyer testified that dioxins could be created in the combustion phase itself. (N.T. 439)

83. The testimony of Dr. Meyer that some dioxins were created and disposed of at the Site as a result of the open burning of SIMCO's wire is entitled to greater weight than the testimony of Ms. Meloy.

84. The Department's interim responses at the Site, consisting of the prompt interim response, the remedial investigation, the risk assessment and the feasibility study, were all interim responses. The scrap metal removal was an initial remedial response. (N.T. 230-234; 277)

85. Each of these interim response actions were in furtherance of and preparation for both the initial and final remedial action to be taken at the Site.

Divisibility of Harm

86. Copper and lead were detected at various concentrations at each Areas of Concern (AOC) at the Site. (Ex. C-18a, C-18b)

87. It is impossible to differentiate the copper and lead which were generated by the processing of SIMCO's electric wire from the copper and lead generated by other sources. (N.T. 616-619)

88. Dioxin was detected at various concentrations at AOC-2, AOC-6, AOC-7a, AOC-8, AOC-9 and AOC-10a. (Ex. C-18c)

89. It is impossible to differentiate between any dioxin which may have been generated during the processing of SIMCO's electric wire and the dioxin generated from the burning of PCBs

or any other source. (Meyer, N.T. 453)

90. Open burning of SIMCO's insulated wire contributed to the lead, copper and dioxins at the Site through fugitive emissions. (Meloy, N.T. 570)

91. The Department acknowledges that SIMCO is not liable for the presence of PCE in the groundwater since it is not responsible for PCE at the Site and this harm to the groundwater is divisible from the harm to the soils.

Amount of Response Costs

92. The Department's evidence established that it incurred $3,727,706 in response costs including the costs of interim response, the initial remedial action of scrap metal removal, administrative and legal costs and the development of the final remedial action. (Ex. C-22)

93. Other defendants have paid the Department $3,165,000 in settlement. (JS Nos. 17, 18)

94. The Department's expenditures of $41,398 to provide nearby residents with bottled water, as well as a yet to be determined amount to remedy the contaminated groundwater, is included in the foregoing finding as to the Department's response costs. (Department brief at 77)

OPINION

SIMCO's Responsibility for Copper and Lead at the Site

Section 701(a)(2) of HSCA states that "a person shall be responsible for a release or threatened release of a hazardous substance from a site" when:

> The person generates, owns or possesses a hazardous substance and arranges by contract, agreement or otherwise for the disposal, treatment or transport for disposal or treatment of the hazardous substance.

35 P.S. § 6020.701(a)(2). If SIMCO is found to be a responsible party as specified in section 701 of HSCA, 35 P.S. § 6020.701, then section 507 of HSCA provides that the responsible persons "shall be liable for the response costs and for damages to natural resources." 35 P.S. § 6020.507.

The Board has previously entered summary judgment against SIMCO under section 701(a) of HSCA, 35 P.S. § 6020.701(a), as one who arranged for the treatment of copper, a hazardous substance. *Crown Recycling v. DEP*, 1997 EHB 169. Section 103 of HSCA defines "treatment" as "[a] method, technique or process, designed to change the physical, chemical or biological character or composition of a hazardous substance" so as to, among other things, render the hazardous substance suitable for recovery. 35 P.S. § 6020.103. The Board found that treatment occurred when the burning of SIMCO's wire changed the physical character of the insulated copper wire which allowed the reclamation facility to recover the reusable portion of the insulated wire and resulted in the contamination of the Site with residual ash. *Crown*, 1997 EHB at 179. The Board also determined that there was sufficient evidence of a release from the treatment facility. In so finding, the Board relied in part on decisions of the federal courts under CERCLA.[8]

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[8] HSCA has been the subject of relatively few judicial opinions, unlike its federal counterpart, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-

Liability for Disposal of Copper and Lead

SIMCO acknowledges that some of the copper and lead at the Site resulted from the burning of SIMCO's copper wire. (Meloy, N.T. 570; SIMCO's post-hearing brief at 16-17) This acknowledgment is clearly supported by the evidence.

SIMCO's copper wire consisted of 50-55% copper and had a steel member to make it rigid. (Bd. Adj. 8) The insulation on the wire was plastic. (Bd. Adj. 9) SIMCO had an agreement with the Cardinales that SIMCO would send them the insulated wire. (Bd. Adj. 15) Rather than selling the insulated wire to the Cardinales and buying back the stripped wire afterwards, SIMCO simply retained ownership of the wire and paid the Cardinales a fee to remove the insulation. (Bd. Adj. 18) The Cardinales removed the insulation by placing the wire, along with wood and fuel oil, in a crude concrete bunker at the Site and then igniting it. (Bd. Adj. 16) The combustion of the insulated wire reduced the insulation to ash, but the copper remained wire. (Bd. Adj. 17) After the Cardinales burned the insulation off the wire, the ash from the insulation was taken to Franklin Smelting, which paid SIMCO for the ash and extracted any copper remaining in the ash. (Bd. Adj. 19)

The fact that SIMCO's insulated copper wire was processed at the Site is not in dispute. *See Crown Recycling v. DEP*, 1997 EHB 807. During the hearing, the Department presented evidence, through Department Project Officers, documenting Site conditions (Lewis, N.T. 30, 173; Panek, N.T.

9675 (CERCLA). Since the provisions in HSCA were modeled in many instances on those of CERCLA, we and Pennsylvania courts sometimes look to CERCLA decisions to assist with interpreting HSCA. *See General Electric Environmental Services, Inc. v. Envirotech Corp.*, 763 F. Supp. 113 (M.D. Pa. 1991) (finding the interpretations under CERCLA "highly persuasive" in interpreting similar sections of HSCA). Under Pennsylvania law, courts may consider the interpretation of similar statutes in order to interpret a Pennsylvania statute. *See* 1 Pa.C.S.A. § 1921(c)(5). In addition, HSCA makes numerous references to CERCLA. *See, e.g.*, HSCA §§ 102(7), (8), (12), 103, 301(2), (6), (7), (14), 502(a)(1),(e)(2), 504(a), (b) and 705(d).

276-277). The physical release of copper and lead was demonstrated by the copper and lead contaminated ash remaining on the Site and from air emissions during the burning of the wire. (Lewis, N.T. 34-47; Meyer, N.T. 381-383; Ex. C-18a, 18b). That these releases were attributed in part to SIMCO is shown by the shipments of copper wire and ash identified in invoices from SIMCO. (Cole, N.T. 197-203; Ex. C-8, C-10). Copper concentrations taken from various areas of concern (AOC)[9] at the Site ranged from 287 parts per million (ppm) to 406,000 ppm. (Cole, N.T. 208-209; Ex. C-18a) Dr. Eugene Meyer, the Department's expert, opined that lead was added to either the polyethylene (PE) or polyvinyl chloride (PVC) plastic as heat retardants. (Meyer, N.T. 375-378) He further testified that the open burning of this wire resulted in the deposit of ash containing copper and lead at the Site. (N.T. 381-383) His opinion was based on his experience, research of scientific and technical literature, and documents supplied by SIMCO. The range of lead concentration at various AOCs at the Site was from 49.3 ppm to a maximum concentration of 36,200 ppm. (Cole, N.T. 215-216; Ex. C-18b)

Arrangement for Disposal

The Department contends that SIMCO is also liable because it also arranged for the disposal of a hazardous substance at the Site as well as the treatment of the copper wire. While SIMCO's liability for response costs is incurred if it arranged for either treatment or disposal, SIMCO contends that it could not also be liable for having arranged for disposal of a hazardous substance because it could not have intended to dispose of those materials at the Site. To the contrary, SIMCO argues that

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[9] "Areas of concern" is a concept for delineating discrete areas of contamination that was developed by the contractor, Baker Environmental, Inc. (Baker Environmental) who prepared the work plan for the remedial investigation. (Cole, N.T. 220) Since the Site is located on bedrock, an area of concern can be described as an island of soil in the ocean of bedrock. (Cole, N.T. 220-221)

it made every arrangement to insure that the copper wire was returned to it and that all copper ash was shipped to Franklin Smelting so that all residual copper in the ash could be recovered by Franklin Smelting.

The Department bears the burden of establishing that SIMCO arranged for disposal of the ash generated during the burning of SIMCO's insulated copper wire at the Site. 25 Pa. Code § 1021.101(b)(2). *Environmental Protection Agency v. TMG Enterprises, Inc.*, 979 F. Supp. 1110 (W.D. Ky. 1997). Although "arrange for" is not defined by HSCA, "disposal" is. "Disposal" is defined to include "[t]he incineration, combustion, evaporation, air stripping, deposition, injection, dumping, spilling, leaking, mixing or placing of a hazardous substance . . . in a manner which allows it to enter the environment." 35 P.S. § 6020.103. The Board has previously determined that whether SIMCO is liable for arranging for disposal of a hazardous substance and whether intent is a necessary element of disposal liability were both issues of material fact for the hearing. *Crown v. DEP*, 1997 EHB 169, 180-181. The Board pointed out, however, that a likelihood exists that some of the residual copper may have been spilled onto the ground and that the incineration process may have resulted in air emissions containing copper.

The Department argues that intent cannot possibly be an element of proof under HSCA because Section 702(a) of HSCA states that "[a] person who is responsible for a release or threatened release of a hazardous substance from a site as specified in section 701 is *strictly liable*" for specified response costs and natural resource damages. 35 P.S. § 6020.702(a) (emphasis added). However, this strict liability would apply to SIMCO only if it were a responsible party under section 701(a) of HSCA by reason of its having arranged for the disposal of hazardous substances at the Site. 35 P.S. § 6020.701(a). Since arranger liability may require some element of intention, it is possible that strict

liability may not attach if there is clear evidence indicating that the arrangement was not intentionally aimed at disposal.

Because the provisions for arranger liability under HSCA are substantially the same as those under CERCLA, we think it is appropriate to look to court decisions under CERCLA for guidance. Although CERCLA does not expressly provide for strict liability of responsible parties, most federal courts have refused to consider the intent of responsible parties who send hazardous substances to a site. *See United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); *but see United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996).

SIMCO points out that the Court of Appeals for the Sixth Circuit granted a defendant's motion for summary judgment on the issue of arranger liability under CERCLA where the evidence conclusively showed that the defendants lacked the intent to dispose of residual hazardous substances. *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996). In that case, potentially responsible parties returned empty drums with residual levels of hazardous substances to a solvent manufacturer in order to recoup a deposit paid on the drums. In this case, however, SIMCO paid the Cardinales to burn insulation off of copper wire owned by SIMCO.

The evidence demonstrates that the disposal of hazardous substances at the Site as a result of the burning of SIMCO's wire was the necessary consequence of SIMCO's arrangement and not an accidental occurrence. Invoices were introduced into evidence documenting 1,643,200 pounds of insulated copper wire sent at various points of time between December 3, 1981 and May 30, 1986 by SIMCO to the Cardinales for processing at the Site. (Cole, N.T. 198-200; Ex. C-10) Additional invoices were introduced into evidence documenting 296,260 pounds of copper ash and 41,215

pounds of copper mud[10] sent by SIMCO from the Site to Franklin Smelting. (Cole, N.T. 200-202; Ex. C-8) It was established during the liability phase of the proceedings that open burning occurred in a non-enclosed area at the Site. (Finding of Fact 60) Testimony was introduced indicating that the Site is located at the top of a hill and is subjected to precipitation and wind. (Lewis, N.T. 30, 172-173; Panek, N.T. 276-277) The emissions from that burning therefore went directly into the atmosphere and particulates were deposited in the area due to wind or surficial waters. (Meyer, N.T. 383; Meloy, N.T. 544) In fact, SIMCO's expert testified that the open burning of PVC wire would cause lead and copper emissions which could be distributed by wind. (Meloy, N.T. 621) Additionally, ash generated from the burning of insulated wire was exposed to various weather conditions for an average of six and a half months, and on one occasion up to 12 months, prior to being shipped to Franklin Smelting. (Cole NT. 202-203; Ex. C-8)

However, SIMCO contends that since SIMCO believed that the Site was an environmentally controlled facility, SIMCO could not have intended to dispose of the incinerator ash at the Site. This position was outlined in the testimony of Bernard Schilberg, the executive vice president of SIMCO, in which he asserted that he believed that pollution controls were in place at the Site similar to the pollution controls in a facility which SIMCO operated in Connecticut but which he closed because it proved to be too costly. (Schilberg, N.T. 493-498)

The facts demonstrated, however, that this was not a reasonable belief. He never visited the Site to determine the nature of the incineration facility. (Schilberg, N.T. 525). In addition, Mr. Schilberg's own testimony indicates that he could not have reasonably believed that the Site was an

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[10] Copper mud is a byproduct generated at a wire mill during a drawing operation where copper rod is taken and drawn down into wire. The chips of copper drop to the bottom of the tank where the drawing process is taking place as a mixture of chips and lubricant. (Schilberg, N.T. 513)

environmentally controlled facility. According to Mr. Schilberg, in 1981 it cost SIMCO seven and a half cents per pound of copper wire to operate its Connecticut incinerator facility with pollution controls, including afterburners and a stack. (Schilberg, N.T. 493, 514) SIMCO has since had to cease operating its facility as an incinerator because it became uneconomical to continue to burn lower grade material and is now operating it for processing. (Schilberg, N.T. 493) SIMCO paid the Cardinales four cents per pound of copper wire for their services. (Schilberg, N.T. 514) SIMCO had an arrangement with the Cardinales which required the Cardinales to drive approximately two and a half hours to pick up the insulated wire at SIMCO's Connecticut facility, drive approximately two and a half hours to take the material to the Site, remove the insulation, return the copper reclaimed, and transport the ash to Franklin Smelting in Philadelphia. (Schilberg, N.T. 477, 514, 515) Mr. Schilberg testified that he did not know whether, in fact, it was SIMCO's ash that the Cardinales shipped to Franklin Smelting. (Schilberg, N.T. 512)

Mr. Schilberg testified that the purpose of this arrangement was to produce two streams of revenue: (1) the reclaimed copper sent back to SIMCO's facility in Connecticut; and (2) the ash sent to Franklin Smelting. (Schilberg, N.T. 479) However, this arrangement evidently generated a low profit margin for SIMCO. (Schilberg, N.T. 486) In addition, the Cardinales did not derive any revenue from SIMCO or from Franklin Smelting for the amount of ash that was sent to Franklin Smelting. (Schilberg, N.T. 484) Since it cost SIMCO almost twice as much to operate a pollution controlled facility compared to what it cost SIMCO to pay the Cardinales, SIMCO could not have reasonably believed that the Cardinales were processing SIMCO's wire in an environmentally sound manner or with the benefit of pollution controls. *See also Courtlands Aerospace, Inc. v. Hoffman,* 826 F. Supp. 245 (E.D. Ca. 1993); *Environmental Protection Agency v. TMG Enterprises,* 979 F.

Supp. 1110 (W.D. Ky. 1997) (where generators were found liable under CERCLA for having arranged for disposal of hazardous substances).

Based on this evidence, we believe that SIMCO fully intended that treatment of its wire would necessarily result in the disposal of hazardous substances at the Site, including residual copper. Accordingly, even if HSCA does require proof of intentionality in order to impose arranger liability, we believe that the Department met its burden of proof to demonstrate that SIMCO is liable as an arranger for the disposal of hazardous substances at the Site.

Liability for Dioxins at the Site

The most difficult factual issue in this case is whether or not the burning of SIMCO's wire contributed to dioxins at the Site. Resolution of this issue turns primarily on the weight which we give to the conflicting expert testimony presented by the parties.

The Department asserts, based on the expert testimony of Dr. Meyer, that the open burning of SIMCO's insulated copper wire produced dioxin which contributed to the dioxin contamination at the Site. SIMCO asserts that the Department has failed to meet its burden of proof with respect to the claim that SIMCO is responsible for the presence of dioxin at the Site, relying primarily on the testimony of its expert, Kelly Meloy.

Dr. Meyer testified as an expert process chemist. (N.T. 361, 368) Dr. Meyer worked for the United States Environmental Protection Agency (EPA) as Regional Expert in the Chemistry of Hazardous Waste from 1979 through 1982 and Chief of the Technical Program Section of the Air and Hazardous Materials Division for one year during that period. (Meyer, N.T. 358-359, 410) During his tenure with EPA, Dr. Meyer's responsibilities included reviewing RCRA permit applications for facilities that incinerate hazardous waste and diminishing the dioxin concentration in emissions from

such incinerators was a primary issue of concern. (Meyer, N.T. 440) He has since formed his own consulting business and his work now primarily entails reviewing manufacturing processes that occur at various plants around the country to determine what waste streams are generated. (Meyer, N.T. 359-360) In addition to publishing several peer review articles, Dr. Meyer is the author of two chemistry books, including a textbook written primarily for firefighters. (Meyer, N.T. 359-360) This textbook addresses the combustion of hazardous and inert materials and PVC materials found in homes which could expose firefighters to hydrogen chloride, dioxin and lead. (Meyer, N.T. 360, 460) Finally, Dr. Meyer has been involved in two federal cases involving the burning of insulated copper wire. (Meyer, N.T. 365)

The basis for his testimony was Dr. Meyer's understanding from reviewing the testimony that from 1981 through 1986, SIMCO sent approximately 30,000 pounds of wire per month to the Cardinales for a period of approximately four and a half years. (Meyer, N.T. 371-372, 378) The ash from the burning of SIMCO's wire remained at the Site for an average of six and a half months before it was shipped to Franklin Smelting. (Cole, N.T. 203; Ex. C-8) Dr. Meyer stated that SIMCO's pre-hearing memorandum revealed that some of its wire processed by the Cardinales contained PVC. (Meyer, N.T. 377-378; SIMCO pre-hearing memorandum, ¶¶ 4, 6) Dr. Meyer opined that some of SIMCO's 1.6 million pounds of copper wire contained lead additives that were added to either the PE or PVC plastic as heat retardants. (Meyer, N.T. 375-376)

A number of compounds are collectively referred to as dioxin. (Cole, N.T. 217) Dr. Meyer described the molecular structure of dioxin in detail. (Meyer, N.T. 389) From samples taken at various AOCs at the Site, dioxin concentration ranged from less than 1 ppb to a maximum concentration of 16.68 ppb. (Cole, N.T. 219; Ex. C-18c) Dr. Meyer proffered his expert opinion that

"at least some of the dioxin that has been identified in the samples of soil and ash collected at the [Site] originated from the processing of SIMCO's insulated copper electrical wire." (Meyer, N.T. 380-381)

He based his opinion that the open burning of SIMCO's wire created dioxins on his general knowledge of the combustion process as well as various technical and scientific literature articles to conclude that dioxin is formed as a product of the incomplete combustion of PVC. (Meyer, N.T. 381) According to Dr. Meyer, chemists distinguish between two types of combustion: incomplete and complete combustion. (Meyer, N.T. 381) Incomplete combustion occurs most typically in the open where the amount of fuel and air and the temperature cannot be regulated. (Meyer, N.T. 381) Dr. Meyer described combustion during open burning as "a very turbulent phenomenon" where smoke carrying particulates of the ash generated during the combustion process is ejected from the burning site. (Meyer, N.T. 382-383) Dioxin is a byproduct of the incomplete combustion of chlorinated substances, such as PVC. (Meyer, N.T. 382) Complete combustion, by contrast, occurs in an incinerator with a combustion box where the amount of fuel and air and the temperature can be regulated. (Meyer, N.T. 382) Carbon dioxide, water vapor, and minute amounts of dioxin are byproducts during complete combustion. (Meyer, N.T. 382)

Dr. Meyer has personally observed the open burning of insulated copper wire. (Meyer, N.T. 384-386) Depending on the environmental conditions at a site during open burning, wind may carry the smoke and subsequently deposit particulates on the surface soils. (Meyer, N.T. 383) In addition, water can percolate through any stored ash and carry the contaminants within the ash down to the soils where they could be further moved by the movement of surficial waters. (Meyer, N.T. 383)

Ms. Meloy testified that dioxins are not formed by the open burning of PVC. Ms. Meloy believes that three primary things are necessary to cause the creation of dioxin: (1) the presence of fly ash and hot gases that have evolved from the combustion zone in a post-combustion zone[11]; (2) the temperature range, approximately 300 to 400 degrees Centigrade, within which dioxins have shown to be formed; and, (3) sufficient residence time within that narrow temperature window within the post-combustion chamber so that the gases and fly ash can complete the reaction to produce dioxin. (Meloy, N.T. 551) Ms. Meloy asserts that the lack of residence time in open burning precludes the formation of dioxins. (Meloy, N.T. 551-552) Ms. Meloy also testified that she has reservations about samples taken from the Site which indicate the presence of dioxin because there are known interferences when analyzing for dioxin which she contends were not taken into consideration when the data was analyzed. (Meloy, N.T. 552-564)

Ms. Meloy worked for the Department for a year and a half reviewing municipal landfill applications, inspecting municipal landfills, and evaluating the chemical and physical characteristics of waste streams generated by industry to determine what landfills could appropriately handle the waste. (Meloy, N.T. 534) She worked in the Hazardous Waste Permitting Division of the Texas Department of Water Resources for five years and then as an environmental consultant for six years in the arena of environmental site investigation and remediation. (Meloy, N.T. 535, 536) Since 1994 when she founded her own consulting company, she has evaluated sites to establish the degree of subsurface contamination and determine the appropriate cleanup remedies. After reviewing the records involved in this case and conducting a literature search of scientific and technical research

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[11] Ms. Meloy described a post-combustion zone as being located downstream from the combustion zone. For instance, in an incinerator with a primary combustion chamber, the stack would constitute the post-combustion chamber. (Meloy, N.T. 546-547)

relating to dioxin, Ms. Meloy opined that dioxins are not formed during the open burning of PVC-coated wire and were thus not created during the open burning of SIMCO's copper wire. (Meloy, N.T. 541-542, 545-546, 569-570)

We are inclined to credit the testimony of Dr. Meyer rather than the testimony of Ms. Meloy in reaching the conclusion that some dioxins at the Site were created by the burning of SIMCO's wire based in large part on Dr. Meyer's more direct experience in the study of open burning of PVC wire. His opinion is also supported, at least in part, by a peer review article published in Chemosphere which reported on the production of open burning conducted in small scrap wire and scrap car incineration. (N.T. 454; Ex. C-24) While SIMCO points out that this study is not conclusive because the dioxins may have come from the incineration of the incompletely combusted petroleum products in the cars, our examination of the study leads us to conclude that it does provide support to Dr. Meyer's testimony. Ms. Meloy, by contrast, offered no studies which indicated that dioxins would not be produced through open burning of PVC wire.

SIMCO's attacks of Dr. Meyer's testimony as being self-contradictory misses an essential point of his testimony on the subject of open burning. As SIMCO points out, he testified that cuperic and lead oxide would be formed at the relatively high hundreds of degrees Centigrade. (Meyer, N.T. 429-430) SIMCO says that this temperature range is far in excess of the 400 decree Centigrade temperature range necessary for the formation of dioxins. (Meyer, N.T. 436) However, the principal point of Dr. Meyer's testimony is that dioxins were formed in open burning as a result of incomplete combustion precisely because the temperatures cannot be controlled in open burning. (Meyer, N.T. 435)

We also note that SIMCO's pre-hearing memorandum twice stated that the burning of SIMCO's insulated wire did not contribute *in any appreciable manner* to the concentrations of dioxins already present at the Site. (SIMCO pre-hearing memorandum, ¶ 93) In addition, SIMCO's pre-hearing memorandum described Ms. Meloy's testimony as providing an opinion that the burning of any organic material, including wood, can result in the generation of dioxins and that the incineration of PVCs or PE wire does not contribute "in any appreciable manner" to the levels of dioxin stemming from the combustion of organic material at the Site. (SIMCO pre-hearing memorandum at 26-27) We cannot ignore the apparent admission that the burning of SIMCO's wire contributed to some dioxins at the Site. Under CERCLA case law, it is clear that even minimal contributions of a hazardous substance will result in liability. *See, e.g., Environmental Protection Agency v. TMG Enterprises,* 979 F. Supp. 1110, 1119 (W.D. Ky. 1997).

The Divisibility Defense

SIMCO argues that liability under HSCA is not joint and several where the harm or damages are divisible and reasonably capable of apportionment. It asserts that it is liable, at most, for the harm caused by the presence of 13 tons of copper and lead bearing ash.

Although HSCA expressly provides for joint and several liability, a limited defense is available based upon the common law doctrine of divisibility of harm as stated in the Restatement (Second) Torts § 433A (1965). *See United States v. Alcan Aluminum Corp.,* 964 F.2d 252, 268-269 (3d Cir. 1992).

Section 433A of the Restatement provides:

(1) Damages for harm are to be apportioned among two or more causes where
(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each to a single harm.

(2) Damages of any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts § 433A (1965).

Under the affirmative defense based upon the divisibility of harm rule in section 433A, where two or more joint tortfeasors act independently and cause a distinct harm or single harm for which there is a reasonable basis for determining the contribution of each to that single harm, then each is liable only for its contribution to the single harm. But where each tortfeasor causes a single indivisible harm, then damages are not apportioned and each is jointly and severally liable for the entire harm. *United States v. Monsanto Company*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989); *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 276 (D. Colo. 1994). The decision of whether to impose joint and several liability therefore turns on whether there is a reasonable basis for dividing liability, which is a question of law. *Broderick*, 862 F. Supp. at 276. *See also Restatement (Second) Torts* § 434(1)(b), (2)(b), *comment d.* If the harm is capable of being divided among its various causes, the actual apportionment of the harm is a question of fact. *Id.* Based on these common law principles, SIMCO may escape liability for response costs if it either succeeds in proving that its hazardous wastes did not contribute to the release and the clean-up costs that followed, or contributed at most to only a divisible portion of the harm. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992).

The principles of the defense of divisibility of harm must not be confused with principles of "apportionment" in which equitable factors are applicable only in an action for contribution. The court in *United States v. Western Processing Company, Inc.*, 734 F. Supp. 930, 938 (W.D. Wash. 1990) (citation omitted) explained the issue of apportionment as follows:

> There are two distinct contexts in which the issue of "apportionment" arises. It is critical that these two different contexts are not confused. In the first context, the question is whether the harm resulting form two or more causes is indivisible, or whether the harm is capable of division or apportionment among separate causes. If there is a single harm that is theoretically or practically indivisible, each defendant is jointly and severally liable for the entire injury. However, if there are distinct harms that are capable of division, then liability should be apportioned according to the contribution of each defendant.
>
> The second context in which the issue of "apportionment" arises occurs after the first inquiry regarding the indivisibility of the harm. If the defendants are found to be jointly and severally liable, any defendant may seek to limit the amount of damages it would ultimately have to pay by seeking an order of contribution apportioning the damages among the defendants.

In deciding an appeal from a district court, the Court of Appeals for the Fourth Circuit stated that the trial court did not abuse its discretion in determining that allocation was a matter more appropriately considered in an action for contribution between responsible parties after the plaintiff has been made whole. *United States v. Monsanto Company*, 858 F.2d 160, 173 (4th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989)(citation omitted). In fact, section 705 of HSCA permits apportionment of damages in a contribution action:

> (b) Allocation. In a civil action in which a liable party seeks a contribution claim, the court, or the board in an action brought under section 507 or 1101, shall enter judgment allocating liability among the liable parties. Allocation shall not affect the parties' liability to the department. The burden is on each party to show how liability should be allocated. In determining allocation under this section, the court or the board may use such equitable factors as it deems appropriate.

35 P.S. § 6020.705.

These equitable principles applicable in a contribution action should not be confused with the defense of divisibility. Much of the authority relied upon by SIMCO for its claim that it is entitled to an apportionment of the costs of response arises from contribution actions and are simply not applicable to the issue before the Board. SIMCO argues that this is unjust because all of the other parties have settled with the Department and may not now bring a contribution action for equitable

apportionment against other responsible parties. We reject this argument. One of the principal considerations a party has to evaluate in any action against joint tortfeasors is the possibility that a failure to enter into a settlement agreement with the plaintiff early in the litigation may result in bearing a disproportionate responsibility for the plaintiff's claims if other defendants settle by way of a joint tortfeasor release or a covenant not to sue. Having taken the risk of refusing to enter into a settlement agreement until all other financially responsible parties have settled, SIMCO can hardly complain of the consequences of its decision to defend the Department's claim.

SIMCO's Claim of Divisibility. Ms. Meloy testified, based on her knowledge of insulated wire and the amount of wire that SIMCO sent to the Site for treatment and the amount of the ash that was sent to Franklin Smelting for treatment, that the maximum volume of SIMCO's ash that could have been left at the Site amounted to 13 tons. (Meloy, N.T. 571-576, 645) Accordingly, she testified that the cost of excavation, transportation and disposal of ash should be limited to the same 13 tons of contaminated soil. (Meloy, N.T. 581-583) She further testified that copper and lead oxides have extremely low migratory potential, relatively low toxicity, and no synergistic effect. (Meloy, N.T. 575-576, 654) Therefore, according to Ms. Meloy, the contaminants discovered in other areas at the Site were not worsened by the addition of the lead and copper from the incineration of SIMCO's wire. (Meloy, N.T. 582) This testimony and argument depends in large part on Ms. Meloy's conclusion that dioxins were not created by the open burning of SIMCO's wire so that the cost of cleaning and removal of scrap metal could not be attributed to SIMCO.

The Department's Response. The Department states that SIMCO has failed to prove that the harm to soils is divisible because the wastes, including metals, placed there by many parties are intermixed so as to make it clear that there is only a single harm to the soils. The Department argues

that under Pennsylvania's Contribution Among Joint Tortfeasors Act,[12] once two or more parties are found liable for a single harm, they are jointly and severally liable to the plaintiff without any apportionment or divisibility relief available except in the context of settlement and contribution actions. The Department states that SIMCO approached the issues of relative toxicity, migratory potential and synergistic effect only of its own waste, in a very limited fashion, and not with respect to other materials at the Site.

We conclude that the harm done to the soils is not divisible and that SIMCO has failed to demonstrate a reasonable basis for determining the contribution of each party to the single harm to the soils. We do so based primarily on the decisions of the federal courts in the *Alcan* litigation. In that line of cases, Alcan Aluminum Corp. (Alcan) contended that its substance, which consisted of an emulsion with only trace amounts of metals below ambient levels, could not have contributed to a release because the contribution of increased metals to the Susquehanna river was zero. The United States Court of Appeals for the Third Circuit held that Alcan was entitled to a hearing on divisibility. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992). The court stated, among other things, that a factual issue might be presented as to whether the trace levels of metals might become concentrated and thereby cause an environmental threat. *Alcan,* 964 F.2d at 270. The court also rejected the Government's argument that there could be no divisible harm because the wastes were commingled with the wastes of other generators. The court determined that "commingled" waste is not synonymous with "indivisible" harm. *Id.* at 270, n.29.

Shortly thereafter, the United States Court of Appeals for the Second Circuit issued a very similar opinion based in large part on the opinion of the Court of Appeals for the Third Circuit. *See*

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[12] 42 Pa.C.S.A. §§ 8321-8327.

United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993) This opinion said that Alcan should have the opportunity to show that the harm caused was capable of reasonable apportionment through evidence relevant to establishing divisibility of harm, such as proof disclosing the relative toxicity, migratory potential, degree of migration and synergistic capacities of the hazardous substances at the site. Alcan had submitted affidavits indicating that the contamination at the site was caused by organic chemicals and that the metals in its emulsion, for which the Government sought to find it liable, were insoluble compounds. The Government countered with a declaration that metals in Alcan's emulsion were found at the site and that the metals contained in the Alcan emulsion might become water soluble through reaction with other substances at the site. The Court of Appeals directed a hearing on these issues.

On remand of the first of these cases to the United District Court for the Middle District of Pennsylvania, a hearing was held. The trial court found that Alcan had not met its burden of proof of divisibility because its proof related only to the metals in the emulsion and not to the entire emulsion. *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648 (M.D. Pa. 1995), *aff'd.* 96 F.3d 1434 (3d Cir. 1996), *cert. denied,* 117 S. Ct. 2479 (1997).

We conclude that the rule of divisibility of harm defense as promulgated by the *Alcan* cases has no application to the circumstances here. After the first of the decisions in the *Alcan* litigation, the United States Court of Appeals for the Third Circuit held that there is no basis for apportionment under CERCLA where the generator fails to show that none of the contamination at the site is attributable to it. *United States v. Rohm & Haas Company,* 3 F.3d 1265, 1280 (3d Cir. 1993). No contention is made in this case that the metals contributed to the Site by SIMCO were below background levels or were not found at the Site. Indeed, it is clear that SIMCO's copper wire

contributed lead as well as copper to the Site. SIMCO does not contend that these levels were at or below background levels. In addition, we have credited the testimony of Dr. Meyer to find that the incineration of SIMCO's wire resulted in the disposal of some portion of the dioxins found at the Site. Finally, the evidence as to toxicity, migratory potential and synergistic effect presented by Ms. Meloy was not sufficiently specific as to permit a finding of divisibility. She only testified that the toxicity and migratory potential were low. She could not tell where the metals from SIMCO's wire were located at the Site, and could only give a theoretical calculation as to how much of the ash might have come from SIMCO's wire.

SIMCO's counsel presented a number of theories as to how the costs of response could be segregated and presented an appealing argument that there was a reasonable basis for apportionment of the response costs based on the volume of copper and lead contributed by SIMCO to the Site. However, these contentions do not sustain the burden of proof of divisibility of harm to the soils caused by the incineration of SIMCO's wire at the Site. Additionally, SIMCO's reliance on *Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.*, 1996 U.S. LEXIS 14446 at *209 (E.D. Pa. 1996) is misplaced. As the Department points out, that case was a private party action for contribution and has no application under HSCA to a suit by the Government.

Recoverable Response Costs

The Department claims that it is entitled to recover the costs of its interim response at the Site and reserves the right to proceed against SIMCO for future costs of remediation. The amount of response costs for which SIMCO may be found responsible is $562,706. The Department's cost recovery package (Ex. C-22) contains evidence of total costs of response in the amount of

$3,727,706.[13] The Department's Ex. C-22 contains invoices and time records related to the cost of the Government's response actions at the Site. It includes the affidavit of Ronald Flory, the Department's Director of the Bureau of Financial Management, that the Department's site specification contracted costs as of March 30, 1998 amounting to $3,095,265.17. His affidavit further states that the time value of accumulated labor relating to the Department's response action at the Site was $578,202.47. This amount represents the cost of the Department's response activities at the Site from October 1, 1989 through March 30, 1998 in the Bureau of Land, Recycling and Waste Management and from July 1, 1996 through March, 1998 in the Department's Office of Chief Counsel. This includes the cost of bid specifications development in the amount of $192,883. (Ex. C-22, pp. 205.1-205.9) In addition, Ex. C-22 contains the verification of Robert Clark of the Office of Chief Counsel that the Office of Chief Counsel and its Bureau of Investigation's payroll and operating expenses, including indirect expenses related to the Site, amounts to $54,239.35 for the time period July 1, 1990 to June 30, 1996. Section 507(b), 35 P.S. § 6020.507(b), of HSCA specifically authorizes the recovery of the Department's administrative and legal costs as response costs.

For purposes of calculating SIMCO's responsibility for response costs, SIMCO must be given two credits. The Department acknowledges that SIMCO is entitled to credit for all costs connected with the remediation of the groundwater at the Site since the harm done to the groundwater is clearly divisible from the damage done to the soils. A portion of this cost for which SIMCO is not responsible is $41,398 for the cost of providing bottled water to residents affected by the

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[13] SIMCO stipulated that these records were authentic records of the Department's response costs rather than requiring the custodian of these records to appear as a witness at the hearing. (N.T. 17-20) The testimony of the Department's Project Officers at the Site also describes the nature of many of these costs and supported the conclusion that these records were prepared in the ordinary course of the Department's official activities.

contamination of the water. The Department also acknowledges that SIMCO is entitled to full credit for the amounts paid in settlement by the other defendants in this case in the total amount of $3,165,000.

The Department's post-hearing brief categorizes all of its response costs as the costs of the prompt interim response, the remedial investigation, the risk assessment/ feasibility study and scrap metal removal. The Department's post-hearing brief asserts that each of these activities is an "interim response" within the meaning of HSCA.

Prompt Interim Response. The costs of the prompt interim response were testified to by Mr. Lewis. He testified that this work included the costs for on-site activities such as site surveys, construction of a fence to prevent site access, and the removal of ash. He reviewed and approved the invoices for this work which are included in Ex. C-22, and testified that all of these costs were properly incurred during the interim response action. (Lewis, N.T. 49-53; Ex. C-22, pp. 171-202) The cost of the Department's contractors for their work in this portion of the response, including the installation of monitoring wells, is in the total amount of $392,259.47. (Lewis, N.T. 52-55; Ex. C-22, pp. 126-138) The costs of this interim response were incurred during the time period from March 11, 1990 to August 15, 1992. (Lewis, N.T. 50; Finding of Fact Nos. 20-33)

Remedial Investigation. Woodrow Cole succeeded Mr. Lewis as the Department's Project Officer at the Site. The remedial investigation was a standard study utilized in all hazardous site investigations. The investigation was conducted in December, 1992 and the remedial investigation report was subsequently submitted in June, 1993. (Ex. C-12) Accordingly, this study took less than two years to complete. Mr. Cole prepared the scope of work which the contractor followed in conducting this study and in preparing the report. He oversaw the work of the contractor and saw that

the drafts of this report were read and commented upon by appropriate DEP personnel. (Cole, N.T. 203-205) The contractor cost for the completion of the remedial investigation was $180,111.30. (Ex. C-22, pp. 27, 44) Since IT Analytical Services performed all sample analyses except asbestos, some of the laboratory costs on page 566 of Ex. C-22 are attributable to the remedial investigation. (Finding of Fact Nos. 34, 37)

Risk Assessment/ Feasibility Study. Mr. Cole also supervised the development of the risk assessment feasibility study. He described the work done in connection with the risk assessment and the feasibility study and the cost of that work. He developed the scope of work for these studies which the contractors followed for the remedial investigation, risk assessment and feasibility study. He reviewed the invoices submitted for this work to assure that they were correct and made corrections where necessary. (Cole, N.T. 223-228). He testified to the amount of these costs as shown by Ex. C-22. (Cole, N.T. 225-227) A more complete description of the work done by the contractors for these studies is contained in Ex. C-22, pp. 95-125. This phase of the interim response action was conducted during August, 1990 to January, 1992 and April, 1992 to August, 1993. (Cole, N.T. 225) The purpose of the studies in this phase of the response action is to delineate the extent of the contamination, assess the risks presented by the contaminants at the Site as a framework for the later development of cleanup standards and to identify and evaluate potential remedial alternatives for the Site. (Cole, N.T. 204, 223-224; Finding of Fact Nos. 35-37)

Scrap Metal Removal. This phase of the response action was testified to by Paul Panek, who took over as the Department Project Officer from Mr. Cole. He testified that this initial remedial action was necessary because there was scrap debris all over the Site. (Panek, N.T. 278) It was in the way and was mixed with the contaminated ash. There was visible dirt on the metal and wipe tests

indicated that they were contaminated with PCB's and dioxins. (Panek, N.T. 278-279) The response included high pressure washing of the metal and disposal. (Panek, N.T. 280-281) He testified that the total cost of this phase of the response was $1,700,000. (Panek, N.T. 281-282) He testified to the Department's response cost package, Ex. C-22, by identifying all the documents related to the scrap removal. (Panek, N.T. 289) Mr. Panek also testified to the work done following the scrap removal. This included the preparation of the bid specifications package for the remedial action as well as the costs of legal time. (Panek, N.T. 290-294; Finding of Fact Nos. 38-46)

SIMCO claims in both its motion for directed verdict and its post-hearing briefs that this evidence is insufficient to prove recoverable response costs because virtually all of these costs are "costs of remedial response" within the meaning of section 702(a)(2) of HSCA, 35 P.S. § 6020.702(a)(2), which requires proof that these costs are "reasonable and necessary." Since the witnesses did not testify that each invoice and time record was reasonable and necessary, SIMCO believes that the Department has failed to meet the required standard of proof of its response cost.

The Department responds to this argument, in part, with the claim that HSCA creates a presumption that all of the Government's response costs are reasonable and necessary unless the Defendant can show that the Department's action was arbitrary and capricious on the basis of the administrative record as developed under section 506 of HSCA, 35 P.S. § 6020.506. The Department says that section 507(e), 35 P.S. § 6020.507(e), requires that a challenge to any decision of the Department, with respect to a response action, be made on the administrative record and that the party making the challenge shall have the burden of proving the Department's action to be arbitrary and capricious. The Department also refers to decisions under CERCLA in which the courts have held that the responsible party has the burden of proving that the costs incurred were inconsistent with the

National Contingency Plan.[14]

We base our decision that the Department has met its burden of proof for all of the response costs claimed by it on the following brief review of the applicable statutory provisions. Section 507(a), 35 P.S. § 6020.507(a), states the general rule that a responsible party "shall be liable for the response costs and for damages to natural resources." Section 507(e) provides that the Department's right to recover its response costs "shall be upheld unless the liable person can demonstrate that the Department acted arbitrarily and capriciously on the basis of the administrative record developed under section 506 as permitted to be supplemented under section 508." 35 P.S. § 6020.507(e). In *Department of Environmental Resources v. Bryner*, 636 A.2d 227 (Pa. Cmwlth. 1993), the court granted the Department's motion for entry of response costs based on its conclusion that the response action was reasonable at the time it was taken and the defendants had failed to establish that the Department acted in an arbitrary and capricious manner in incurring the costs associated with the interim response action.

This may not end the burden of proof on the nature and the amount of the costs, however, for two reasons. The first is that section 506(a), which lists what must be included in the administrative record for a response action, does not make the nature or amount of the response costs part of the administrative record. 35 P.S. § 6020.506(a). It requires information relating to the release and to the selection, design and adequacy of their response action. 35 P.S. § 6020.506(a)(2). It also requires public notice as to the nature of the response action considered, public comment on that notice and the Department's statement identifying the basis and purpose for its description of alternatives

[14] We conclude that this body of case law under CERCLA is not applicable to proof of costs under HSCA.

considered. 35 P.S. § 6020.506(a)(1), (3), (4), (5). However, section 506 does not even contemplate the inclusion of the actual costs of the response action in the administrative record. 35 P.S. § 6020.506.

The second reason is that the provisions of section 702, 35 P.S. § 6020.702, appear to require the Department to present some proof of the actual costs of response. Section 702(a) defines the scope of liability to be, among other things:

> (1) Costs of interim response which are reasonable in light of the information available to the department at the time the interim response action was taken.
> (2) Reasonable and necessary or appropriate costs of remedial response incurred by the United States, the Commonwealth or a political subdivision. . . .

35 P.S. § 6020.702(a). This provision suggests that however much the Department is entitled to recover its response costs, the Department has some burden of proving that its claimed costs of response were reasonably incurred.[15]

If the costs are "interim response" costs, the Department's burden is limited to proof that the costs were reasonable in the light of information available to the Department at the time the interim response was taken. 35 P.S. § 6020.702(a)(1). If the costs are "remedial" response costs under section 702(a)(1), 35 P.S. § 6020.702(a)(1), the Department must show that the costs were "reasonable and necessary or appropriate costs of response." 35 P.S. § 6020.702(a)(2). HSCA does not really define the critical terms used in this section. A "response" is defined as virtually any action to protect the present or future public health, safety or welfare of the environment. 35 P.S. § 6020.103. It is also

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[15] We also think it significant that section 507(d), 35 P.S. § 6020.507(d), expressly provides a presumption for recovery of an assessment of natural resource damages, but creates no similar presumption for the amount of the Department's response costs.

clear that interim response costs may be incurred both before and after the preparation of the administrative record. 35 P.S. § 6020.505(b). However, the definition of "interim response" only places cost and time limitations of $2,000,000 and 12 months duration on the interim response unless an exception applies. An interim response is not otherwise defined. 35 P.S. § 6020.103. The uncertainty of the remaining terms is compounded by the definition of "remedial response or remedy" which is defined as "[a]ny response which is not an interim response." 35 P.S. § 6020.103.

We interpret the term "interim response" to mean response actions taken prior to the development and execution of a remedial action. Certainly the response actions taken under the category of prompt interim response were interim response actions, and we find that two of the three other categories of response action described above are interim responses in that they were taken prior to the execution of a final remedial action for the Site. Having reviewed the testimony of Mr. Lewis, we conclude that the costs which were incurred in this phase of the response were "reasonable in light of the information available to the Department at the time the interim response action was taken" within the meaning of section 702(a)(1), 35 P.S. § 6020.702(a)(1).

We also believe that the remedial investigation and the risk assessment/ feasibility study portions of the response may also be categorized as an interim response. These studies are routinely done in connection with sites contaminated with hazardous substances as a necessary step to devising the final remedial response. Since these studies are interim actions necessary to the development of a final remedial action, they may be categorized as an interim response. The testimony of Mr. Cole persuades us that the incurrence of these costs was reasonable and necessary in light of the information available to the Department at the time, so that the Department's evidence is sufficient to meet the requirements of section 702(a), 35 P.S. § 6020.702(a).

We agree with SIMCO that the scrap metal removal and the preparation of the bid package for the final remedial action are remedial costs. Indeed, the Department described the scrap metal removal in its pre-hearing memorandum as the first phase of the remedial action. However, we find that the Department met its burden of proving that these costs were reasonable, necessary and appropriate and that SIMCO has failed to prove that it was not liable for these costs based on its defense of divisibility.

Mr. Panek testified that the initial phase of the remedial response action was the scrap removal phase. (Panek, N.T. 276, 277) Mr. Panek testified that it was necessary to remove the scrap material from the Site surface "because the scrap debris was all over the Site. . . . It was mixed with the soil and contaminated ash and it was covering areas which were inaccessible and it was necessary to conduct a final remedial response action." (Panek, N.T. 278) The Department had concerns about the visible dirt that was on the scrap materials because previous sampling data indicated the presence of dioxins and polychlorinated biphenyl (PCB). (Panek, N.T. 278-279) The results of a subsequent wire sample study revealed that what scrap material was visibly clean was indeed clean and what was visibly dirty was contaminated with dioxin and PCB. (Panek, N.T. 279, 280)

The Department decided to decontaminate the scrap that was visibly dirty. (Panek, N.T. 280) First, the Department conducted a decontamination pilot study to determine the effectiveness of the decontamination process. (Panek, N.T. 280) Then the material had to be segregated from the contaminated soil and ash. (Panek, N.T. 282) Next, the scrap metal was decontaminated and salvaged (recycled) and the residual waste was disposed of. (Panek, N.T. 355) The total cost incurred by the Department for the scrap removal phase was approximately $1.7 million. (Panek, N.T. 281-282) The costs for the scrap removal are identified on pages 139-170 of the cost recovery package for the Site.

(Panek, N.T. 289; Ex. C-22) Because it was necessary to remove dioxins from the scrap metal, SIMCO has not met its burden of proof that the cost of removal of the white goods are divisible from the harm caused by other defendants.

We reject SIMCO's arguments that the response costs relating to the activities that we have categorized as interim response actions cannot all be recovered in this action because of the time and cost amount limitation contained in section 103, 35 P.S. § 6020.103. First of all, nothing in HSCA suggests that these interim responses need to be aggregated for purposes of these limitations. As indicated above, no one of the three activities which we have categorized an "interim response" exceeded the time and dollar amount limitations. Second, the evidence in the record describing the conditions of the Site is sufficient to prove the existence of two of the four exceptions to these limitations set forth in section 103, 35 P.S. § 6020.103. The evidence of the conditions of this Site are clearly sufficient to demonstrate that there was an immediate threat to public health, safety or the environment. In addition, we believe that the Department was not obliged to present formal testimony that assistance would not otherwise be provided on a timely basis. The operators of the facility had long since abandoned the facility. While EPA initially investigated the Site, it obviously decided not to remedy the Site under CERCLA.

SIMCO's argument that these were nearly all remedial response costs within the meaning of section 702(a)(2), 35 P.S. § 6020.702(a)(2), requiring proof that the costs were both necessary and reasonable, is self defeating. If this interpretation of HSCA is adopted, then SIMCO has the burden of proving on the administrative record that the Department's incurrence of these costs was arbitrary and capricious. In addition to the provisions of section 507(e), 35 P.S. § 6020.507(e), requiring the responsible party to prove arbitrary or capricious action, section 508, 35 P.S. § 6020.508, places the

same burden on the responsible party in a challenge to the selection and adequacy of a remedial action. More importantly, however, we find that the prompt interim response, the remedial investigation, the risk assessment and feasibility study were all interim responses. (Finding of Fact Nos. 85, 86)

The Response Was Not Arbitrary or Capricious

SIMCO did not bear its burden of proving that the incurrence of any portion of the response costs by the Department was arbitrary or capricious. In its post-hearing briefs, SIMCO claims that the costs associated with the work of Baker Environmental's installation of the monitoring wells in bed rock were unreasonably incurred. Ms. Meloy testified that these wells could be of no reasonable assistance in determining whether contamination was in fact present at the Site because the bedrock was fractured and the wells were not fully developed. (Meloy, N.T. 586-590, 655-667) Mr. Lewis testified that the purposes of the wells was to determine whether PCE and other contaminants were coming off the Site and how decisions were made as to the placement of the wells. (Lewis, N.T. 71, 689-700) The wells disclosed the presence of metals in the groundwater which were present in the soils. (Lewis, N.T. 125-130) The contaminant PCE found in the wells led to the determination that groundwater remediation was appropriate. (Lewis, N.T. 150, 696) We conclude from this testimony that the Department believed at the time that this work was necessary and would lead to significant findings. The fact that the Department subsequently determined that it was not necessary to complete the wells, thus increasing its response costs (Lewis, N.T. 125-132), fails to demonstrate that the costs were incurred without a belief that they were necessary or indicate that the incurrence of these costs was arbitrary or capricious.

SIMCO contends that certain costs were included within the Department's cost recovery

request without any testimony offered as to what those costs represent or why they were incurred. We find their claim to be without merit. The invoices from the Maintenance Equipment Rental Company clearly constitute part of the interim response in that they relate to fence repair and maintenance. Mr. Panek testified that the IT Analytical Services invoices were associated with samples taken during the scrap removal phase. (Panek, N.T. 301) The costs from Roy F. Weston, Inc. were also incurred during the performance of analytical services.

We reject SIMCO's argument that the Department was obliged to describe with specificity what each Department employee and contractor representative did in the response as part of its affirmative proof. The Department's evidence with respect to each category of the response was sufficient to prove the reasonableness and necessity of the response taken. It then became SIMCO's burden to point to items in the Department's cost recovery package which were insufficiently described.

Final Determination of Amount of Response Costs

The Board cannot provide a final determination of the amount of the Department's response costs because neither party was prepared to address the amount of costs related to groundwater remediation, including the provision of bottled water to nearby residents. As the Department has acknowledged, SIMCO clearly has no liability for these costs because the PCE contamination to the groundwater is clearly divisible from the harm to the soils. SIMCO, therefore, is not responsible for PCE contamination at the Site. Because SIMCO's counsel had not conducted discovery as to the costs related to groundwater remediation and the Department was not in a position to prove the cost of this portion of the interim response, we cannot enter final judgment at this time. Our order directs the Department to supply SIMCO with a statement of total costs of the action taken with respect to

the contaminated groundwater and a statement as to how this amount was calculated with reference to the Department's cost documentation. This statement should provide SIMCO with a designation of the Department employees most familiar with these costs in the event SIMCO should desire to interview them or take their depositions. If necessary, the Board will schedule a final hearing to determine the amount of response costs attributable to groundwater contamination and enter a final judgment as to the amount of the response costs the Department is entitled to recover.

Prejudgment Interest

SIMCO argues in both its motion for directed verdict and in its post-hearing briefs that the Department failed to prove its entitlement to prejudgment interest. HSCA authorizes the Department to recover interest at the rate of 6% annually for its response costs from the later of the date payment is demanded in writing or the date the expenditure is incurred. 35 P.S. § 6020.702(b).

We agree that this proof was not offered for the same reason that the amount of the expenditures for remediating the groundwater was not offered. We will permit the Department to submit a calculation of prejudgment interest to SIMCO containing the same type of information above required of the Department with respect to the costs of groundwater remediation. The calculation must also account for the amounts paid in settlement by other parties. The amount of prejudgment interest will be the subject of a final hearing in the event the parties cannot reach agreement on this issue.

Declaratory Judgment

The Department's complaint requests that the Board enter a declaratory judgment that SIMCO is also responsible for all future costs of response. The Board denies this request. The entry of such a judgment would not promote the disposition of the disputes between the Department and SIMCO because the nature and amounts of these costs is unknown at this time. If the Department proceeds

to conduct a remedial action of the soils, SIMCO's responsibility for the cost of that remedy may be dictated by the application of principles of collateral estoppel based on the Board's Adjudication in this appeal. However, the nature of the dispute as to further response costs cannot be determined at this time.

In addition, there is some question as to whether the Board can issue such a declaratory judgment at all. First, the Supreme Court of Pennsylvania determined in *Empire Sanitary Landfill, Inc. v. Department of Environmental Protection,* 684 A.2d 1047 (Pa. 1996), that the Board does not have the power to enter a declaratory judgment where there was no action of the Department from which an appeal might have been taken to this Board. A different result might be reached when the Board's adjudicatory powers are invoked in either an appeal or a complaint proceeding before the Board. However, we need not reach this issue because there is some question as to whether HSCA authorizes declaratory relief for future response costs. In a now withdrawn three judge opinion of the Commonwealth Court in *Department of Environmental Protection v. Delta Chemicals, Inc.,* No. 523 M.D. 1995 (Pa. Cmwlth. filed December 4, 1997), the court held that HSCA does not authorize the Department to seek a declaratory judgment regarding future costs. The Commonwealth Court has not issued a final opinion on this issue as of the date of this adjudication.

Accordingly, we make the following:

CONCLUSIONS OF LAW

1. SIMCO arranged for the treatment of its insulated copper wire at the Crown Site, and is therefore a responsible person under the Pennsylvania Hazardous Sites Cleanup Act, Act of October

18, 1988, P.L. 756 No. 108, *as amended,* 35 P.S. §§ 6020.101-6020.1305.[16]

2. SIMCO's arrangement with the Cardinales to have its insulated copper wire treated by incineration at the Site with knowledge that ash would be generated as a result of processing its wire as an arrangement for the disposal of copper, lead and dioxin at the Site so that SIMCO is a "responsible person" under HSCA, 35 P.S. § 6020.701.

3. As a "responsible person," SIMCO is jointly and severally and strictly liable for response costs incurred by the Department relating to the contaminated soils and metal at the Site.

4. SIMCO has the burden to prove that the harm stemming from conditions at the Site is divisible and is not a single environmental harm.

5. SIMCO has not introduced sufficient evidence to show that the harm to the soils at the Site caused by its hazardous substances is divisible from the harm to the soils caused by other defendants at the Site because the evidence presents no reasonable basis for allocating the costs of response among the responsible parties.

6. SIMCO is not responsible for response costs relating to the contaminated groundwater at the Site because SIMCO did not dispose of the substances which contaminated the groundwater at the Site and the harm done to the groundwater is divisible from the harm done to the soils at the Site.

7. The recoverable response costs which the Department proved it incurred was in the total amount of $3,727,706.

8. The Department's evidence was sufficient to show that the Department's response

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[16] The Board previously held that SIMCO arranged for the treatment of its insulated copper wire. *Crown Recycling v. DEP,* 1997 EHB 169.

costs of interim response were reasonable in light of information available to the Department at the time the interim responses were taken and that the costs of scrap metal removal were reasonable, necessary and appropriate.

9. SIMCO failed to meet its burden to prove that the incurrence of any of these interim response costs was arbitrary or capricious.

10. SIMCO is entitled to a credit for the $3,165,000 paid in settlement by other defendants and for the admitted $41,398 cost of providing bottled water to nearby residents reducing the amount of response costs for which it may be found responsible to $562,706.

11. SIMCO will be entitled to a credit against this amount for all response costs related to the contaminated groundwater at the Site to be determined at a final hearing for the assessment of liability.

12. The Department may be entitled to recover prejudgment interest in an amount to be determined at a final hearing for the assessment of liability.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
	:	
CROWN RECYCLING & RECOVERY, INC., et al.	:	

ORDER

AND NOW, this 4th day of November, 1998, it is hereby ordered as follows:

1. SIMCO's motion for a directed verdict is denied except to the extent that the Board has declined to issue a declaratory judgment with respect to future response costs.

2. SIMCO is liable to the Department for $562,706 for the Department's costs of interim response incurred at the Crown Recycling and Recovery, Inc. site subject to:

   A. A credit in SIMCO's favor for the amount to be subsequently determined for the amount of response costs which related to the contaminated groundwater; and

   B. The determination of SIMCO's liability for prejudgment interest in an amount to be subsequently determined under the procedures provided for below.

3. Within 30 days of the date of this order the Department shall provide SIMCO with

a statement of the total costs of the action taken with respect to the contaminated groundwater describing how this amount was calculated with reference to the Department's cost documentation admitted into evidence during the hearing on the merits. This statement is to designate those employees of the Department most familiar with these costs.

4. Within 30 days of the date of this order the Department shall provide SIMCO with a calculation of its claim for prejudgment interest after giving SIMCO credit for the costs of response related to the groundwater describing how this amount was calculated with reference to the Department's cost documentation admitted into evidence during the hearing on the merits. This statement is to designate those employees of the Department most familiar with this calculation.

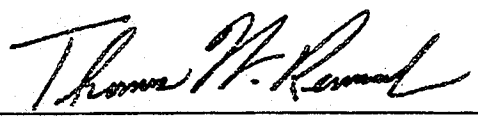
5. Following the receipt of the two statements from the Department described above, SIMCO shall have 60 days to conduct such discovery as it may desire with respect to the credit for response costs relating to the groundwater and the amount of the Department's claim for prejudgment interest.

6. A final hearing for the assessment of the amount of SIMCO's liability to the Department will be held after the completion of this discovery as the parties may request.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 4, 1998

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

For the Commonwealth, DEP:
Paul R. Brierre, Esquire
Northeast Region

For Defendant:
John R. Bashaw, Esquire
Brian P. Daniels, Esquire
BRENNER, SALTZMAN, WALLMAN & GOLDMAN
New Haven, CT

jlp

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 19, 1998**

OPINION AND ORDER ON MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a motion to certify an interlocutory order denying a motion for temporary supersedeas where the movant failed to demonstrate the existence of a controlling question of law which would materially advance the ultimate disposition of the matter.

OPINION

This motion requests the Board to amend an interlocutory order for immediate appeal to the Commonwealth Court. The background facts are as follows.

This appeal arises from an administrative order issued by the Department of Environmental Protection which orders Ronald L. Clever (Appellant) to permit access to a property to assess the extent of contamination with hazardous substances under the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. §§ 6020.101-6020.1305 (HSCA). The Appellant contends that the order is invalid because he is not the owner of the property but was a successful

bidder at a judicial sale at which he acted on behalf of unnamed clients. On October 14, 1998, the Appellant filed a motion with the Board seeking a temporary supersedeas of the Department's order. The Board heard argument and considered briefs filed by the parties and on October 15, 1998, denied the Appellant's motion on the grounds that he was unlikely to succeed on the merits of his appeal because the testimony at the hearing indicated that the Department has reasonable cause to believe that there has been a release of hazardous substances at this property which requires the Department to investigate it under HSCA. In addition, the Appellant's claim that he is not the owner of the property deprives him of standing to prevent the Department from entering the property to conduct its investigation no matter what the Department finds on the property cannot adversely affect the Appellant if he is not the owner of the property. The Appellant now seeks certification of this order for immediate appeal to the Commonwealth Court.

We deny the Appellant's motion for certification of the Board's order for immediate appellate review. Certification can be provided if the Board's order involved a controlling question of law on which there must be a substantial ground for difference of opinion and an immediate appeal would materially advance the ultimate disposition of the matter. 42 Pa. C.S. § 702(b). *Throop Property Owner's Assoc. v. DEP,* EHB Docket No. 97-164-MR (Opinion issued July 8, 1998); *The Carbon/Graphite Group, Inc. v. DER,* 1991 EHB 461; *City of Harrisburg v. DER,* 1990 EHB 585. Certification will be denied where the legal issue is only potentially controlling and there are factual rather than legal disputes. *CNG Transmission Corp. v. DEP,* EHB Docket No. 97-169-MR (Opinion issued May 26, 1998).

It is unclear from the Appellant's motion precisely what issue in this appeal he believes is a controlling question of law which would materially advance the ultimate disposition of the matter.

The petition for supersedeas was denied because the testimony at the hearing indicated that the Department has proper cause to conduct its investigation under HSCA. Accordingly, Appellant is unlikely to succeed in the appeal based on his claim that the Department has no just cause to conduct such an investigation. Whether the Department's order is properly issued to the Appellant who claims he is not the owner of the property (even though the deed to the property is held in his name as the high bidder at the tax sale) is at best a question of fact.

Neither of these bases for the Board's denial of the petition for supersedeas involve a controlling question of law which would materially advance the ultimate disposition of the matter. Indeed, granting the motion would only delay the final disposition of this appeal. We therefore deny the Appellant's request to certify our October 15, 1998 order denying his motion for temporary supersedeas for interlocutory appeal to the Commonwealth Court.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of November, 1998, IT IS HEREBY ORDERED that the motion of Ronald L. Clever to certify the Board's order dated October 15, 1998 for immediate appeal to the Commonwealth Court is hereby denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: November 19, 1998

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

For the Commonwealth, DEP:
Paul Rettinger, Esquire
Southeast Region

For Appellant:
Ronald L. Clever, Esquire
Allentown, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ARNOLD and PATRICIA GASBARRO	:	
	:	
v.	:	**EHB Docket No. 97-031-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 20, 1998

ADJUDICATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from the denial of a private request under the Sewage Facilities Act, Act of January 24, 1996, P.L. (1965) 1535, *as amended,* 35 P.S. §§ 750.1 - 750.20a, where Appellants failed to establish that the Department of Environmental Protection (Department) abused its discretion by denying a request not in compliance with the existing regulations concerning estimated sewage flows and tank capacity.

Appellants waive any issue not raised in their pre-hearing memorandum.

PROCEDURAL HISTORY

On January 21, 1997 Arnold and Patricia Gasbarro (Appellants) filed a notice of appeal seeking review of the Department's December 24, 1996 denial of a private request. The private request sought, in accordance with Section 5(b) and (b.1) of the Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.5(b) and (b.1), to revise the East Huntingdon Township Official Sewage Facilities

Plan to increase sewage flows to, but not to expand, the existing on-lot sewage system at a property in Mount Pleasant, Westmoreland County (Site).

Appellants wish to build an inn with a restaurant and bar on their property. They state that this addition would increase the on-lot sewage flows to an average of 3,000 gallons per day. Appellants want to allow the increase to enter the existing on-lot sewage system without any expansion.

A hearing was held on November 5 and 6, 1997 before Administrative Law Judge Michelle A. Coleman. The Department was represented by legal counsel and Appellants appeared *pro se*. Both parties presented evidence in support of their positions. Appellants filed their post-hearing brief on February 27, 1998. The Department filed its post-hearing brief on May 5, 1998.

On June 30, 1998 the Board granted the Department's Motion to Strike documents submitted by Appellants only as attachments to their post-hearing brief. By the Board's July 1, 1998 order we denied Appellant's Petition to Reopen the Record to admit specific documents.

The record consists of the pleadings, a hearing transcript of 363 pages and 32 exhibits. After a full and complete review of the record we make the following findings:

FINDINGS OF FACT

Background

1. The property involved in this appeal is located in Mount Pleasant, Westmoreland County. (Notice of Appeal)

2. Arnold and Patricia Gasbarro are individuals who live at 906 Arthur Avenue, Scottdale, Pennsylvania 15683. The Gasbarros own the property at Route 7, Box 61, Mount Pleasant, Pennsylvania. (Notice of Appeal)

3. The Gasbarros propose to build a restaurant/inn on the Mount Pleasant property and submitted proposals to increase sewage flows to an average of 3,000 gallons per day without expanding the existing on-lot sewage system. (Cmwlth. Ex. 6)[1]

4. There is a nearby development, Kimberly Estates, with a sewage treatment system. (N.T. 342, 348)

5. The Gasbarros have submitted applications since 1993. (Cmwlth. Ex. 1)

6. Arthur Gusbar of Gusbar & Associates, Inc., an engineering and surveying group, hired by the Gasbarros submitted a letter on March 16, 1994 to the East Huntingdon Township Supervisors as part of their consideration of the Gasbarros' request for the proposed inn with a restaurant and bar. (Cmwlth. Ex. 1D)

7. The March 16, 1994 letter set forth that the proposed project could utilize one of the following alternatives: 1) use of the existing system; 2) convert the existing septic tanks to holding tanks; 3) connect to the Kimberly Estates sewage system; or 4) connect to the Iron Bridge sewage system. (Cmwlth. Ex. 1D)

8. By a November 22, 1994 letter the Department notified the Township that the planning module submittal for the proposed Gasbarro project was, upon receipt, determined to be incomplete because it did not include the requisite soils and system information material. (Cmwlth. Ex. 6C)

9. A May 15, 1995 Department memorandum from William J. Davis, a Department Soil Scientist, to Jack Crislip, Water Quality Specialist Supervisor, noted that the Gasbarros' January

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[1] The following abbreviations will be used: "N.T. ___" for the Transcript; "Cmwlth. Ex. __" for Commonwealth Exhibits; "App. Ex. ___" for Appellants' Exhibits.

1995 report again did not address the soils and system information material. (Cmwlth. Ex. 6B)

10. On August 7, 1996 the Department received Appellants' private request to revise the East Huntingdon Township Official Sewage Facilities Plan. (Cmwlth. Ex. 2, Cmwlth. Ex. 6)

11. By an August 12, 1996 letter to the township supervisors, the Department informed them that the Gasbarros had filed a private request and that the municipality may submit in writing comments regarding the Township's denial/refusal to approve the Gasbarro Plan. (Cmwlth. Ex. 2)

12. On September 5, 1996 East Huntingdon Township filed its comments to the Department in which they stated: 1) that there was a moratorium issued by the Department on the issuance of sewage permits in the locale of the property; 2) that the Township denied approval because the submittals were incomplete, they did not address the long term sewage needs of the property; and 3) the submittals did not provide proof that the existing septic system was capable of assimilating the proposed flows. (Cmwlth. Ex. 5)

13. By a December 24, 1996 letter the Department denied the Gasbarros' private request because the site investigation(s) failed to demonstrate that the soils, site and existing on-lot system were adequate to renovate and treat the proposed sewage effluent flows. (Cmwlth. Ex. 6)

14. On January 21, 1997 Appellants, Arnold and Patricia Gasbarro, appealed the denial of the private request to the Environmental Hearing Board. (Notice of Appeal)

Sewage Flows

15. The proposed inn will have at least 16 hotel rooms, a 30 seat restaurant with an average turnover of three per day and a 150 seat bar with an average turnover of three per day. Employees such as waiters, cooks, bus boys, bartenders, and clerical staff will be needed to operate the proposed hotel, bar and restaurant. (Cmwlth. Ex. 1; N.T. 241-247, 249)

16. The Gasbarros estimated the average daily flow at 2,995 gallons per day (gpd). (Cmwlth. Ex. 1D)

17. Based on the information provided in Gasbarros' private request, and using the Department rules and regulations, and without accounting for flows generated by employees of the proposed inn, the sewage flows from the proposed inn will be at least 8,080 gpd. (N.T. 241-247)

Tank capacity

18. Under the regulations, the capacity of the tanks for an on-lot sewage disposal system should be 12,408 gallons when the sewage flows from the inn are 8,080 gpd. (N.T. 249)

19. The tank capacity of the existing on-lot sewage system is 4,000 gallons. (App. Ex. E; N.T. 26, 248-249)

20. The current tank capacity of the existing on-lot system is unsuitable for the treatment of sewage flows from the proposed inn. (N.T. 250-251)

21. William J. Davis is a Soil Scientist II employed by the Department. (N.T. 202)

22. The Board accepted Mr. Davis as an expert in solid science and on-lot sewage system designs. (N.T. 208, 210)

23. Mr. Davis reviewed the private request and previously submitted materials to determine whether the Site's existing on-lot sewer system met the minimum technical requirements of the regulations. (N.T. 213-215; 216-217)

24. Mr. Davis testified that undersized tanks would allow solids and greases to be discharged which in turn would clog the pipes and thus increase the potential for the system to malfunction. (N.T. 249-251)

25. Jack Crislip is a Water Quality Specialist Supervisor employed by the

Department.(N.T. 332-333)

26. Pursuant to the parties' stipulation, the Board accepted Mr. Crislip as an expert in soil science and on-lot sewer system design. (N.T. 331-332)

27. Mr. Crislip reviewed the request to determine whether the design and condition of the existing on-lot sewage system complied with the requirements of the regulations. (N.T. 335-340)

28. Mr. Crislip found the existing sewage system failed to meet the technical requirements of the regulations. He opined, to a reasonable degree of scientific certainty, that the existing on-lot sewage system would not adequately renovate sewage effluent and that, if used, the existing on-lot system would malfunction and would cause pollution. (N.T. 338-340)

29. Mr. Crislip testified that each of the methods suggested by Gusbar consulting firm to handle the sewage situation with the proposed project could not be considered as alternatives to an expanded, updated on-site system. (N.T. 340-343)

30. Mr. Crislip testified that the Gasbarros did not include provisions to show that the holding tank alternative could be implemented, that the existing plan of the Kimberly Estates treatment plant does not include service to the Gasbarro's parcel and there are no provisions that would allow the proposed inn to be connected to that system and that an additional treatment facility, the Iron Bridge facility, as yet was not built. (N.T. 341-343, 348)

DISCUSSION

Private Request

The term "private request" is explained in the existing Sewage Facilities Act regulations thusly:

> A person who is a resident or legal or equitable property owner in a

> municipality may file a private request with the Department requesting that the Department order the municipality to revise or implement its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs. A private request may be made only after a prior written demand upon and written refusal by the municipality to so implement or revise its official plan ....

25 Pa. Code § 71.14. Appellants have submitted applications for a proposed inn/restaurant since 1993. By March 16, 1994 letter Arthur Gusbar, of the engineering consulting firm Gusbar & Associates hired by Appellants, requested East Huntingdon Township's consideration of the request for expansion of the facility by proposing one of the following alternatives: 1) use of existing system (on-lot disposal); 2) convert existing septic tanks to holding tanks; 3) a connection to the Kimberly Estates sewage system[2]; or 4) connection to the Iron Bridge sewage system.[3] By letter dated September 5, 1996[4] the Township rejected Appellants' sewage application and planning module on the grounds that: 1) module submittals were deficient and 2) did not meet the Department requirements. Furthermore, it noted that a Sewage Facilities Act, Act 537, revision was being conducted and if approved and implemented, it would provide public sewer access to the subject property (Cmwlth. Ex. 5). The correspondence also noted that in 1989 the Department issued a moratorium on the issuance of sewage permits within the geographical area where the property is located. This moratorium is still in effect. Having been rejected by the Township, Appellants filed a private request.

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[2] The system is a private system.

[3] Details about this system were not provided in the evidence.

[4] The delay in the response was due to the fact the Appellants' initial requests were deficient in appropriate material and they had to resubmit the application (Cmwlth. Ex. 1).

The Department rejected the private request because Appellants failed to show that the Township's official plan is not being implemented or is inadequate to meet Appellants' needs, and failed to submit details of any other alternative sewage system disposal. (Cmwlth. Ex. 6)

Waiver

Appellants contend in their post-hearing brief that the 1974 amendments to the accompanying regulations of the Sewage Facilities Act are inapplicable to their sewage system which was installed in the late 1950s.

The Department asserts that Appellants waived this issue when Appellants limited the legal issues they would raise to only one. Appellants stated in their Pre-Hearing Memorandum, "[t]he only issue to be decided is whether the Gasbarro Inn's on-lot sewerage meets the minimum standards of the Sewerage [sic] Facilities Act 537 which would permit the use of the 4000 gallon on-lot sewage existing system."

We agree with the Department that the only issue raised by Appellants in their Pre-Hearing Memorandum was whether the Gasbarros' on-lot sewage system meets the minimum standards of the Sewage Facilities Act, Act 537, and would permit the use of the existing 4,000 gallon on-lot sewage system. This Board has noted that it has long been the law that issues not raised in a party's pre-hearing memorandum are waived. *Oley Twnshp. v. DEP*, 1996 EHB 1098; *Jay Twnshp. v. DER*, 1994 EHB 1724. Although Appellants raised other issues in their Notice of Appeal, those issues, including the issue that the current requirements of the regulations do not apply to their 1996 private request, are waived since these issues were not contained in the pre-hearing memorandum.

Burden of Proof

Appellants have the burden of proof and the burden of proceeding since they are the party

who is asserting the affirmative of the issue. 25 Pa. Code § 1021.101(a). To sustain their burden Appellants must prove by a preponderance of the evidence that the Department committed an error of law or abused its discretion when it denied Appellants' private request to revise the East Huntingdon Township Official Sewage Plan to handle the increase of sewage flows as the result of their building an inn with restaurant and bar on their property. 25 Pa. Code § 1021.101(a)

The Department asserts that Appellants failed to prove that their current system, and any documentation supporting the proposed additional flows are in accordance with the Sewage Facilities Act and its accompanying regulations. In support of this assertion, the Department claims in its post-hearing brief that it provided uncontradicted evidence that the proposal in Appellants' request was inconsistent with the regulations and, therefore, the Department could not be assured that there would be proper functioning of Appellants' existing on-lot sewage system.

Under the Sewage Facilities Act,

> Upon receipt of a private request for revision, the department shall notify the municipality and appropriate planning agencies within the municipality, including a planning agency with areawide jurisdiction, if one exists under the act of July 31, 1968 (P.L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code," and the existing county or joint county department of health of receipt of the private request and inform them that written comments may be submitted to the department no later that forty-five days after the department's receipt of the private request for revision. In arriving at its decision, the department shall consider: ...
>
> (4) Whether the proposed sewage facilities and documentation supporting the proposed sewage facilities is consistent with the department's rules and regulations.
>
> (5) The municipality's official plan.

35 P.S. §§ 750.5(b.1)(4) and (5).

Appellants attempted to present evidence that their proposed use of the existing system would

be in compliance with current regulations. When Mr. Gasbarro, acting on behalf of Appellants, could not elicit the evidence through witnesses' testimony he was asked for an offer of proof. He then proffered the following argument:

> The technology that is available to the Department of Environmental Resources is nil. There isn't anything in the regulation that shows how you can evaluate an existing system.
>
> This is something that I have taken up with several engineers and they said run the dye test.
>
> We engaged two professional engineers to make the module and bring it up-to-date, and both of them says, we don't know what they are trying to do, but just run a five day 17,000 gallons test versus 3,000 gallons.
>
> Now, the 3,000 one-day was a 3,000 gallon test. Here, we figured we could run it for 30 days if necessary. But in this case here, it's very important that this report be entered into the records and showing that it meets the minimum requirements.
>
> Later on, I am going to show that the regulations after 1976 of the Environmental Resources are not applicable in this case. In other words, this system was put in at the time that they had the Health Department. It was the Pennsylvania Health Department that was involved. The Secretary was referred to, the Secretary of Health. Then the regulations came into effect in February 2nd or something of 1976. So, the regulations do not apply to this system.
>
> We want to show that we're going to cooperate with the regulations to prove that we are meeting the minimum requirement of the regulations. That is the reason.
>
> We spent some money on this thing. We have spent money on several engineers. We have had them on several times. And that is the reason. Thank you.

(N.T. 47-48) Later in the hearing Appellant has a discourse with Judge Coleman during which Judge Coleman attempted to explain the regulatory process to Appellant. In that discourse Appellant states that the Sewage Facilities Act, enacted in 1937, was amended in 1965 and amended again in 1976, that the original regulations were enforced by the Department of Health, that the current act does not

mention any regulations, and "that new regulations, other than if it hinders health or bothers the community or whatever it is, the regulations, you know, are applicable on the existing system." (N.T. 300-305) However, the statements made in Appellants' arguments are either incorrect or irrelevant to the case before us for reasons explained later in this opinion.

The Department presented evidence that the proposed sewage facility is not in compliance with the standards for sewage treatment found at 25 Pa. Code Chapter 73. The areas in which the proposal is deficient include, but are not limited to, those which follow.

Estimated sewage flows

Under the current regulations, specifically Section 73.17(a), a hotel/motel is allotted 100 gallons per room and under Section 73.17(b) restaurants are allotted 10 gallons per day per patron with an additional 2 gallons per day for bars and cocktail lounges. 25 Pa. Code §§ 73.17(a) and (b).

Appellants proposed that the total flow from the proposed inn/restaurant would be 2,995 gallons per day (Cmwlth. Ex. 1D, pg. 2).

Using the figures set forth in the regulations we can estimate the number of gallons of sewage the proposed inn, with a restaurant and bar, would generate. The proposed inn will have at least 16 hotel rooms. The 30 seat restaurant and 150 seat bar each with average turnover of three per day will need sufficient flow for 540 patrons. (N.T. 241-247) Employees such as waiters, cooks, bus boys, bartenders and clerical staff will be needed to operate the proposed hotel, bar and restaurant. (N.T. 241-247) For a 16 room hotel and 150 seat restaurant and bar, the amounts as determined by the regulations would be :

Inn (Hotel & motel)	1,600 gallons per unit[5]
Restaurant & Bar	6,480 gallons per day[6]
	8,080 gallons per day

Mr. Davis, a soil scientist with the Department, concurred with the estimated total for the restaurant and bar. He testified that the total gallons for the proposed restaurant and bar alone would be 6,480 gallons. (N.T. 245) Furthermore, Mr. Davis noted that this figure is a low estimate because it excludes any employees of the inn. (N.T. 247) Consequently, the number would be even higher since there will be employees on site. Using these figures Jack Crislip, a Water Quality Specialist Supervisor, testified that the existing system failed to meet the technical requirements of the regulations. (N.T. 338-340) Mr. Crislip, opined to a reasonable degree of certainty, that the existing on-lot sewage system would not adequately renovate sewage effluent and that, if used, the existing on-lot system would malfunction. (N.T. 338-340) Thus, the estimated flows stated in the Private Request were inconsistent and not in compliance with the regulations currently in effect. Therefore, Appellants failed to sustain their burden of proof.

The estimated flows are critical for designing the proper sized on-lot sewage system. If the system is below the projected flows the overflow will result in odors and pollution of the surrounding water and soils. Having determined the estimated sewage flows, we can use those

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[5] Hotel and motel formula is: Number of units (16) x 100 gallons per unit = 1600 gallons per unit. 25 Pa. Code § 73.17(a)

[6] Restaurants (toilets and kitchen wastes per patron) formula is: Number of seats x Number of turnovers per day x 12 gallons per day per patron (180 seats x 3 turnovers x 12 gallons = 6480 gallons per day). A turnover is a meal period. The 12 gallons per patron is the allocation of 10 gallons for the restaurant and 2 gallons for the bar per person. 25 Pa. Code § 73.17(b). The 10 and 2 figures are combined because the facility must be considered as a whole. (N.T. 244)

figures to determine what is the appropriate tank capacity under the regulations.

Tank capacity

Section 73.31 of the regulations provides:

> The minimum septic tank capacity shall be calculated from the following table using estimated sewage flows from paragraph (2), or § 73.17(a)-(c) relating to sewage flows:

Design flow (gallons per day)	Tank capacity (gallons)
0-500	(3.5 x flow exceeding 400 gpd) + (900)
500-5,000	(1.5 x flow exceeding 500 gpd) + (1,250)
5,000-7,500	(1.45 x flow exceeding 5,000 gpd) + (8,000)
7,500-10,000	(1.35 x flow exceeding 7,500 gpd) + (11,625)
over 10,000	(1.50 x the daily flow)

25 Pa. Code § 73.31(a)(3). Using the table, an estimated flow of 7,500 - 10,000 gallons per day uses the formula (1.35 x flow exceeding 7,500 gallons per day + 11,625). 25 Pa. Code § 73.31(a)(3) In this case a suitable on-lot system, which could adequately handle the estimated flow of 8,080 gpd based on the intended capacity of the proposed inn with a restaurant and bar, should consist of 12,408 gallons (1.35 x (8080-7500) + (11,625) = 12,408). Appellants want to use the existing system whose capacity is only 4,000 gallons. (N.T. 249; Cmwlth. Ex. 1; Cmwlth Ex. 2) Thus, the system can handle well below the projected amount which it will need to handle if the proposed inn is built using the existing system. Mr. Davis testified on behalf of the Department that undersized tanks will allow solids and greases to be discharged which in turn will clog the pipes and soil interface and thus increase the potential for the system to malfunction. (N.T. 249-251). Mr. Crislip concurred with Mr. Davis and expressed a similar opinion that the existing on-lot system would

malfunction because of its inadequacy to handle the additional load as the result of the proposed inn. (N.T. 338-340) Thus, the private request as submitted failed to satisfy the regulations for the minimum septic tank capacity for on-lot systems. Therefore, Appellants failed to sustain their burden of proof on this issue.

Mr. Crislip testified on cross-examination that the suggested alternatives to using of the existing system were inappropriate because there was nothing to show 1) that the holding tanks alternative could be implemented, 2) that the plan of the Kimberly Estates sewage system plant provided service to the Gasbarro parcel, 3) that the Iron Bridge facility had ever been built. (N.T. 341-343) Since there was no alternative method available the on-site system would have to be able to handle the projected capacity. As noted above the evidence presented did not demonstrate that the system could handle the proposed inn with a restaurant and bar. Thus pollution is likely to occur if the proposed project utilizes the existing system.

Mr. Gasbarro, acting *pro se*, incorrectly believed that the existing system, constructed in 1954 with no evidence to show that it has been adequately updated, could handle the increased flows of the proposed inn and restaurant and still satisfy the current regulations. He persistently attempted to have witnesses answer the question of whether the existing system previously had malfunctioned. This reflects his misguided belief that because there have been no system malfunctions previously the existing system can adequately support the increased usage and still be in compliance with current regulations.

CONCLUSIONS OF LAW

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

2. Appellants have the burden of proving by a preponderance of the evidence that the Department acted unlawfully or abused its discretion in denying Appellants' request.

3. The Department is authorized by the Sewage Facilities Act to deny private requests for sewage systems.

4. Appellants waived the issue that the current requirements of the regulations which accompany the Sewage Facilities Act do not apply to their 1996 private request when they failed to raise the issue in their pre-hearing memorandum.

5. Appellants failed to sustain their burden of proof that the Department abused its discretion in denying their private request on the grounds that their request did not comply with existing regulations regarding estimated sewage flows, tank capacity, and others.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ARNOLD and PATRICIA GASBARRO	:	
	:	
v.	:	**EHB Docket No. 97-031-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of November, 1998, it is ordered that the appeal filed by Arnold and Patricia Gasbarro is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 20, 1998

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

For the Commonwealth, DEP:
Bruce M. Herschlag, Esquire
Southwest Regional Counsel

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Patricia A. Gasbarro
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAM A. SMEDLEY	:	
	:	
v.	:	**EHB Docket No. 97-253-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY, Permittee	:	**Issued:** November 20, 1998

OPINION AND ORDER ON MOTION TO DISMISS OR TO LIMIT ISSUES

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants the Department of Environmental Protection's motion to limit issues concerning the ash issues raised in the appeal of an air operating permit when those issues should have been raised regarding an earlier solid waste permit. Consequently, appellant is precluded from raising those issues in its current appeal.

OPINION

This matter was initiated with the filing of William A. Smedley's (Appellant) November 21, 1997 Notice of Appeal of the Department of Environmental Protection's (Department) October 22, 1997 letter notifying him that it had modified International Paper Company's (International Paper) operating permit to allow use of tire derived fuels (TDF) in lieu of coal at the company's Lock Haven Mill in Clinton County.

Appellant raised, among other issues, waste issues in its appeal. Specifically,

E.

1. International Paper by burning TDF will become a RCRA hazardous waste generator due to the toxic by-products contained in the fly and bottom ash which are not present in coal ash. The creation of this ash again negates any idea of beneficial use or proper disposal. Fly-ash is listed under the definition of "Air Pollution" listed above. Because the Department's permit modification which allows burning of tires (TDF) will result in International Paper generating a hazardous waste and will result in the unpermitted disposal of this hazardous waste, the Department's decision to allow International Paper to burn tires is not in accordance with law.

2. Because the Department's permit modification does not require testing of the fly and bottom ash to determine whether it qualifies as a hazardous waste, and does not require collection of the fly ash and disposal of the fly and bottom ash at a licensed hazardous waste facility, the Department's decision is arbitrary and capricious.

On July 27, 1998 the Department filed a Motion to Dismiss or to Limit Issues. The Department contends that the Board either lacks jurisdiction to hear the issues raised in Section E or that these issues are precluded from this appeal by the doctrine of administrative finality.

Appellant did not file a response.

Discussion

We must assess the motion to dismiss in a light most favorable to the non-moving party. *Tinicum Twnshp v. DEP*, 1996 EHB 816. The Board treats motions to dismiss the same way it treats motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the law is clear so that the moving party is clearly entitled to a judgment as a matter of law. *Tinicum Twnshp v. DEP*, 1996 EHB 816. The same rule applies in the case of motions to limit issues. A motion to limit issues generally seeks to exclude a particular issue's consideration because of a procedural or evidentiary defect in its assertion. *Tinicum Twnshp v. DEP*, 1996 EHB 816; *Koretsky v. DER*, 1994 EHB 905.

Facts

Under Board Rule 1021.70(f), 25 Pa. Code § 1021.70(f), the Board will deem a party's failure to respond to a motion to be an admission of all properly pleaded facts contained in the motion, except in the case of motions for summary judgment or partial summary judgment. Facts set forth in the Department's motion are deemed admitted by Appellant because he failed to file a response in which he specifically denied the Department's averments. Consequently, there are no disputes of material fact.

The basis for the appeal is a minor permit modification of Air Quality Control Operating Permit No. OP-18-0005, which the Department issued to International Paper on October 20, 1997. The Department issued the modification under the authority of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001- 4106 and its accompanying regulations. On or about November 20, 1997, Appellant filed a notice of appeal challenging the minor permit modification. In Section E of the appeal, Appellant raises issues related to the disposal of ash generated from International Paper's burning of tire-derived fuel.

On September 3, 1997 the Department issued International Paper a Permit for Solid Waste and/or Processing Facility, Permit No. 300904, for its Lock Haven Mill Residual Waste Landfill. The disposal of ash generated from International Paper's burning of tire-derived fuel is regulated under Permit No. 300904 which was issued under the authority of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003.

On September 20, 1997 the notice of the Department's issuance of Permit No. 300904 to International Paper was published in the *Pennsylvania Bulletin*, Volume 27, No. 38. Appellant admits that he did not appeal the Department's issuance of Permit No. 300904.

Administrative Finality

Since there is no dispute regarding the facts, we must determine whether the Department is entitled to judgment as a matter of law. The doctrine of administrative finality precludes any collateral attack on an appealable action which was not challenged by a timely appeal. *See DER v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977); *Lower Paxton Twnshp Authority v. DER*, 1994 EHB 1826. Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert denied*, 434 U.S. 969 (1977). This Board has stated that where a party is aggrieved by an administrative action of the Department and fails to pursue its statutory appeal rights, neither the content nor the validity of either the Department's action or the regulation underlying it may be attacked in a subsequent administrative or judicial proceeding. *Tinicum Twnshp v. DEP*, 1996 EHB 816; *Kennametal, Inc. v. DER*, 1990 EHB 1453. Furthermore, the Board has consistently held that in accordance with the principles of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable" unless an exception applies. *Tinicum Twnshp v. DEP,* 1996 EHB 816; *Ingram Coal Co. v. DER*, 1988 EHB 800.

The Department is entitled to judgment as a matter of law. Appellant does not dispute that the disposal of ash generated from the burning of the tire-derived fuel is regulated under the solid waste permit, Permit No. 300904. Appellant could have and should have raised the issues he raises in Section E of his appeal upon notice of the issuance of the solid waste permit on September 3,

1997. He did not file an appeal based on the issuance of that permit. The Air Quality Control permit, which is the basis of the appeal, does not concern the issue of ash disposal. Thus, under the doctrine of administrative finality, Appellant is precluded from raising the ash issues in this appeal.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM A. SMEDLEY	:	
	:	
v.	:	**EHB Docket No. 97-253-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY, Permittee	:	

ORDER

AND NOW, this 20th day of November, 1998, the Department of Environmental Protection's Motion to Dismiss or, to Limit Issues is granted for Section E, Paragraphs 1 and 2 of William A. Smedley's Notice of Appeal regarding ash issues.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 20, 1998

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

For the Commonwealth, DEP:
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Northcentral Regional Counsel

For Appellant:
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Berea, KY

For Permittee:
Mark J. Shaw, Esquire
MacDONALD ILLIG JONES & BRITTON
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

F.R.&S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 25, 1998**

OPINION AND ORDER ON MOTION IN LIMINE

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a motion in limine filed by the Department of Environmental Protection. It is unclear that the evidence which the permittee may offer at the hearing on the assessment of civil penalties arising out of the operation of a landfill will be irrelevant.

OPINION

Before the Board is a motion in limine filed by the Department of Environmental Protection (Department) to preclude the Permittee, F.R.&S., Inc. from presenting certain evidence at the hearing on its appeal of a civil penalty assessment. The hearing in the matter is scheduled to commence on December 1, 1998.

The Department first argues that the Permittee should be precluded from offering evidence concerning the penalties assessed against other landfills for allegedly similar violations. This issue was addressed by the Board previously in the context of a motion for summary judgment where we

held that the fact that other landfills were assessed lower penalties was insufficient to sustain a claim of discriminatory enforcement. In its pre-hearing memorandum the Permittee explains that it intends to offer essentially the same evidence to prove that the penalty assessed by the Department was unreasonable. The Permittee takes the position that since Section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.605, allows the Department to consider "other relevant factors" in assessing a civil penalty, penalties against other violators are therefore relevant.

We have held that "what the Department did with other similar violators under another set of facts is irrelevant." In our prior opinion in this case we stated that "[a]ll the Permittee's evidence shows is that under different facts the Department acted differently in prosecuting two other landfills. The treatment of other violations, alone, is not relevant to the reasonableness of the amount of a penalty assessed against an appellant." *F.R.&S. Inc., d/b/a Pioneer Crossing Landfill v. DEP*, EHB Docket No. 97-247-MG (Opinion issued September 3, 1998), slip op. at 5-6; *see also American Auto Wash, Inc. v. DEP*, 1997 EHB 568, 572. However, there have been instances where the Department has considered penalties assessed against other violators in a general way. For example, in *Gemstar v. DEP,* EHB Docket No. 97-010-MG (Adjudication issued February 10, 1998), the Department reduced a total civil penalty assessment "to bring the Gemstar penalty in line with other penalties assessed under similar circumstances." Slip op. at 37. Therefore, it is possible that evidence of penalties assessed against other landfills may be relevant to the reasonableness of the amount of the penalty. Certainly if evidence is adduced at hearing that the Department did consider other penalties assessed in *similar circumstances* as a factor in making its assessment against the Permittee, we would allow the Permittee to make an offer of proof concerning any evidence it may

wish to present related to penalties assessed in factual circumstances similar to those of this case. Therefore we deny the Department's motion.

The Department next moves to strike portions of the Permittee's pre-hearing memorandum which it contends seeks to preclude the Department from offering evidence that the Permittee violated 25 Pa.Code § 273.258(b). The Department suggests that the Permittee intends to argue that since the Department did not describe a violation of Section 273.258(b) in its penalty assessment, it should not be permitted to introduce facts related to that violation. The Department takes the position that this question was not properly raised in the Permittee's notice of appeal.

We will deny the Department's motion to strike. In its pre-hearing memorandum the Permittee states that the "Department has not alleged or asserted in its civil penalty assessment that Pioneer Crossing's leachate collection system as constructed fails to comply with the design requirements of 25 Pa. Code § 273.258(b)." (Permittee's Pre-Hearing Memorandum at 12) In the violation section of the civil penalty assessment the Department states that the Permittee "failed to provide for automatic and continuous functioning of the leachate collection system in violation of 25 Pa. Code § 273.258(b)." (Department Motion Ex. A at 9) It is unclear from the Department's pre-hearing memorandum that its evidence is limited to this topic. Obviously, the Department can not seek a penalty for a violation different from the violation described in its assessment order. Therefore it is necessary for the evidence to be developed at the hearing before ruling on this issue.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

F.R.&S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of November, 1998, the motion of the Department of Environmental Protection to preclude evidence and strike portions of the pre-hearing memorandum of F.R.&S., Inc. in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

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

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Southcentral Region

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Harleysville, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MICHAEL W. FARMER and M.W. FARMER CO.	:	
v.	:	**EHB Docket No. 98-050-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 1, 1998**

OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

by Michelle A. Coleman, Administrative Law Judge

Synopsis:

On a motion for summary judgment, the Board will not consider an affidavit which is not sworn to or affirmed and which contains no statement relating to unsworn falsification to authorities. Moreover, the Board will not consider exhibits attached to a response which are not verified or certified and which lack supporting affidavits.

A Motion for Summary Judgment is granted in favor of the Department on all issues. First, Appellant challenged the underlying facts which served as the basis for the Department's revocation of Appellant's storage tank inspector certification. However, from the evidence, there appears to be no dispute that the Department previously suspended Appellant's certification, and that Appellant subsequently violated 25 Pa. Code § 245.106, a conflict of interest regulation, when he inspected a tank while employed as a certified inspector by the tank owner. The Department was authorized to

suspend Appellant's certification for the violation of 25 Pa. Code § 245.106. *See* 25 Pa. Code § 245.108. Because of the prior suspension, the Department was also authorized to *revoke* Appellant's certification. *See* 25 Pa. Code § 245.109. Therefore, the Department is entitled to summary judgment on that issue.

Second, Appellant claims that the Department's revocation order violates his rights under Article I, Section 8 of the Pennsylvania Constitution because its allegations are generalized, vague, and overbroad. However, Article I, Section 8 pertains to "Security from searches and seizures" and, thus, does not apply here. Moreover, the Department's allegation with respect to the conflict of interest violation sets forth the date of the violation, the location of the violation, the circumstances of the violation, and the regulation violated. It is *not* generalized, vague, and overbroad. Therefore, the Department is entitled to summary judgment on that issue.

Third, Appellant claims that the Department would not allow him to see documents which contained alleged false and erroneous information prior to his filing an appeal. However, the conflict of interest violation, which by itself justifies revocation of Appellant's certification, does not involve documents which allegedly contained false and erroneous information. Moreover, the Department has presented evidence to refute this claim, and Appellant has presented no evidence to counter that of the Department. Therefore, the Department is entitled to summary judgment on that issue.

Fourth, Appellant claims that he has not received a Notice of Violation for improper paperwork since the Department's certification program has been in effect. This is irrelevant. The Department's decision to issue a Notice of Violation is an aspect of its prosecutorial discretion. As such, it is not reviewable by the Board. Therefore, the Department is entitled to summary judgment on that issue.

Fifth, Appellant claims that the Department's revocation order was issued because of bias, bad faith, and improper motive, *i.e.*, to discredit Appellant at an upcoming criminal trial. However, the Department has presented evidence to refute this claim, and Appellant has present no evidence to counter that of the Department. Therefore, the Department is entitled to summary judgment on that issue.

Finally, Appellant claims that the Department's revocation order violates his rights under Article I, Section 1 of the Pennsylvania Constitution because it is unreasonable and illegal to revoke an inspector certification for mere paperwork violations. However, the conflict of interest violation is *not* a mere paperwork violation. Moreover, it is clear that the Department took appropriate legal action in revoking Appellant's certification under 25 Pa. Code §§ 245.106, 245.108, and 245.109. Appellant does not challenge the constitutionality of these regulations in his Notice of Appeal. Therefore, the Department is entitled to summary judgment on that issue.

OPINION

On March 12, 1998, Michael W. Farmer (Farmer) and M.W. Farmer Co. (collectively, Appellant) filed a Notice of Appeal[1] challenging the Department's March 4, 1998 issuance of an Order revoking "the certification of Michael W. Farmer, certification ID No. 15, in all categories of installer and inspector, for all storage tank systems and storage tank facilities."[2] (Notice of Appeal, Exhibit A.) The Department revoked the certification pursuant to the provisions of the Storage Tank

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[1] Appellants also filed a Petition for Supersedeas, which the Board denied on April 9, 1998 after a hearing.

[2] This appeal was originally assigned to Administrative Law Judge Robert D. Myers under EHB Docket No. 98-050-MR. However, on August 14, 1998, due to the pending retirement of Judge Myers, the appeal was reassigned to Administrative Law Judge Michelle A. Coleman under EHB Docket No. 98-050-C.

and Spill Prevention Act[3] (Storage Tank Act) and the regulations promulgated thereunder.

The Department alleged in its Order that: (1) Farmer's certification was suspended on January 25, 1995 because he performed an inspection without a valid certification (Paragraph C); (2) Farmer inspected a Pennsylvania Department of Transportation (DOT) facility on October 29, 1996, but the inspection report was incomplete and contained false and erroneous information (Paragraph E); (3) Farmer inspected Danville Sales and Service (Danville) on July 7, 1997, but the inspection report contained false and erroneous information (Paragraph F); (4) Farmer inspected M. W. Farmer Co. on July 17, 1997 while he was employed as a certified inspector by the tank owner (Paragraph G); (5) Farmer inspected Brownie's Gulf Service (Brownie's) on July 24, 1997, but the inspection report contained false and erroneous information (Paragraph H); (6) Farmer inspected Brennan Truck Plaza (Brennan) on September 30, 1997, but the inspection report contained false and erroneous information (Paragraph I); (7) Farmer inspected Roadway Express (Roadway) on October 11, 1997, but the inspection report contained false and erroneous information (Paragraph J); and (8) Farmer inspected Stiff Oil Co. (Stiff Oil) on July 2, 1997, but the inspection report contained false and erroneous information (Paragraph K). Based on these allegations, the Department revoked Farmer's certification under 25 Pa. Code § 245.109. The Order was signed by Michael C. Welch, Environmental Protection Manager.

In the Notice of Appeal, Farmer denies the allegations of the Department in Paragraphs E through K of the Department's Order. (Objection Nos. 1, 3.) Farmer also claims that: (1) the Order violates his constitutional rights under Article I, Section 8 of the Pennsylvania Constitution because its allegations are generalized, vague, and overbroad (Objection No. 2); (2) the Department would

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[3] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 - 6021.2104.

not allow him to see the documents containing the alleged false and erroneous information prior to his filing an appeal (Objection No. 4); (3) he has never received a Notice of Violation for improper paperwork (Objection No. 5); (4) the Order was issued because of bias, bad faith, and improper motive by the Department (Objection No. 6); and (5) the Order violates his rights under Article I, Section 1 of the Pennsylvania Constitution because it deprives him of property without due process of law (Objection No. 7).

On August 20, 1998, the Department filed the present Motion for Summary Judgment (Motion), a supporting brief, and various exhibits and affidavits. On October 6, 1998, Appellant filed a response entitled "Appellant's Reply to Motion for Summary Judgment." Attached to Appellant's response were several exhibits and an "Affidavit in Support of Petitioner's Appeal" (Affidavit). On October 22, 1998, the Department filed a Memorandum of Law in reply to Appellant's response. In its reply, the Department challenges the propriety of the Affidavit and exhibits.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to existence of material fact must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

I. Affidavit and Exhibits

A.

As a preliminary matter, we shall examine the Department's attack on Appellant's Affidavit and exhibits. The Department first argues that the Affidavit does not meet with the requirements for an affidavit set forth in Rule 76 of the Pennsylvania Rules of Civil Procedure and, therefore, should be ignored.

Rule 76 defines an "affidavit" as:

> [A] statement in writing of a fact or facts, signed by the person making it, that either (1) is *sworn to or affirmed* before an officer authorized by law to administer oaths, or before a particular officer or individual designated by law as one before whom it may be taken, and officially certified to in the case of an officer under his seal of office, *or* (2) is *unsworn and contains a statement* that it is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Pa. R.C.P. No. 76 (emphasis added). The Department points out that Appellant's Affidavit does not state that it was "sworn to or affirmed." We note, too, that, while the Affidavit contains a "Notarial Seal" and the signature of notary public Frances L. Gonzalez, it does not contain a jurat stating that the Affidavit was sworn to and subscribed before Gonzalez. *See Commonwealth v. Chandler*, 477 A.2d 851 (Pa. 1984); *Black's Law Dictionary*, 852 (6th ed. 1990). Nor does it contain a statement relating to unsworn falsification to authorities.

The Department suggests that Appellant intentionally submitted the Affidavit without these necessary components because Paragraph 8 of the Affidavit directly conflicts with Farmer's sworn testimony at the March 26, 1998 supersedeas hearing. (*See* Department's Reply at 4-5, n. 2, 6-7.) Paragraph 8 of the Affidavit addresses the Department's charge that Farmer violated a conflict of interest rule when he inspected tanks belonging to M.W. Farmer Company on July 17, 1997 while employed as a certified inspector by M.W. Farmer Company. At the supersedeas hearing held in this case on March 26, 1998, Farmer testified under oath that M.W. Farmer Company owned the tanks.

(N.T. at 34-35.) Paragraph 8 of the Affidavit states that Michael and Jeanette Farmer owned the tanks, *not* M.W. Farmer Company.

Because Farmer's Affidavit is not sworn to or affirmed, because it contains no statement relating to unsworn falsification to authorities, and because it contains statements which conflict with his prior sworn testimony, we will not consider the Affidavit in ruling on the Department's Motion.

B.

The Department also challenges the propriety of the exhibits in Attachment A of Farmer's response to the Department's Motion. On a motion for summary judgment, the record consists of the pleadings, depositions, answers to interrogatories, admissions, and affidavits. Pa. R.C.P. No. 1035.1. If a party wants the Board to consider documentary evidence that does not fall into one of these categories, the party must present the document by means of an affidavit or one of the other documents listed in Pa. R.C.P. No. 1035.1. *City of Scranton v. DEP*, 1997 EHB 985; *Monessen, Inc. v. DER*, 1990 EHB 465; *T & R Coal, Inc. v. DER*, 1990 EHB 621.

The reason for this requirement is clear. Pleadings, depositions, answers to interrogatories, admissions, and affidavits must be supported by oath or affirmation, or must be submitted subject to the penalties for unsworn falsification to authorities. Pa. R.C.P. Nos. 76, 1024, 1035.4, 4006(a)(1), 4014, 4015, 4017(d), and 4017.1(c). Thus, our Superior Court has held that unsworn exhibits are not properly part of the record on a motion for summary judgment. *Wheeler v. Johns-Manville Corp.*, 493 A.2d 120 (Pa. Superior 1985); *Mueller v. Macaulay*, 433 A.2d 77 (Pa. Superior 1981); *Irrera v. SEPTA*, 331 A.2d 705 (Pa. Superior 1974); *see* 6 *Standard Pennsylvania Practice* § 32:75 (1994).

Because the exhibits here are unsworn exhibits, neither verified nor certified and lack a

supporting affidavit,[4] we will not consider them in ruling on the Department's Motion.

II. Motion for Summary Judgment

A.

In his Notice of Appeal, Appellant denies the underlying facts which serve as the basis for the Department's revocation of Appellant's certification. The Department has presented evidence in support of the underlying facts and asks the Board to grant summary judgment with respect thereto. In particular, the Department has presented evidence to show that: (1) Farmer's certification had been suspended once before; and, (2) after his certification was restored, Farmer violated 25 Pa. Code § 245.106 by inspecting tanks owned by M. W. Farmer Company while he was employed as a certified inspector by M.W. Farmer Company.

The Department revoked Appellant's certification pursuant to 25 Pa. Code § 245.109, which provides in pertinent part:

> (a) The Department may revoke the certification of a certified installer or certified inspector if the certified installer or certified inspector has done one or more of the following:
>
> ....
>
> (3) Committed an act requiring suspension under § 245.108 (relating to suspension of certification) after having certification suspended previously.

The regulation at 25 Pa. Code § 245.108 provides that the Department may suspend an inspector's certification for a violation of the Storage Tank Act or the Department's storage tank regulations.

Because Appellant's certification has been previously suspended, the Department could *revoke* Appellant's certification for any *single* violation of the statute or regulations. As noted

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[4] We note that Farmer's Affidavit makes no mention of the exhibits. Thus, even if we had decided to consider the Affidavit, we still would have had no basis for considering the exhibits.

above, the Department's Order alleges *eight* violations of the statute or regulations. We shall focus on the Department's allegation that Appellant violated 25 Pa. Code § 245.106 on July 17, 1997 when he inspected tanks owned by M.W. Farmer Company while he was employed as a certified inspector by M.W. Farmer Company.[5] If we determine that Appellant violated that one regulation, then the Department was justified in revoking Appellant's certification and is entitled to summary judgment.[6]

The July 17, 1997 inspection report is Exhibit C-50 to the Department's Motion. On its face, the report states that Farmer inspected two tanks for M.W. Farmer Company, and that Farmer is employed by "Farmer Co." (Motion, Exhibit C-50.) Farmer's "Installer and Inspector Certification Application Form" is Exhibit C-52 to the Department's Motion. Farmer indicated on this application form that his employer is M.W. Farmer Company. (Motion, Exhibit C-52.) Farmer swore that this was true before a notary public on April 7, 1997, only a few months before the July 17, 1997 inspection. (Motion, Exhibit C-52.) Farmer testified at the supersedeas hearing that the tanks he inspected on July 17, 1997 were owned by M.W. Farmer Company. (March 26, 1998 Supersedeas Hearing, N.T. at 34-35.) Thus, Farmer inspected tanks owned by M.W. Farmer Company while he was employed by M.W. Farmer Company as a certified inspector.

This is a violation of 25 Pa. Code § 245.106, which means that the Department was authorized to *revoke* Farmer's certification under 25 Pa. Code § 245.109(a)(3). Accordingly,

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[5] The regulation at 25 Pa. Code § 245.106 makes it unlawful for a certified inspector to inspect the tanks his employer because such constitutes a conflict of interest.

[6] The Honorable Robert D. Myers previously ruled in this case, based on evidence presented at the supersedeas hearing, that Farmer violated 25 Pa. Code § 245.106 when he inspected M.W. Farmer Company tanks on July 17, 1997 while employed by M.W. Farmer Company as a certified inspector. *Farmer v. DEP*, EHB Docket No. 98-050-MR (Opinion filed April 9, 1998.) The evidence before us now is no different.

summary judgment is entered in favor of the Department.

B.

Appellant also claims in his Notice of Appeal that the Department's Order violates his constitutional rights under Article I, Section 8 of the Pennsylvania Constitution because the allegations contained therein are generalized, vague, and overbroad. We note that Article I, Section 8 of the Pennsylvania Constitution pertains to "Security from searches and seizures." Thus, this provision is not applicable here.

Nevertheless, we shall consider whether the Department's allegation that Farmer improperly inspected tanks while employed by the tank owner is generalized, vague, and overbroad. Paragraph G of the Department's Order states:

> On July 17, 1997, Michael W. Farmer performed a facility operations inspection at the M.W. Farmer Company facility which is identified by the Department facility ID No. 41-24347. A Department review of the inspection report completed by Michael W. Farmer revealed that Michael W. Farmer ... [c]onducted the facility operations inspection at a time when he was employed as a certified IUM inspector by the underground storage tank owner. Consequently, Michael W. Farmer's inspection violates the provisions of 25 Pa. Code § 245.106(a)(1).

Appellant does not explain in what manner this allegation is generalized, vague, and overbroad. The allegation sets forth the date of the violation, the location of the violation, the circumstances of the violation, and the regulation violated. This is quite sufficient. Therefore, summary judgment is entered in favor of the Department on this issue.

C.

Appellant also claims in his Notice of Appeal that the Department would not allow him to see the documents which contained alleged false and erroneous information prior to his filing an appeal. However, the conflict of interest violation, which by itself justifies the Department's

revocation of Appellant's certification, does not involve documents which allegedly contained false and erroneous information. Therefore, this claim has no legal effect here. Moreover, the Department has presented evidence to refute Appellant's claim, and Appellant has presented no evidence to counter that of the Department.[7] Therefore, the Department is entitled to summary judgment on that issue.

D.

Appellant also claims in his Notice of Appeal that he has never received a Notice of Violation for improper paperwork since the Department's certification program has been in effect. The Board agrees with the Department that this assertion is not relevant to the legal issues in this case. Moreover, the matter pertains to the Department's use of its prosecutorial discretion, which is not reviewable by the Board. *Ridenour v. DEP*, 1996 EHB 928. Therefore, summary judgment is entered in favor of the Department on this matter.

E.

Appellant also claims in his Notice of Appeal that the Department's Order was issued because of bias, bad faith, and improper motive, *i.e.*, to discredit Appellant at an upcoming criminal trial. However, the Department has presented evidence to refute this assertion,[8] and Appellant has provided no evidence to counter that of the Department. Therefore, summary judgment is entered

---

[7] The Department has presented the affidavits of Philip M. Zechman, Storage Tank Section Chief, and R. Curtis White, Environmental Compliance Specialist, which state that the Department never told Farmer that he would not be able to see or review a document in the Department's possession. (Motion, Exhibit C-92 at para. 4 and Exhibit C-93 at para. 7.)

[8] The Department has presented Zechman's affidavit to show that the Department's Order was grounded on facts of record and legal conclusions that were completely independent of Farmer's criminal trial. (*See* Motion, Exhibit C-92 at para. 5.)

in favor of the Department on this issue.

F.

Finally, Appellant claims in his Notice of Appeal that the Department's Order violates his rights under Article I, Section 1 of the Pennsylvania Constitution because it was unreasonable and illegal for the Department to revoke Appellant's certification for mere paperwork violations. However, Appellant's violation of the conflict of interest regulation is *not* a mere paperwork violation. Moreover, we have determined that the Department took appropriate action in revoking Appellant's certification under 25 Pa. Code §§ 245.106, 245.108, and 245.109. Appellant does not challenge the constitutionality of these regulations in his Notice of Appeal. Therefore, summary judgment is entered in favor of the Department on this issue.

For all of the foregoing reasons, the Department's Motion is granted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL W. FARMER and M.W. FARMER CO.	:	
v.	:	**EHB Docket No. 98-050-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of December, 1998, it is ordered that the Department's Motion for Summary Judgment is **granted**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 1, 1998

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

For the Commonwealth, DEP:
Geoffrey J. Ayers, Esquire
Northcentral Region

For Appellant:
Gregory Barton Abeln, Esquire
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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

M.W. FARMER CO.	:	
	:	
v.	:	**EHB Docket No. 98-055-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 1, 1998**

OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

by Michelle A. Coleman, Administrative Law Judge

Synopsis:

On a motion for summary judgment, the Board will not consider an affidavit which is not sworn to or affirmed and which contains no statement relating to unsworn falsification to authorities. Moreover, the Board will not consider exhibits attached to a response which are not verified or certified and which lack supporting affidavits.

A Motion for Summary Judgment is granted in favor of the Department on all issues. First, Appellant challenged the underlying facts which served as the basis for the Department's 90-day suspension of Appellant's company storage tank certification. However, there is no dispute that a certified inspector employed by Appellant violated the Department's regulation at 25 Pa. Code § 245.106. Thus, the Department was authorized to suspend Appellant's certification under 25 Pa. Code § 245.123. Therefore, the Department is entitled to summary judgment on that issue.

Second, Appellant claims that the Department's suspension order violates his rights under

Article I, Section 8 of the Pennsylvania Constitution because its allegations are generalized, vague, and overbroad. However, Article I, Section 8 pertains to "Security from searches and seizures" and, thus, does not apply here. Moreover, the Department's allegation with respect to the violation of 25 Pa. Code § 245.106 sets forth the date of the violation, the location of the violation, the circumstances of the violation, and the regulation violated. It is *not* generalized, vague, and overbroad. Therefore, the Department is entitled to summary judgment on that issue.

Third, Appellant claims that the Department would not allow him to see documents which allegedly contained false and erroneous information prior to his filing an appeal. However, the violation of 25 Pa. Code § 245.106, which by itself justifies suspension of Appellant's certification, does not involve documents which allegedly contained false and erroneous information. Moreover, the Department has presented evidence to refute this claim, and Appellant has presented no evidence to counter that of the Department. Therefore, the Department is entitled to summary judgment on that issue.

Fourth, Appellant claims that it has not received a Notice of Violation for tank installation or removal, or for improper paperwork, since the Department's certification program has been in effect. This is irrelevant. The Department's decision to issue a Notice of Violation is an aspect of its prosecutorial discretion. As such, it is not reviewable by the Board. Therefore, the Department is entitled to summary judgment on that issue.

Fifth, Appellant claims that the Department's suspension order was issued because of bias, bad faith, and improper motive, *i.e.*, to discredit Appellant at an upcoming criminal trial. However, the Department has presented evidence to refute this claim, and Appellant has present no evidence to counter that of the Department. Therefore, the Department is entitled to summary judgment on

that issue.

Finally, Appellant claims that the Department's suspension order violates his rights under Article I, Section 1 of the Pennsylvania Constitution because it is unreasonable and illegal to "revoke" a company certification for paperwork violations. However, the Department did not "revoke" the certification; the violation of 25 Pa. Code § 245.106 is *not* a paperwork violation; and it is clear that the Department took appropriate legal action in suspending Appellant's certification under 25 Pa. Code § 245.123. Appellant does not challenge the constitutionality of 25 Pa. Code § 245.123 in his Notice of Appeal. Therefore, the Department is entitled to summary judgment on that issue.

OPINION

On March 26, 1998, M.W. Farmer, Co. (Appellant) filed a Notice of Appeal with the Board. In the Notice of Appeal, Appellant challenged the Department of Environmental Protection's (Department) March 24, 1998 Order suspending Appellant's Company Certification ID No. 19 for a period of 90 days pursuant to the Storage Tank and Spill Prevention Act.[1]

The Order makes the following allegations. First, the Department assessed a civil penalty against Michael W. Farmer because he "loaned" his interim certification number to an uncertified individual for removal of an underground storage tank. Farmer appealed the assessment, but his appeal was resolved by a Consent Adjudication. (*See* Paragraph C.) Second, the Department suspended Farmer's certification on January 25, 1995 because he performed an inspection without a valid certification. (*See* Paragraph D.) Third, an employee of Appellant named Ellen V. Campbell willfully submitted false information to the Department on her application for certification. As a

[1] Act of July 6, 1989, P.L. 169, *as amended*, 35 P. S. §§ 6021.101-6021.2104.

result, the Department suspended her certification for six months; however, Farmer did not take any disciplinary action against her. (*See* Paragraph E.) Fourth, on July 17, 1997, Farmer inspected Appellant's tanks while he was employed as a certified inspector by Appellant. This inspection violated the conflict of interest regulation at 25 Pa. Code § 245.106. (*See* Paragraph F.) Fifth, Farmer submitted false and erroneous information to the Department on inspection reports on at least six occasions. (*See* Paragraph G.) Sixth, the Department revoked Farmer's certification because of the violations set forth in Paragraphs D, F, and G. (*See* Paragraph H.) Based on these allegations, the Department suspended Appellant's certification for 90 days under 25 Pa. Code § 245.123.

In the Notice of Appeal, Appellant denies the allegations in Paragraphs C, E, F, and G of the Department's Order. (Objection Nos. 1, 3.) Appellant also asserts that: (1) the allegations violate Appellant's rights under Article I, Section 8 of the Pennsylvania Constitution because they are generalized, vague, and overbroad (Objection Nos. 2, 3); (2) the Department would not provide documents allegedly containing false and erroneous information until Appellant filed an appeal (Objection No. 4); (3) Appellant has not received a Notice of Violation for storage tank installation or removal, or for paperwork violations, since the certification program went into effect (Objection No. 5); (4) the Department's action was motivated by bias, bad faith, and improper motive, *i.e.*, it was done to discredit Appellant at an upcoming criminal trial (Objection No. 6); (5) the Department's action violates Appellant's rights under Article I, Section 1 of the Pennsylvania Constitution because it was unreasonable to "revoke" Appellant's certification for paperwork violations (Objection No. 7).

On September 8, 1998, the Department filed the present Motion for Summary Judgment (Motion), a supporting brief, and various exhibits and affidavits. The Department also filed a

Motion to Incorporate Record in Related Matter Based on Official Notice (Motion to Incorporate Record). Appellant did not oppose this motion. Thus, in an Order dated September 10, 1998, the Board granted the Department's Motion to Incorporate Record, allowing the Board to consider the information of record in the appeal at EHB Docket No. 98-050-C in disposing of the Department's Motion.

On October 6, 1998, Appellant filed a response entitled "Appellant's Reply to Motion for Summary Judgment." Attached to Appellant's response were several exhibits and an "Affidavit in Support of Petitioner's Appeal" (Farmer's Affidavit). The Affidavit was signed by Michael W. Farmer. On October 22, 1998, the Department filed a Memorandum of Law in reply to Appellant's response. In its reply, the Department challenges the propriety of Farmer's Affidavit and the exhibits.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to existence of material fact must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

I. Affidavit and Exhibits

A.

As a preliminary matter, we shall examine the Department's attack on Farmer's Affidavit and the exhibits. The Department first argues that Farmer's Affidavit does not meet with the

requirements for an affidavit set forth in Rule 76 of the Pennsylvania Rules of Civil Procedure and, therefore, should be ignored.

Rule 76 defines an "affidavit" as:

> [A] statement in writing of a fact or facts, signed by the person making it, that either (1) is *sworn to or affirmed* before an officer authorized by law to administer oaths, or before a particular officer or individual designated by law as one before whom it may be taken, and officially certified to in the case of an officer under his seal of office, *or* (2) is *unsworn and contains a statement* that it is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Pa. R.C.P. No. 76 (emphasis added). The Department points out that Farmer's Affidavit does not state that it was "sworn to or affirmed." We note, too, that, while Farmer's Affidavit contains a "Notarial Seal" and the signature of notary public Frances L. Gonzalez, it does not contain a jurat stating that the Affidavit was sworn to and subscribed before Gonzalez. *See Commonwealth v. Chandler*, 477 A.2d 851 (Pa. 1984); *Black's Law Dictionary*, 852 (6th ed. 1990). Nor does it contain a statement relating to unsworn falsification to authorities.

The Department suggests that Appellant intentionally submitted Farmer's Affidavit without these necessary components because Paragraph 8 of Farmer's Affidavit directly conflicts with Farmer's sworn testimony at the March 26, 1998 supersedeas hearing. (*See* Department's Reply at 4-5, n. 2, 6-7.) Paragraph 8 of Farmer's Affidavit addresses the Department's charge that Farmer violated a conflict of interest rule when he inspected tanks belonging to M.W. Farmer Company on July 17, 1997 while employed as a certified inspector by M.W. Farmer Company. At the supersedeas hearing held in this case on March 26, 1998, Farmer testified under oath that M.W. Farmer Company owned the tanks. (N.T. at 34-35.) Paragraph 8 of Farmer's Affidavit states that Michael and Jeanette Farmer owned the tanks, *not* M.W. Farmer Company.

Because Farmer's Affidavit is not sworn to or affirmed, because it contains no statement relating to unsworn falsification to authorities, and because it contains statements which conflict with his prior sworn testimony, we will not consider Farmer's Affidavit in ruling on the Department's Motion.

B.

The Department also challenges the propriety of the exhibits in Attachment A of Appellant's response to the Department's Motion. On a motion for summary judgment, the record consists of the pleadings, depositions, answers to interrogatories, admissions, and affidavits. Pa. R.C.P. No. 1035.1. If a party wants the Board to consider documentary evidence that does not fall into one of these categories, the party must present the document by means of an affidavit or one of the other documents listed in Pa. R.C.P. No. 1035.1. *City of Scranton v. DEP*, 1997 EHB 985; *Monessen, Inc. v. DER*, 1990 EHB 465; *T & R Coal, Inc. v. DER*, 1990 EHB 621.

The reason for this requirement is clear. Pleadings, depositions, answers to interrogatories, admissions, and affidavits must be supported by oath or affirmation, or must be submitted subject to the penalties for unsworn falsification to authorities. Pa. R.C.P. Nos. 76, 1024, 1035.4, 4006(a)(1), 4014, 4015, 4017(d), and 4017.1(c). Thus, our Superior Court has held that unsworn exhibits are not properly part of the record on a motion for summary judgment. *Wheeler v. Johns-Manville Corp.*, 493 A.2d 120 (Pa. Superior 1985); *Mueller v. Macaulay*, 433 A.2d 77 (Pa. Superior 1981); *Irrera v. SEPTA*, 331 A.2d 705 (Pa. Superior 1974); *see* 6 *Standard Pennsylvania Practice* § 32:75 (1994).

Because the exhibits here are not verified or certified, and lack a supporting affidavit,[2] we will not consider them in ruling on the Department's Motion.

II. Motion for Summary Judgment

A.

In his Notice of Appeal, Appellant denies the underlying facts which serve as the basis for the Department's 90-day suspension of Appellant's certification. The Department has presented evidence in support of the underlying facts and asks the Board to grant summary judgment with respect thereto.

The Department suspended Appellant's company certification pursuant to 25 Pa. Code § 245.123, which provides in pertinent part as follows:

> (a) The Department may suspend the certification of a certified company for good cause, which includes, but is not limited to:
>
> (1) A violation of the act or this chapter by the company or a certified installer or certified inspector employed by the company.

Under this provision, the Department was justified in suspending the Appellant's company certification if any certified installer or certified inspector employed by the company violated one of the Department's storage tank regulations.

The Department alleged in its Order that Farmer violated the Department's conflict of interest regulation at 25 Pa. Code § 245.106 by inspecting tanks owned by M. W. Farmer Company while he was employed as a certified inspector by M.W. Farmer Company. In *Farmer v. DEP* at EHB Docket No. 98-050-C (Opinion issued November __, 1998), the Board determined that Farmer did

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[2] We note that Farmer's Affidavit makes no mention of the exhibits. Thus, even if we had decided to consider Farmer's Affidavit, we still would have no basis for considering the exhibits.

indeed violate 25 Pa. Code § 245.106. Because the record in this case is identical with the record in the appeal at EHB Docket No. 98-050-C, we once again conclude that Farmer violated 25 Pa. Code § 245.106 while employed as a certified inspector by Appellant. Therefore, the Department was justified in suspending Appellant's certification and is entitled to summary judgment on this matter.[3]

B.

Appellant also claims in his Notice of Appeal that the Department's Order violates his constitutional rights under Article I, Section 8 of the Pennsylvania Constitution because the allegations contained therein are generalized, vague, and overbroad. We note that Article I, Section 8 of the Pennsylvania Constitution pertains to "Security from searches and seizures." Thus, this provision is not applicable here.

Nevertheless, we shall consider whether the Department's allegation that Farmer improperly inspected tanks while employed by the tank owner is generalized, vague, and overbroad. Paragraph F of the Department's Order states:

> On July 17, 1997, Michael W. Farmer performed a facility operations inspection at the M.W. Farmer Company facility which is identified by the Department facility ID No. 41-24347. A Department review of the inspection report completed by Michael W. Farmer revealed that Michael W. Farmer conducted the facility operations inspection at a time when he was employed as a certified IUM inspector by the underground storage tank owner. Consequently, Michael W. Farmer's inspection violates the provisions of 25 Pa. Code § 245.106(a)(1).

Appellant does not explain in what manner this allegation is generalized, vague, and overbroad. The allegation sets forth the date of the violation, the location of the violation, the circumstances of the violation, and the regulation violated. This is quite sufficient. Therefore, summary judgment is

[3] It is not necessary for us to address the other allegations in the Department's Order.

entered in favor of the Department on this issue.

C.

Appellant also claims in his Notice of Appeal that the Department would not allow him to see the documents which contained alleged false and erroneous information prior to his filing an appeal. However, Farmer's violation of 25 Pa. Code § 245.106, which by itself justifies the Department's suspension of Appellant's certification, does not involve documents which allegedly contained false and erroneous information. Therefore, this claim has no legal effect here. Moreover, the Department has presented evidence to refute Appellant's claim, and Appellant has presented no evidence to counter that of the Department.[4] Therefore, the Department is entitled to summary judgment on that issue.

D.

Appellant also claims in his Notice of Appeal that he has never received a Notice of Violation for tank installation or removal, or for improper paperwork, since the Department's certification program has been in effect. The Board agrees with the Department that this assertion is not relevant to the legal issues in this case. Moreover, the matter pertains to the Department's use of its prosecutorial discretion, which is not reviewable by the Board. *Ridenour v. DEP*, 1996 EHB 928. Therefore, summary judgment is entered in favor of the Department on this matter.

E.

Appellant also claims in his Notice of Appeal that the Department's Order was issued

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[4] In the appeal at EHB Docket No. 98-050-C, the Department presented the affidavits of Philip M. Zechman, Storage Tank Section Chief, and R. Curtis White, Environmental Compliance Specialist, which state that the Department never told Farmer that he would not be able to see or review a document in the Department's possession. (*See* EHB Docket No. 98-050-C, Motion for Summary Judgment, Exhibit C-92 at para. 4 and Exhibit C-93 at para. 7.)

because of bias, bad faith, and improper motive, *i.e.*, to discredit Appellant at an upcoming criminal trial. However, the Department has presented evidence to refute this assertion,[5] and Appellant has provided no evidence to counter that of the Department. Therefore, summary judgment is entered in favor of the Department on this issue.

F.

Finally, Appellant claims in his Notice of Appeal that the Department's Order violates his rights under Article I, Section 1 of the Pennsylvania Constitution because it was unreasonable and illegal for the Department to "revoke" Appellant's certification for paperwork violations. However, the Department did not "revoke" Appellant's certification; the Department only suspended it for 90 days. Moreover, Farmer's violation of 25 Pa. Code § 245.106 is *not* a mere paperwork violation. Finally, we have determined that the Department took appropriate action in suspending Appellant's certification under 25 Pa. Code § 245.123. Appellant does not challenge the constitutionality of this regulation in his Notice of Appeal. Therefore, summary judgment is entered in favor of the Department on this issue.

For all of the foregoing reasons, the Department's Motion is granted.

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[5] In the appeal at EHB Docket No. 98-050-C, the Department presented Zechman's affidavit to show that the Department's Order was grounded on facts of record and legal conclusions that were completely independent of Farmer's criminal trial. (*See* EHB Docket No. 98-050-C, Motion for Summary Judgment, Exhibit C-92 at para. 5.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.W. FARMER	:	
	:	
v.	:	**EHB Docket No. 98-055-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of December, 1998, it is ordered that the Department's Motion for Summary Judgment is **granted**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman
Administrative Law Judge
Member

EHB Docket No. 98-055-C

DATED: December 1, 1998

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

For the Commonwealth, DEP:
Geoffrey J. Ayers, Esquire
Northcentral Region

For Appellant:
Gregory Barton Abeln, Esquire
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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ALBERT H. WURTH, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 98-179-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN WASTE OF BETHLEHEM, INC., Permittee and CITY OF BETHLEHEM, Intervenor	:	**Issued: December 17, 1998**

OPINION AND ORDER ON MOTION TO INTERVENE

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to intervene where the petitioner has demonstrated that it is an "interested party" under Section 7514(e) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(e), because a determination of the Board in favor of the appellants would have a direct affect upon the petitioner by operation of a contract between the petitioner and the permittee.

OPINION

Before the Board is the petition to intervene of the City of Bethlehem, which seeks to intervene in a third-party appeal of the Department's approval of the reissuance/transfer of a solid waste landfill permit from the City to Eastern Waste of Bethlehem, Inc. (Permittee). The Appellants,

a number of individuals and citizens' groups, oppose the intervention of the City.[1] The Department of Environmental Protection and the Permittee have filed advised the Board that they do not object to the petition.

In its petition for intervention the City explains the background of this appeal as follows. The City has owned and operated a landfill known as the City of Bethlehem Landfill on Applebutter Road in Lower Saucon Township, Lehigh County from the 1940s until 1998. In 1998, the City and the Permittee entered into a landfill purchase agreement which provided for the purchase of the landfill by the Permittee. The agreement contains a provision which requires the City to repurchase the landfill in the event that the reissuance of the solid waste permit from the City to the Permittee is invalidated or materially modified in such a way that the Permittee's right to own, operate in its entirety or control the landfill is adversely affected. On July 17, 1998, the Department approved the reissuance of the permit to the Permittee and the purchase agreement was consummated on the same day. The Appellants appealed the reissuance of the permit charging, among other things, that the Department should not have approved the reissuance from the City to the Permittee.

The City seeks intervention in this appeal on the grounds that the outcome of the appeal may trigger its obligations under the purchase agreement and it is an "interested party" pursuant to Section 7514(e) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(e). The Appellants oppose the intervention of the City because it is not an interested party, and pursuant to Pa. R.C.P. No. 2329, the City has not established that its interests are inadequately represented in the proceeding by the current parties of record.

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[1] The Appellants are Albert H. Wurth, Jr., Margaret Browne, Guy Gray, Bethlehem Landfill Emergency Committee, CIVIS (Citizens for a Vital Southside). Lehigh Valley Greens, and SAVE, Inc.

We believe that the City is an "interested party" as that term has been defined by the Commonwealth Court in *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057 (Pa. Cmwlth. 1991) and 598 A.2d 1061 (Pa. Cmwlth. 1991).[2] Therefore we will grant the petition to intervene.

The Appellants' reliance upon the requirement in the Pennsylvania Rules of Civil Procedure requiring a potential intervenor to demonstrate that its interests will be inadequately represented in a proceeding unless it is permitted to intervene is misplaced. The Commonwealth Court addressed this specific issue in the factually similar cases of *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057 (Pa. Cmwlth. 1991), and 598 A.2d 1061 (Pa. Cmwlth. 1991). In that case the petitioner had entered into an agreement with a municipality in which the municipality agreed to designate it in its solid waste management plan. The Department conditionally approved the plan, and that approval was appealed by third-party appellants. The petitioner sought intervention which the Board denied because, among other things, the petitioner had failed to demonstrate that the other parties would not adequately defend the plan.

The Commonwealth Court reversed the Board. Interpreting Section 7514(e) of the Environmental Hearing Board Act[3], the court concluded that the only requirement for intervention in proceedings before the Board was that the petitioner be an "interested party." The court went on to say that

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[2] The opinion in these two cases was identical. Each addressed the appeal of different third-party appellants to the same Department action and the petition to intervene was identical in both matters.

[3] This section provides: "Any interested party may intervene in any matter pending before the board." 35 P.S. § 7514(e).

> [t]he interest required, of course, must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination.

Browning-Ferris, 598 A.2d at 1060-61. Applying this definition, it concluded that the petitioner was an "interested party" and should be allowed to intervene and that the Board had abused its discretion by denying intervention on the basis that the petitioner had failed to demonstrate that its interests would not be protected by the other litigants.

We believe the petition before us creates a virtually identical situation. If the Board grants the appeal of the Appellants or orders modification of the reissuance in a significant way, the City is certainly affected by direct operation of our order under the terms of its contract with the Permittee.

Under our rules, therefore, the City has a right to defend the Department's action and we will grant the petition to intervene.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALBERT H. WURTH, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 98-179-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN WASTE OF BETHLEHEM, INC., Permittee and CITY OF BETHLEHEM, Intervenor	:	

ORDER

AND NOW, this 17th day of December, 1998, the petition to intervene of the City of Bethlehem is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: December 17, 1998

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

For the Commonwealth, DEP:
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Margaret "Greta" Browne
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Citizen for a Vital Southside (CIVIS)
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Guy Gray
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Lehigh Valley Greens
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

202 ISLAND CAR WASH, L.P., EMCO CAR WASH, L.P. and CAR WASH OPERATING COMPANY, INC.	:	
v.	:	**EHB Docket No. 98-023-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 18, 1998**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part the appellants' motion for summary judgment in an appeal of an administrative order issued in connection with gasoline underground storage tanks alleged to have caused contamination of groundwater and nearby drinking water wells. The Board grants the motion on the provisions of the order which require a cessation of operation of the facility pending the receipt of certain facility and operation information and the submission of a third party inspection report because the appellants have adequately satisfied these requests of the Department. The motion will also be granted where the Department has assessed an automatic civil penalty because such a provision is arbitrary as a matter of law. The Board denies the motion on the provision of the order which requires a corrective action program where the appellants have failed to show that they are entitled to judgment in their favor.

OPINION

Before the Board is a motion for summary judgment filed by 202 Island Car Wash, L.P., EMCO Car Wash, L.P. and Car Wash Operating Company, Inc. (collectively, Appellants). On February 11, 1998, the Appellants filed an appeal and petition for supersedeas from an administrative order issued by the Department of Environmental Protection which required the Appellants and Mobil Oil Corporation to, among other things, conduct a site assessment and remedial action relating to a suspected release of gasoline into groundwater and nearby drinking water wells. By order dated February 24, 1998, the Board granted a temporary supersedeas of the Department's order based on information submitted by the parties which indicated that there was no evidence of an ongoing leak of the gasoline tanks at that time. After a hearing the Board superseded certain portions of the Department's order, and denied the petition as to other portions. *202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998). Discovery has been completed and the Appellants now move the Board to enter summary judgment in their favor upon several of the ten numbered paragraphs of the administrative order. Specifically, the Appellants seek judgment on Paragraph 1 of the order requiring cessation of operation of the facility pending receipt of information detailed in Paragraph 7; Paragraphs 2, 3, and 4 which require completion of a site characterization plan, a remedial action plan and other remedial activity; Paragraph 8 which requires the monthly submission of leak detection verification and a third party inspection report; and Paragraph 10 which requires the automatic payment of a penalty of $ 1,500 per day per violation of any provision of the Department's order.

The opinion in support of the order granting in part and denying in part the Appellants' petition for supersedeas contains a detailed recitation of the facts of this case, and we will not repeat

them in their entirety here. *202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998). To summarize,[1] the Department's order arose from a complaint that gasoline vapors were found in drinking water wells located in a neighborhood near the Appellants' facility. The Department conducted an inspection on May 16, 1997, and determined that the facility's three regulated underground gasoline storage tanks were not properly registered and that leak detection was not being conducted as required by the Department's rules and regulations. Through a series of correspondence with the Appellants beginning on July 10, 1997, the Department requested that the Appellants perform various site investigations and characterizations. In October, 1997, the Appellants' consultant conducted a preliminary sub-surface investigation which indicated elevated levels of gasoline components in several wells. Thereafter the Department requested a work plan for a site characterization and a site characterization report which was to be completed by February 27, 1998. Because no action was taken in response to this request the Department issued the order on February 5, 1998, which is the subject of this appeal.

Paragraphs 1, 7 and 8: Cessation of Operations and Information Submittals

Paragraph 1 of the order requires a cessation of operations and removal of product from the facility. At the supersedeas hearing the presiding judge determined that as a result of testing conducted in February, 1998, there was no ongoing release from the facility therefore it superseded this paragraph of the Department's order. The Appellants seek summary judgment on this

---

[1] Many of these facts are taken from the record created at the supersedeas hearing held on March 2, May 7, and May 11, 1998. The Department has requested that this record be incorporated into its response to the motion for summary judgment. See *202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998), for specific references to the record.

requirement because there is "no release, either ongoing or historic, from underground storage tank structures on the Site." (Motion at introductory ¶ 1) In response, the Department does not object to the continued ongoing operation of the facility provided that Appellants conduct leak detection as required by the regulation and that there is no evidence of any new ongoing release. (Answer to the Motion at introductory ¶ 1)

However, the Appellants do not just argue that the cessation requirement is unnecessary at the present time. They argue that the provision was an abuse of discretion at the outset because it contravenes Section 1309 of the Storage Tank and Spill Prevention Act (Storage Tank Act), Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. § 6021.1309. The Department in response takes the position that the order was properly issued in the first instance even though there currently has been adequate compliance.

Section 1309 of the Storage Tank Act provides in relevant part:

> The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include . . . orders requiring persons to cease unlawful activities or cease operation of an establishment, which, in the course of its operation, is in violation of any provision of this act, rule or regulation . . . . Such an order may be issued if the department finds that any condition existing in or on the facility or operation involved is causing or is creating a danger of pollution of the waters of this Commonwealth, including any public or private water supply.... [A]n order addressed to an operation not directly related to the condition or violation in question may be issued only if the department finds that the other enforcement procedures, penalties and remedies available under this act would not be adequate to effectuate prompt or effective correction of the condition or violation.

35 P.S. § 6021.1309. The Appellants contend that Paragraph 1 of the order is in violation of Section 1309 because the reopening of the facility was only predicated upon the submission of information[2]

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[2] The information required by the Department included a history of the facility ownership and operators, a history of all tank handling activities, including maintenance and repairs,

to the Department and that the Department failed to make a determination that no other enforcement mechanism was sufficient to obtain the information. The Appellants further argue that the provision is unlawful because there is no longer a danger of pollution to waters of the Commonwealth as the tanks are now tight.

The Department takes the position that Paragraph 1 of the order was fully authorized by the statute because at the time the order was issued the Appellants were in violation of the Storage Tank Act and there was no demonstration that the tanks were not leaking. Specifically, during the spring of 1997 the lines were recorded as leaking, and in November of 1997 Waste Concepts, Inc. documented contamination of the groundwater beneath the facility and that the drinking water wells of neighboring homes were contaminated by similar gasoline constituents. (Supersedeas Ex. AP-4; Supersedeas Ex. C-33; *see also* testimony of Paul White, Supersedeas N.T. 471-72 (admitting that there had been some release of gasoline)). The documentation requested by the Department, particularly leak detection and tank tightness data, was clearly necessary to assure that pollution from the facility would not continue. Therefore, at the time the Department's order was issued it had a sound basis for ordering the cessation of operation until it could be assured that there was no continuing release of gasoline.

The Department also tried to work with the Appellants before issuing the order. Through correspondence the Department repeatedly requested information from the Appellants before commencing formal enforcement action. Therefore the importance of assuring the prevention of further pollution coupled with unfruitful attempts to resolve the situation informally convinces us

---

documentation of leak detection and tank tightness tests performed at the facility and a report on the status of filter systems installed by Appellants at residences affected by gasoline contaminated drinking water.

that the Department was justified in ordering the cessation of operations at the time the order was issued.

However, we nevertheless will render final judgment on this provision of the Department's order because we believe that this portion is now moot inasmuch as the Appellants have now satisfied the requirements of Paragraph 1 by submitting the information required in Paragraph 7.

Paragraph 1 required the Appellants to cease operations until it submitted to the Department a history of the facility ownership and operators, a history of all tank handling activities, including maintenance and repairs, documentation of leak detection and tank tightness tests performed at the facility and a report on the status of filter systems installed by Appellants at residences affected by gasoline contaminated drinking water. In its brief in response to the present motion the Department takes the position that although monthly inventory information had to be reconstituted due to the unavailability of original records, the requirements of Paragraph 1 have been complied with. (Department Brief at 4)

The Department's order at Paragraphs 7 and 8 required the Appellant to supply the Department with specified facility and operations information and a report on the installation of a water filtration system at impacted residences. In addition, paragraph 8 required the Appellant to arrange for monthly reports and a third party operations inspection.

The evidence at the hearing on the petition for supersedeas indicated that the requirements of Paragraph 7 and at least the third party inspection required by Paragraph 8 had been met by the time of the completion of the supersedeas hearing. The Appellant's motion for summary judgment also provides evidence that these requirements have been met by the Appellant. The Department's response does not challenge that these requirements have been met. Under these circumstances, we

will grant summary judgment with respect to Paragraph 7 and the portion of Paragraph 8 which requires a third party inspection as now being moot. However, this judgment is without prejudice to any penalty the Department may subsequently decide to impose because the information was not timely submitted.

The remainder of Paragraph 8 provides that

> On a monthly basis, [the Appellants shall] submit documentation which demonstrates leak detection has been properly conducted at the Facility. The first monthly report shall be submitted no later than March 15, 1998, and each successive report shall be submitted no later than the 15th of each following month.

Some leak detection data has been submitted to the Department, however, it is unclear whether this provision is a continuing obligation on the part of the Appellants. Therefore we will not render a final judgment on this portion of Paragraph 8.

Paragraphs 2, 3 and 4: Corrective Action Program

Paragraph 2 of the order requires the Appellants to complete a site assessment report on or before February 27, 1998. Paragraphs 3 and 4 require further reports and plans to be submitted on a time table triggered by the completion of the site assessment. The Appellants argue that these deadlines are unreasonable because it would be impossible to perform a site assessment between February 5, 1998, when the order was issued, and February 27, 1998.

The Board addressed this question in detail in our opinion declining to supersede this portion of the Department's order:

> The Board will not supersede the Department's Order with respect to the development of the site assessment report on or before February 27, 1998. The Appellants have been on notice since July, 1997 that the Department wanted a work plan to be submitted to it for a site assessment and a site characterization performed

> if the site characterization indicated a release. They also had been on notice since November 25, 1997 of the Department's request that a site characterization report be performed by February 27, 1998 as a result of the finding of a release by Waste Concepts in its site assessment report. Nothing in the evidence indicates that the time period from November 25, 1997 to the end of February, 1998 would not have been adequate to develop a work plan and site characterization report, and Mr. Sinding's testimony was that the required work could be done in this time period. The evidence demonstrates that the Appellants were advised by the Department based on the Waste Concepts report that a release had occurred to ground water to the area surrounding the car wash facility. Under the Department's regulations at 25 Pa. Code § 245.304, Appellants were then under an obligation to conduct the site characterization investigation as requested by the Department. Appellants chose not to do so even though the evidence shows that the Appellants had prior notification that a release had occurred by reason of a car accident to one of the gasoline dispensing facilities that resulted in a release, that one dispenser had failed a tightness test because of an O-ring failure and that a release was confirmed by Waste Concept's monitoring wells in October, 1997.

202 Island Car Wash, L.P. v. DEP, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998), slip op. at 15-16. The Appellants urge us to revisit this issue arguing that neither the April, 1997 car accident nor the O-ring failure in July, 1997 constitute "reportable releases" which would trigger the requirement that it is the Appellants' duty to conduct a site characterization.

Section 245.304 of the Department's regulations provides, in relevant part:

> The owner or operator of storage tanks and storage tank facilities shall initiate and complete an investigation of an *indication of a release* of a regulated substance as soon as practicable, but no later than 7 days after the indication of a release. An indication of a release includes one or more of the following conditions:
>
> (1) The presence of a regulated substance or an unusual level of vapors from a regulated substance of unknown origin, at a storage tank facility.
>
> (2) Evidence of a regulated substance or vapors in soils . . . or groundwater in the surrounding area. . . .

25 Pa. Code § 245.304(a)(1) and (2)(emphasis added). If it is confirmed that a reportable release[3]

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[3] A "reportable release" is generally defined as "[a] quantity or an unknown quantity of regulated substance released to or posing an immediate threat to surface water, groundwater, bedrock, soil or sediment." 25 Pa. Code § 245.1. Certain spills are excluded from this definition,

occurred a site characterization is required by 25 Pa. Code § 245.309. Even if we accept as true that neither the car accident nor the O-ring failure triggered the investigation requirement of the regulations, certainly the unexplained presence of contamination discovered by Waste Concepts would mandate an investigation. The Appellants have not explained this contamination or otherwise shown that it was *not* caused by a reportable release. Therefore, we deny the Appellants' motion for summary judgment on Paragraphs 2, 3 and 4 of the Department's order.[4]

Paragraph 10: Civil Penalty Assessment

As we stated in our prior opinion, we find this provision of the Department's order most troubling. The presiding judge at the supersedeas hearing declined to consider this provision in the context of the supersedeas because such a prospective penalty has never been considered by the Board and the Department was willing to waive the requirement that the penalty be paid currently.

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including spills of less than one gallon to surface soil.

[4] We note that the Appellants' motion does not demonstrate that there are no material facts in dispute concerning a release from either the car accident or the O-ring failure. Mr. Grether's affidavit only says that he did not observe any petroleum products at the facility on the day of the car accident. (Appellants' Ex. 3 ¶ 3) Moreover, in his testimony at the supersedeas hearing Mr. Grether said that he was not onsite at the time of the accident or after the accident. (Supersedeas N.T. 37) There is insufficient proof that there was no leakage of gasoline as a result of the car accident in the spring of 1997.

There is also inadequate evidence to support the proposition that there was no leakage as a result of the O-ring failure in the summer of 1997. Mr. Grether, and others, say that there was no gasoline observed outside the sump during the investigation and repair of the incident. However, the exhibits proffered by the Appellants only show that the leak detectors and lines were tested on July 21, 1997. (Appellants' Ex. 7) These reports do not demonstrate that the tanks themselves were tight. The tanks were to be tested on July 25, 1997, but those reports have not been offered. Also, as pointed out by the Department, there is no evidence concerning how long the lines were leaking prior to July 21, 1997. Finally, in its memorandum of law in response to the motion for summary judgment the Department states that it has never taken the position that the O-ring failure was not a cause of the contamination at the neighboring drinking water wells.

202 Car Wash, L.P. v. DEP, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998), slip op. at 20-21.

Paragraph 10 provides that any failure of the Appellants to comply with the order will result in a penalty of $1,500 per day per violation which is due automatically and without notice. The order does not prescribe any mechanism for the payment of the penalties other than requiring remittance by hand delivery or certified mail to the Department. The Appellants contend that such an automatic assessment of civil penalties is not authorized by the Storage Tank Act because the Department did not consider all of the relevant factors required by the statute. Specifically, the Appellants claim that the penalty would apply to any violation no matter how serious or trivial and is therefore arbitrary. The Department takes the position that the penalty is a "reasonable fit" for *any* violation of the order and is therefore an appropriate exercise of the Department's authority to assess civil penalties.

We hold that the automatic assessment of a civil penalty in the administrative order is arbitrary as a matter of law and therefore an abuse of the Department's discretion. Section 1307 of the Storage Tank Act provides that the Department has the authority to assess a civil penalty for violations of its orders. Such a penalty can be assessed even if the violation was not willful. The statute then instructs that the Department

> shall consider the willfulness of the violation; damage to air, water, land or other natural resources of this Commonwealth or their uses; cost of restoration or abatement; savings resulting to the person in the consequence of the violation; deterrence of future violations, and other relevant factors.

35 P.S. § 6021.1307(a). Once a penalty is assessed the Department "shall inform the person of the proposed amount of the penalty." 35 P.S. § 6021.1307(b). The person charged with a penalty then

has 30 days to pay the penalty in full or lodge an appeal of either the fact of the violation or the amount of the penalty with the Board. 35 P.S. § 6021.1307(b).[5]

First, we believe that to calculate a reasonable penalty for a particular violation, the Department must consider that facts surrounding the violation itself, not just the facts underlying its order which gives rise to a violation. For example, an event could occur which is outside the control of the Appellants resulting in a violation of the Department's order. The violation of the information requirements of Paragraphs 7 and 8 of the order probably would not deserve a penalty as high as the penalty for the failure to implement remedial action. Yet Paragraph 10 applies to *any* failure "to comply in a timely manner with any term or provision of the ORDER." Depending on the circumstances, it may not be appropriate to assess a penalty at all. On the other hand a particularly egregious act on the part of the Appellants could create a violation where the $ 1,500 penalty is grossly inadequate. The assessment of a penalty in advance of a violation is necessarily made without adequate information concerning the nature and effect of the specific violation. Under the circumstances the determination of a reasonable penalty is purely speculative.

This problem with the Department's approach is well illustrated by the testimony of Linda Wnukowski who decided to use $ 1,500 as the penalty. She arrived at this figure by *assuming* that a violation of the order would be a low risk violation, and utilized a wilfulness "multiplier" by *assuming* that any violation would be deliberate. (Motion Ex. 17) There is obviously no factual basis for either of these assumptions. The failure to meet the information requirement in the time frame required might be only accidental or negligent. Whether the failure to remediate is a low risk or a

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[5] As a prerequisite of appealing any aspect of a civil penalty, the person charged must also prepay the amount of the penalty. 35 P.S. § 6021.1307(b).

high risk violation can hardly be determined until after the site characterization and remedial action studies are complete. In fact, Ms. Wnukowski provided testimony that the Department would consider a violation of certain parts of the order more serious than others. For example, failure to provide information is generally considered a low risk violation but a violation of Paragraph 2 of the order relating to the site characterization is generally considered high risk and therefore a more serious violation. (Motion Ex. 17 at 53-54) This difference is not reflected in the blanket civil penalty in the Department's order.

Second, it is unclear from the Storage Tank Act that the Department has the authority to assess civil penalties automatically in advance of a specific violation. There is no specific language in the Act nor has the Department promulgated a regulation which authorizes an automatic penalty in advance of an actual violation. Our research could not find a single instance where an agency assessed an automatic penalty on the authority of a general statutory provision granting the power to assess civil penalties. Moreover, statutes prescribing automatic penalties are rare and provide a very specific formula for the calculation of the amount of a penalty which obviate the need for an agency to exercise any discretion. *See, e.g.,* 15 Pa. C.S. § 9503 (failure of a trustee to file a business trust instrument with the Department of State is liable for a penalty of $1,000). The more common scheme is that a penalty is assessed after an explicit finding of liability either by an agency or a court. In some cases a specific penalty is prescribed and in others, such as most environmental statutes, the tribunal must exercise some discretion and consider various criteria to determine an appropriate penalty. *Compare* 42 Pa. C.S. § 8308 (penalty for a civil action for retail theft is the value of the merchandise plus $150), *and* 31 P.S. § 20.5 (in assessing a civil penalty for violations of the Food Act the secretary shall consider the gravity of the violation). We believe that if the

General Assembly intended the Department to have the authority under the Storage Tank Act to assess a specific civil penalty without considering the facts surrounding a particular violation it would have explicitly so provided.

Third, automatic penalties create serious procedural dilemmas which do not appear to be contemplated by the statute. The scheme of the Storage Tank Act when reading subsection (a) and subsection (b) together, contemplates a scenario where a civil penalty would be calculated after a violation of the Act, regulations or an order of the Department and prescribes an orderly fashion by which either the fact of the violation charged or the amount of the penalty could be appealed and considered by the Board. 35 P.S. § 6021.1307(a) and (b). As we expressed in our prior opinion, prospective penalties such as that at issue here would give rise to multiple appeals creating a grave burden not only to the Appellants, but to the Board as well.

We therefore grant the Appellants motion for summary judgment on Paragraph 10 of the Department's order and enter the following:

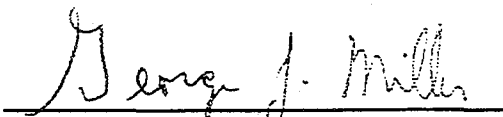
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

202 ISLAND CAR WASH, L.P.,	:	
EMCO CAR WASH, L.P. and	:	
CAR WASH OPERATING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 98-023-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 18th day of December, 1998, inspection, the motion of 202 Island Car Wash, L.P., Emco Car Wash, L.P. and Car Wash Operating Company, Inc. is hereby **GRANTED** as to Paragraphs 1 and 7 of the administrative order of the Department of Environmental Protection dated February 5, 1998; the portion of Paragraph 8, relating to the third party inspection; and Paragraph 10. This action with respect to Paragraph 7 and 8 of the Order is without prejudice to any penalty that the Department may assess for a failure to meet those requirements on a timely basis. The motion is **DENIED** as to all other remaining issues.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: **December 18, 1998**

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

For the Commonwealth, DEP:
Wm. Stanley Sneath, Esquire
Southeast Regional Counsel

For Appellants:
Philip L. Hinerman, Esquire
FOX ROTHSCHILD O'BRIEN & FRANKEL, LLP
Philadelphia, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SEVEN SISTERS MINING COMPANY, INC.	:	**Issued: December 18, 1998**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board dismisses a third-party appeal from the issuance of a coal surface mining permit. Evidence presented during the hearing demonstrated that the installation of the clay seal, which was the basis for the Appellant's objection to the permit, is not necessary to prevent pollution to the waters of the Commonwealth. The primary purpose of the clay seal is to prevent iron staining from occurring on the banks of the creek in the unlikely event that groundwater would flow through the area. The Board holds that the Appellant has failed to show that the proposed mine site is expected to cause acid mine drainage and therefore the Department of Environmental Protection did not abuse its discretion in issuing the permit.

PROCEDURAL HISTORY

This case involves a third party appeal of the issuance of Coal Surface Mining Permit No. 0390113 (permit) by the Department of Environmental Protection (Department) to Seven Sisters

Mining Company, Inc. (Seven Sisters). The permit authorizes Seven Sisters to conduct surface coal mining activities at a surface mine located in Burrell and Southbend Townships, Armstrong County. This mine is commonly known as the Laurel Loop mine. Mr. Peter Blose filed a notice of appeal, a petition for temporary supersedeas and a petition for supersedeas on February 26, 1998. Pursuant to an agreement by the parties, Mr. Blose subsequently filed a motion requesting an expedited hearing on the merits and withdrew four of the six objections listed in his notice of appeal. Seven Sisters filed a motion for summary judgment which the Board granted in part and denied in part. *Blose v. DEP*, EHB Docket No. 98-034-R (Opinion issued June 19, 1998).

As a result of the Board's decision on the motion for summary judgment, the only issue remaining to be decided concerned the effectiveness of the clay seal installed pursuant to Special Condition 1(c) of the permit in preventing acid mine drainage from polluting Crooked Creek or its watershed. A hearing on the merits was held before Administrative Law Judge Thomas W. Renwand. At the conclusion of Mr. Blose's case, Seven Sisters made an oral motion for nonsuit and directed adjudication, which was denied.[1] The record consists of the pleadings, a transcript consisting of 176 pages, 22 exhibits and a joint stipulation of facts. All of the parties filed post-hearing briefs.[2] After a full and complete review of the record, we make the following Findings of Fact:

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[1] While a motion for nonsuit or directed adjudication may be made at the close of a party's case, a sole administrative law judge does not have the power to grant the motion and has the discretion to deny it. *County of Schuylkill v. DER*, 1991 EHB 1.

[2] Mr. Blose included suggested Findings of Fact and a Conclusion of Law within his post-hearing brief which relate to an objection in his notice of appeal arguing that mining would not be feasible without mining within the dwelling barriers. Since the Board dismissed that objection in *Blose v. DEP*, EHB Docket No. 98-034-R (Opinion issued June 19, 1998), we will disregard Findings of Fact (g) and (h) and Conclusion of Law (b) in Mr. Blose's post-hearing brief.

FINDINGS OF FACT

A. **Parties**

1. The Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a (Surface Mining Act); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-517 (Administrative Code) and the rules and regulations promulgated thereunder. (DEP-PHM ¶ 1)[3]

2. Peter Blose is a private individual with a mailing address of P.O. Box 37, Apollo, PA 15613. (DEP-PHM ¶ 2)

3. Seven Sisters Mining Company, Inc. (Seven Sisters), is a corporation with a mailing address of U.S. Route 22, Delmont, PA 15626. The President of Seven Sisters is Daryll Jacobs. Seven Sisters has been engaged in the business of mining coal and non-coal minerals in Pennsylvania pursuant to License No. 1-01907. (DEP-PHM ¶ 3)

B. **Permit**

4. On January 30, 1998 the Department issued Coal Surface Mining Permit No.

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[3] References to pre-hearing stipulations filed on June 26, 1998, consisting of excerpts from the parties' pre-hearing memoranda which were agreeable to all parties and which were contained in the Department's pre-hearing memorandum, will be denoted as (DEP-PHM ¶ __); references to the Joint Exhibits submitted to the Board in this matter will be denoted as Ex. J-__); references to the transcript of the hearing held on July 1, 1998, will be denoted as (N.T. __); references to the Joint Stipulation submitted to the Board will be denoted as (J.S. ¶ __); references to Mr. Blose's Exhibits will be denoted as (Ex. App.-__); references to the Department Exhibit will be denoted as (Ex. C-__); references to Seven Sisters' Exhibits will be denoted as (Ex. P-__).

03950113 (permit) to Seven Sisters, for what is commonly known as the Laurel Loop mine. (DEP-PHM ¶ 4; Ex. J-3)

5. The Laurel Loop mine is located in Burrell and South Bend Townships, Armstrong County. (DEP-PHM ¶ 5; Ex. J-3)

6. The permit covers 93 acres and Seven Sisters could affect up to 34.5 acres for coal removal. However, pursuant to Authorization To Mine Permit No. 1-01907-03950113-01 (Authorization To Mine No. 1), the issued permit only authorizes surface mining activities on Phase I of the mine, an area covering 12.2 acres, with 3.5 acres of coal removal. (DEP-PHM ¶ 6; Ex. J-3)

7. Pursuant to the Laurel Loop permit, Seven Sisters proposes to remove the Lower Kittanning coal seam and sandstone and shale which overlie the Lower Kittanning coal. (N.T. 89-90; DEP-PHM ¶ 7)

C. **Background**

8. On April 3, 1995, Seven Sisters first submitted the Laurel Loop permit as a non-coal permit. It proposed to mine Vanport limestone and the Lower Kittanning coal. (N.T. 90-91; DEP-PHM ¶ 9)

9. The Department returned the initial application because it lacked the right of entry documents required for a non-coal mining permit application. (N.T. 90; DEP-PHM ¶ 10)

10. On June 15, 1995, Seven Sisters resubmitted the Laurel Loop permit as a coal permit. (N.T. 90-91; DEP-PHM ¶ 11)

11. The Department returned this application to Seven Sisters because, among other reasons, it proposed to mine limestone units which were below the coal to be mined and deficiencies existed in the reclamation plans. (N.T. 90-91; DEP-PHM ¶ 12)

12. Seven Sisters again submitted a Laurel Loop coal mining application on December 22, 1995. The Department accepted this application for review on January 2, 1996. (DEP-PHM ¶ 13; Ex. J-1)

13. Seven Sisters owns the minerals which underlie the Laurel Loop permit area pursuant to a deed of severance and it has a means of access to and from the mine site. (DEP-PHM ¶¶ 14, 16)

14. The area covered by the Laurel Loop permit includes the Laurel Loop Hunting Camp. The Camp consists of numerous privately-owned occupied dwellings and a larger number of unimproved lots. (N.T. 93-94; DEP-PHM ¶ 15)

15. Crooked Creek State Park is also located in the vicinity of the Laurel Loop mine. (N.T. 93; DEP-PHM ¶ 17)

16. The Department received numerous comments from the public during the permit review. (N.T. 96-98; DEP-PHM ¶ 18)

17. A public conference was held on March 28, 1996. (N.T. 97; DEP-PHM ¶ 19)

18. Concerns expressed by the public included prevention of water pollution, protection of Crooked Creek State Park, surface disruptions caused by mining, mining of the Vanport limestone, site access, and the adequacy of reclamation after mining.(N.T. 98; DEP-PHM ¶ 20)

19. The Department considered and addressed each of these concerns during its review of the permit application. (N.T. 98-99; DEP-PHM ¶ 21)

20. Michael D. Gardner is a Professional Geologist and a Hydrogeologist and has been employed continuously by the Department for the past fifteen years. One of Mr. Gardner's tasks as a hydrogeologist is to conduct a technical review of surface mining permit applications submitted to the Department. Mr. Gardner has reviewed approximately one hundred surface mining permits

in the last fifteen years. He was the lead technical reviewer of the permit application for the Laurel Loop mine for the Department. (J.S. ¶¶ 25, 26, 28, 29; Ex. J-4)

21. The review of the application took ten months, which is somewhat longer than the normal review period. (N.T. 99)

22 Mr. Gardner has testified as an expert witness in the field of hydrogeology in proceedings before the Board. (J.S. ¶ 27) The Board recognized Mr. Gardner as an expert in the field of hydrogeology. (N.T. 88-89)

D. **Geology and Hydrogeology**

23. The Lower Kittanning coal seam outcrops approximately 30 feet above Crooked Creek around the entire permit area. (N.T. 94-95; DEP-PHM ¶ 22)

24. The Lower Kittanning coal seam dips to the north at less than 1%. (N.T. 78, 95-96, 107; DEP-PHM ¶ 23)

25. The Laurel Loop mine is located on a narrow strip of land which is surrounded on three sides by Crooked Creek. Crooked Creek is classified as a Cold Water Fishery (CWF) in Chapter 93 of the Department's Regulations, 25 Pa. Code Chapter 93. (N.T. 96; DEP-PHM ¶ 24; Ex. J-2b)

26. Crooked Creek is a major recreational resource in the area. (N.T. 100)

E. **Pollution potential**

27. Acid mine drainage is caused by the oxidation of pyrite in coal or coal overburden. Its formation requires oxygen, water and pyritic material. (N.T. 103-104)

28. Hydrogeologists can assess the potential for acid mine drainage formation by considering the geology and overburden analysis, the hydrology, the operational methods to be

employed, and prior similar mining in the area. (N.T. 104)

29. Overburden analysis is a chemical analysis of the material to be disturbed during mining. It is a tool commonly used by hydrogeologists to assess the potential for acid mine drainage formation. (N.T..105-106; DEP-PHM ¶ 27)

30. Overburden analysis for the Laurel Loop site shows that the sulfur content of the coal is low, and the total alkalinity of units to be disturbed exceeds potential acidity of the units to be affected. (N.T. 105-106; Ex. J-1 (Mod. 7.4))

31. The mining method to be used by Seven Sisters, the block cut method, will limit the overburden's contact with oxygen, thereby limiting the potential for oxidation to occur. The mine site will be reclaimed to the approximate original contour. (N.T. 108-109; DEP-PHM ¶ 8)

32. Seven Sisters is also required to remove "pit cleanings," or coal remnants, from the pit to a hydrologically isolated area above the groundwater table on the mine site. (N.T. 106-108)

33. Mr. Gardner conducted a Cumulative Hydrologic Impact Assessment to assess any cumulative effects of mining to the receiving streams and to groundwater and concluded that there would not be any acid mine drainage or water quality problems. (N.T. 132-134)

34. Mr. Gardner believes to a reasonable degree of scientific certainty that the Laurel Loop mine, as mined according to the submitted plans, will not cause acid mine drainage. (N.T. 109; J.S. ¶ 31)

35. Based upon the overburden analysis, limited amount of groundwater, and operational methods to be employed at the site, the Laurel Loop mine is not expected to create acid mine drainage. (N.T. 109-110)

36. The Department added several requirements to the permit to further limit the potential

for acid mine drainage pollution. (N.T. 110-112)

37. One of these additional protective measures is Special Condition 1(c) which requires Seven Sisters to place a "clay seal" along any exposed coal seams. This practice will further minimize the possibility that water will migrate through the coal seam. (N.T. 112)

38. The primary purpose of the "clay seal" is to prevent unwanted aesthetic impacts, namely iron staining, from occurring on the banks of Crooked Creek. (N.T. 112-113)

39. The clay seal was also included as an additional safeguard to retard the possible flow of groundwater through the area. (N.T. 113-114, 125)

40. Regardless of whether the clay seal is installed, it is unlikely that water would flow through the intact coal because other flow paths of less resistance exist. (N.T. 114-115)

41. Any water which could flow through the intact coal is not expected to be polluted by acid mine drainage. (N.T. 115-117)

42. Kenneth L. King is a Professional Geologist employed by W.D. Mohney & Associates (Mohney) since March of 1987. In October of 1994, the Commonwealth of Pennsylvania granted Mr. King a Certificate of Registration authorizing him to practice as a Professional Geologist and he has been practicing as a licensed Professional Geologist in Pennsylvania since that time. (J.S. ¶¶ 33-35; Ex. P-2)

43. One of Mr. King's primary tasks as a geologist for Mohney is to prepare applications authorizing coal mining activities for applicants seeking permits from the Department. Mr. King has prepared over one hundred permit applications during his career. Approximately fifteen of these applications involved mining activities in the Crooked Creek watershed. (J.S. ¶¶ 36, 37; N.T. 144-145; Ex. P-3) The Board recognized Mr. King as an expert witness in the fields of geology and

hydrogeology. (N.T. 149)

44. On behalf of Seven Sisters, Mr. King prepared portions of the permit application relating to geology, hydrogeology, mining operations and reclamation. (J.S. ¶ 38)

45. Mr. King performed an overburden analysis and prepared an overburden analysis report which was submitted as part of the permit application. (Ex. J-1) He concluded that the mine site does not contain any potential problem zones since the acid producing materials, the coal seam and the pit cleanings would be removed. The removal of these materials should not cause any problems after mining. (N.T. 147-149; Ex. J-1)

46. Mr. King believes that it would take approximately 100 years for one unit of water to pass through a one foot section of clay. (N.T. 153, 156-158)

47. In his professional opinion, Mr. King believes that the clay seal will be effective in preventing water from the backfilled mine from migrating through the coal seam into Crooked Creek or its unnamed tributary, or from otherwise entering the Crooked Creek watershed. (N.T. 153; J.S. ¶ 41)

48. In his professional opinion, Mr. King believes that it is unlikely that the anticipated coal mining activities at the Laurel Loop Mine will create acid mine drainage. (N.T. 154)

49. The clay seals will be effective to prevent groundwater from the backfilled mine site from migrating offsite causing acid mine drainage to enter the Crooked Creek watershed. (N.T. 111-114, 153, 158)

DISCUSSION

As a third-party appellant challenging the issuance of a permit, Mr. Blose bears the burden of proof in this matter. 25 Pa. Code § 1021.101(c)(2); *James E. Wood v. DER*, 1994 EHB 347. The

applicable regulation dictates that there must be no "presumptive evidence of potential pollution to the waters of the Commonwealth" from the proposed Laurel Loop mine. 25 Pa. Code § 86.37(a)(3). To sustain his burden, Mr. Blose must establish by a preponderance of the evidence that the Department abused its discretion in issuing the permit by acting arbitrary, capricious, or contrary to law. 25 Pa. Code § 1021.101(a); *See Oley Township v. DEP*, 1996 EHB 1098.

In its post-hearing brief, Seven Sisters states that Mr. Blose does not have standing to challenge the permit. We disagree. As previously held by this Board, Mr. Blose has standing to pursue this appeal by virtue of his status as an individual who regularly uses Crooked Creek for swimming, boating and other recreational activities. *Blose v. DEP*, EHB Docket No. 98-034-R (Opinion issued June 19, 1998). Moreover, Mr. Blose presented photographs and testimony during the hearing which were further evidence of his substantial, direct and immediate connection to Crooked Creek and its watershed. (Blose, N.T. 13-18, 55-58; Ex. App. 1-6); *See William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (1975), *Pohoqualine Fish Association v. DER*, 1992 EHB 502.

The sole issue remaining in this appeal is whether the Laurel Loop mine and the use of a clay seal will cause pollution to Crooked Creek and its watershed. Mr. Blose appears to argue in his post-hearing brief that acid mine drainage into Crooked Creek is likely and the use of a clay seal is ineffective in preventing acid mine drainage since the clay seal is not completely impermeable to groundwater. In its post-hearing brief, the Department contends that acid mine drainage is not likely to occur and, moreover, the clay seal specified in the permit is not required to prevent acid mine drainage.

Background

On April 3, 1995, Seven Sisters first submitted the Laurel Loop permit as a non-coal permit. It proposed to mine Vanport limestone and the Lower Kittanning coal. (Gardner, N.T. 90-91; DEP-PHM ¶ 9) The Department returned the initial application because it lacked the right of entry documents required for a non-coal mining permit application. (Gardner, N.T. 90; DEP-PHM ¶ 10) On June 15, 1995, Seven Sisters resubmitted the Laurel Loop permit as a coal permit. (DEP-PHM ¶ 11; N.T. 90) The Department returned this application to Seven Sisters because, among other reasons, it proposed to mine limestone units which were below the coal to be mined and deficiencies existed in the reclamation plans. (Gardner, N.T. 90-91; DEP-PHM ¶ 12) Seven Sisters again submitted a Laurel Loop coal mining application on December 22, 1995. The Department accepted this application for review on January 2, 1996. (DEP-PHM ¶ 13; Ex. J-1)

Seven Sisters owns the minerals which underlie the Laurel Loop permit area pursuant to a deed of severance and it has a means of access to and from the mine site. (DEP-PHM ¶¶ 14, 16) The area covered by the Laurel Loop permit includes the Laurel Loop Hunting Camp. The Camp consists of numerous privately-owned occupied dwellings and a larger number of unimproved lots. (Gardner, N.T. 93-94; DEP-PHM ¶ 15) Crooked Creek State Park is also located in the vicinity of the Laurel Loop mine. (Gardner, N.T. 93; DEP-PHM ¶ 17)

The Department received numerous comments from the public during the permit review. (Gardner, N.T. 96-98; DEP-PHM ¶ 18) A public conference was held on March 28, 1996. (Gardner, N.T. 97; DEP-PHM ¶ 19) Concerns expressed by the public included prevention of water pollution, protection of Crooked Creek State Park, surface disruptions caused by mining, mining of the Vanport limestone, site access and the adequacy of reclamation after mining. (Gardner, N.T. 98; DEP-PHM ¶ 20) The Department considered and addressed each of these concerns during its review of the

permit application. (Gardner, N.T. 98-99; DEP-PHM ¶ 21) The review of the application took ten months, which is somewhat longer than the normal review period. (Gardner, N.T. 99)

The permit as issued only authorizes surface mining activities on Phase I of the mine, an area covering 12.2 acres, with 3.5 acres of coal removal. (DEP-PHM ¶ 6; Ex. J-3) Pursuant to the permit, Seven Sisters proposes to remove the Lower Kittanning coal seam and sandstone and shale which overlie the Lower Kittanning coal. (Gardner, N.T. 89-90; DEP-PHM ¶ 7)

Pollution potential

Mr. Blose testified on his own behalf and asserted that the use of clay seals below the post-mining water table on the unmined portion of the Lower Kittanning cropline is ineffective in preventing acid mine drainage. (Blose, N.T. 43-45) Mr. Blose himself has not had any formal training or experience in geology, water pollution, or clay seals and he has no knowledge as to whether the overburden analysis in the permit file is accurate. (Blose, N.T. 62-63; J.S. ¶¶ 15-19) Mr. Blose called the Department's expert, Michael D. Gardner, to testify. Mr. Gardner was the lead technical reviewer of the permit application for the Department. (Gardner, N.T. 89; J.S. ¶ 25) The parties agreed to stipulate that clay is not totally impermeable and that the Lower Kittanning coal seam contains potentially acid forming materials. (N.T. 9; Gardner, N.T. 76) Mr. Gardner testified that the permeability of clay depends on many factors, including the clay composition and hydraulic pressure pushing against the clay. (Gardner, N.T. 76) Mr. Gardner stated that whether the clay seal was above or below the water table would not really affect the rate at which water might be transmitted through the clay seal. (Gardner, N.T. 77) He also testified that the coal at the Laurel Loop mine is almost flat with less than a 1% dip to the north. (Gardner, N.T. 78-79, 114) Due to the small dip, neither the direction of flow of the groundwater nor the hydraulic pressure on the seal

will be affected very much. (Gardner, N.T. 78-79)

In support of his position regarding the ineffectiveness of the clay seal, Mr. Blose relies upon the Department's May 8, 1996 correction letter in which Mr. Gardner expressed concern about "the potential for acid mine drainage due to the presence of unmined sections of the Lower Kittanning cropline and the presence of Lower Kittanning pit cleanings on the site." (Ex. App. 7) During his testimony, Mr. Gardner explained that numerous issues had not been resolved at the time of the May 8, 1996 letter. (Gardner, N.T. 118-119, 121-127) The correction letter directed Seven Sisters to address several issues related to pollution, including the removal of all "pit cleanings," which are coal remnants and therefore a source of acidic material, and the installation of a clay seal. (Gardner, N.T. 106-108, 125-127) Seven Sisters subsequently revised its application to satisfy the concerns raised in the May 8, 1996 letter and Mr. Gardner was able to evaluate the mine site's pollution potential. (Gardner, N.T. 106-108, 125-127; Ex. C-1)

The Department asserts that it did not abuse its discretion in issuing the permit since the clay seal is not needed to prevent pollution from entering Crooked Creek and its watershed because the waters are protected by the character of the overburden, the hydrology and the mining techniques to be employed at the mine site. (N.T. 81) Mr. Gardner testified on behalf of the Department as an expert in hydrogeology. (Gardner, N.T. 88-89) In his professional opinion, Mr. Gardner does not believe that the mine will create any acid mine drainage or pollution to the waters of the Commonwealth. (Gardner, N.T. 109-110)

Hydrologists predict whether a mine site is likely to cause acid mine drainage by looking at: (1) the history of prior mining in the area; (2) the geology and overburden analysis; (3) the hydrology; and (4) the operational methods to be employed at the site. (Gardner, N.T. 104) Mr.

Gardner testified that the creation of acid mine drainage requires oxygen, water and potentially acid forming materials, such as sulfur, in the rock which overlie the coal, or "overburden." (Gardner, N.T. 103, 108) Mr. Gardner was unable to look at the history of prior mining in the area because no other mines have exclusively mined the Lower Kittanning coal seam. (Gardner, N.T. 104-105)

In terms of geology, the Lower Kittanning coal seam outcrops approximately 30 feet above Crooked Creek around the entire permit area. (Gardner, N.T. 94-95) Mr. Gardner testified that the overburden analysis for the site does not show a potential for acid mine drainage production. Overburden analysis is a chemical analysis of the material to be disturbed during mining. A hole is drilled vertically through all the material to be affected through the coal and to the base of the coal seam. The material is then analyzed for the amount of acidic, or pyritic, material as compared to the amount of alkaline material. (Gardner, N.T. 105) The overburden analysis for the site shows that the sulfur content of the coal is low and the overburden is alkaline. (Gardner, N.T. 105-106; Ex. J-1 (Mod. 7.4))

Mr. Gardner testified that very little groundwater exists at the mine site itself due to the close proximity of Crooked Creek, the topography of Laurel Loop and the small recharge area; therefore, little water would be encountered during the proposed mining. (Gardner, N.T. 79, 101-103, 108) Mr. Gardner explained that in order to get groundwater into a mine site, the site needs a recharge area. (Gardner, N.T. 102) The mine is located on a narrow strip of land which is surrounded on three sides by Crooked Creek.[4] (Gardner, N.T. 96; DEP-PHM ¶ 24; Ex. J-2b) This mine site has only a very small recharge area from the south because Crooked Creek separates the topographically

[4] Crooked Creek is classified as a Cold Water Fishery (CWF) in Chapter 93 of the Department's Regulations, 25 Pa. Code Chapter 93. (DEP-PHM ¶ 24)

higher areas in the north, east, and west from any water. (Gardner, N.T. 102) Mr. Gardner stated that if the site does not have water, which is one of the key ingredients in creating acid mine drainage, then the mine will not produce acid mine drainage. (Gardner, N.T. 108) In any event, it is unlikely that groundwater will flow from the mined area north to the unmined portion of Laurel Loop because water is going to take the path of least resistance toward the sides of Laurel Loop since those areas will be mined and therefore more permeable than sections of intact coal. (Gardner, N.T. 114-115) However, Mr. Gardner conducted a Cumulative Hydrologic Impact Assessment and concluded that any water which would flow through the intact coal is not expected to be polluted by acid mine drainage. (Gardner, N.T. 115-117, 132-134)

The mining methods to be employed by Seven Sisters will minimize the opportunity for any acid forming material to oxidize and create acid mine drainage. (Gardner, N.T. 108-109) The only acid forming material present at the site is the sulfur in the coal itself, which is the material that is going to be mined and removed from the site. (Gardner, N.T. 106) The site will be mined using the block cut method of mining. This means that material is removed and placed back into the hole that was previously excavated. Therefore, the potential for oxidation is reduced because the material's exposure to oxygen in the atmosphere is limited. (Gardner, N.T. 108-109) Seven Sisters is also required to remove all pit cleanings from the pit to a hydrologically isolated area above the groundwater table on the mine site. (Gardner, N.T. 106-108; Ex. J-3, Special Condition 1(b)) This operational method will limit the acid forming material needed for the creation of acid mine drainage. (Gardner, N.T. 106-108)

The Department added several requirements to the permit to further limit the potential for acid mine drainage pollution. (Gardner, N.T. 110-112; Ex. J-1, J-3) One of these additional

protective measures is Special Condition 1(c) which requires Seven Sisters to place a "clay seal" along any exposed coal seams. (N.T. 112; Ex. J-3) Special Condition 1(c) also requires Seven Sisters to analyze the Lower Kittanning underclays every 250 feet and submit the analysis to the Mine Conservation Inspector prior to installing the clay seal. This is required because underclays may not be utilized as a seal if the total sulfur amount is greater than 0.5%. (Ex. J-3) The clay seal is designed to prevent water from flowing from the mined area through unmined coal and cause staining on the stream bank where it discharges at the tip of Laurel Loop. (Gardner, N.T. 112-113; Ex. J-3) The primary purpose of the clay seal is to prevent unwanted aesthetic impacts from occurring on the banks of Crooked Creek. Mr. Gardner testified that "[t]his is the same area that people go out and fish and walk. For aesthetic purposes, I just wanted to try to prohibit any groundwater, if there would be any, from going through that area." (Gardner, N.T. 113) Regardless of whether the clay seal is installed, it is unlikely that water would flow through the intact coal because other flow paths of less resistance exist. (Gardner, N.T. 114-115) Although Mr. Gardner thinks that if water were to flow from the mined to the unmined area it would not be of acid mine drainage quality, he explained that even water with a low concentration of iron can create an orange stain where it discharges. (Gardner, N.T. 115-117) The clay seal was also included as an additional safeguard to retard the possible flow of groundwater through the area. (Gardner, N.T. 113-114, 125)

Seven Sisters introduced testimony which supported Mr. Gardner's opinions. Kenneth L. King testified as their expert witness in geology and hydrogeology. (N.T. 149) Mr. King is a Professional Geologist employed by W.D. Mohney & Associates (Mohney), a consulting firm. (King, N.T. 141-142; J.S. ¶ 33; Ex. P-2) One of Mr. King's primary tasks as a geologist for the firm is to prepare applications authorizing coal mining activities for applicants seeking permits from the

Department. (King, N.T. 142; J.S. ¶ 36) On behalf of Seven Sisters, Mr. King prepared the portions of the permit application for the Laurel Loop mine relating to geology, hydrogeology, mining operations and reclamation. (King, N.T. 143; J.S. ¶ 38) He was also responsible for responding to Mr. Gardner's correction letters. (King, N.T. 146) Mr. King performed an overburden analysis and prepared the overburden analysis report which was submitted as part of the permit application. (King, N.T. 147; Ex. J-1) The results of the analysis indicate an absence of both neutralization potential and acid-producing materials on the site. (King, N.T. 149; Ex. J-1)

Mr. King concluded that the mine site does not contain any potential problem zones since the acid producing materials, which are the coal seam and the pit cleanings, will be removed and therefore this material should not cause any problems after mining. (King, N.T. 149; Ex. J-1, p. 7-4-21) In Mr. King's professional opinion, the clay seals will be effective in preventing the transmission of acid mine drainage through the coal seam into Crooked Creek and its watershed. (King, N.T. 153; J.S. ¶ 41) He based his opinion on a test conducted of the Lower Kittanning underclay, which is the same underclay located at the Laurel Loop site. (King, N.T. 153) The results indicate that the clay has a permeability of 10^{-8}, which means that it would take approximately 100 years for a unit of water to pass through a one foot section of clay. (King, N.T. 153, 156-158) Mr. King opined that it is unlikely that the mining operations at the Laurel Loop mine will produce acid mine drainage. (King, N.T. 154)

In further support of his assertion that clay seals are ineffective in preventing acid mine drainage, Mr. Blose attempted to assert that the use of a clay seal is inconsistent with Chapter 9 of the Coal Mining Engineering Handbook (Ex. App. 9) and Page 30 of the 1996 Water Quality Assessment Report (Ex. App. 10). These documents concern the special handling of overburden.

Mr. Blose seems to equate clay seals with "special handling techniques" and therefore believes that the installation of clay seals is inconsistent with these documents. (Blose, N.T. 42-43, 51-54) Mr. Gardner testified that clay seals are not a special handling technique because "[s]pecial handling is associated with the spoil itself that is affected during mining activities, not [with] an intact portion of coal which can't be removed anyway." (Gardner, N.T. 117) As Mr. Gardner explained in his testimony, the purpose of the clay seal is to limit any water that might flow through the unmined coal in order to prevent iron staining on the bank of Crooked Creek.

Based on the information provided by both expert witnesses, the Board finds that the Department did not abuse its discretion in issuing the permit to Seven Sisters for the proposed Laurel Loop mine. The overburden analysis, the limited amount of groundwater and the operational methods to be employed at the site all indicate that the Laurel Loop mine is not expected to create acid mine drainage. The evidence presented during the hearing established that the clay seal's primary purpose is to guard against unwanted aesthetic impacts from occurring on the banks of a recreational area. Mr. Blose has failed to present any evidence that the clay seal or the proposed mine will cause acid mine drainage to pollute Crooked Creek or its watershed.

Accordingly, we make the following:

CONCLUSIONS OF LAW

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

2. Mr. Blose has standing to challenge the permit. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (1975); *Pohoqualine Fish Association v. DER*, 1992 EHB 502.

3. Mr. Blose, as a third-party appellant challenging a permit issued by the Department, bears the burden of proof in this appeal. 25 Pa. Code § 1021.101(c)(2); *James E. Wood v. DER*,

1994 EHB 347.

4. Mr. Blose has failed to demonstrate that there is "presumptive evidence of potential pollution to the waters of the Commonwealth" from the proposed Laurel Loop mine. 25 Pa. Code § 86.37(a)(3).

5. Mr. Blose has failed to demonstrate that the Department abused its discretion in issuing the Laurel Loop permit by acting arbitrary, capricious, or contrary to law. 25 Pa. Code § 1021.101(a); *Oley Township v. DEP*, 1996 EHB 1098.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SEVEN SISTERS MINING COMPANY, INC.	:	

ORDER

AND NOW, this 18th day of December, 1998, it is ordered that the above-captioned appeal shall be dismissed.

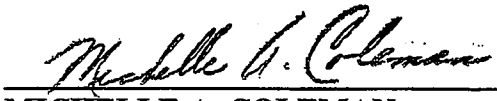
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 18, 1998

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

For the Commonwealth, DEP:
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Southwestern Region

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Apollo, PA

For Permittee:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

ASHLAND TOWNSHIP ASSOCIATION OF CONCERNED CITIZENS, INC.	:	
v.	:	**EHB Docket No. 98-204-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILESTONE CRUSHED, INC., Permittee	:	**Issued: December 18, 1998**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Appellant's petition for supersedeas is granted in part. The Appellant has established that a "water of the Commonwealth," in the form of a drainage swale, does not exist on property bordering the southern boundary of the mine site. Therefore, the Department erred in authorizing the Permittee to discharge mine drainage onto the property in question. However, because no discharge has occurred onto the neighboring property and the evidence indicates that such a discharge is unlikely to occur, we decline to suspend the mining permit which is the subject of this supersedeas. Rather, we suspend that portion of the permit which authorizes discharges onto the neighboring property.

As to the other issues raised by the Appellant in its petition for supersedeas, we find that the evidence does not warrant a supersedeas with regard to these matters.

OPINION

This appeal was filed on October 21, 1998 by the Ashland Township Association of Concerned Citizens, Inc. (the Association), challenging the issuance of a surface mining permit by the Department of Environmental Protection (Department) to Milestone Crushed, Inc. (Milestone). The permit authorizes Milestone to conduct surface mining operations on property known as the Gillingham site, in Ashland Township, Clarion County. The Association consists of a number of residents in the vicinity of the Gillingham site.

On November 18, 1998, the Association filed a Petition for Supersedeas, seeking a stay of the mining permit. The Board conducted a site view of the Gillingham property on November 25, 1998, and a supersedeas hearing was held on December 7, 8, and 10, 1998. Reviewing the evidence, we find that the Association is entitled to a supersedeas in part.

Petitions for supersedeas are governed by Section 4(d)(1) and (2) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(d)(1) and (2), and Rule 1021.78, 25 Pa. Code § 1021.78. In granting or denying a supersedeas, Rule 1021.78(a) provides that the Board should consider (1) the irreparable harm to the petitioner, (2) the likelihood of success on the merits, and (3) the likelihood of injury to the public or other parties. 25 Pa. Code § 1021.78(a). These factors are to be balanced collectively. *Svonavec, Inc. v. DEP*, EHB Docket No. 97-274-R (Opinion issued May 11, 1998).

We now examine the issues raised by the Association in its petition for supersedeas.

Discharge onto Kenemuth Property

The permit authorizes discharges from Milestone's sedimentation and treatment ponds to Little East Sandy Creek and an unnamed tributary to Little East Sandy Creek, which in turn flows

to East Sandy Creek and the Allegheny River. Property to the south of the Gillingham site is owned by Theda Kenemuth. It is the contention of the Department and Milestone that a natural drainage swale[1] exists at the southern end of the Gillingham site, extends onto Mrs. Kenemuth's property, and continues to the unnamed tributary of Little East Sandy Creek. The permit authorizes discharges from the sedimentation and treatment ponds to this alleged drainage swale. It is the contention of Mrs. Kenemuth and the Association that no such drainage swale exists and that the permit authorizes discharges onto her property without her consent.

Pursuant to the Clean Streams Law, Act of June 22, 1937, P.L. No. 1987, *as amended*, 35 P.S. § 691.1 - 691.1001, the Department may authorize discharges from a mine site to "waters of the Commonwealth." 35 P.S. § 691.315(a). The term "waters of the Commonwealth" includes the following: "rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs, and all other bodies or channels of conveyance of surface and underground water, or parts thereof. . ." 35 P.S. § 691.1.

Whether Milestone may discharge onto Mrs. Kenemuth's property hinges on whether the area in question constitutes a "water of the Commonwealth." Based on the evidence, we find that the area in question does not constitute a "water of the Commonwealth."

At the hearing, the Association presented the testimony of James Casselberry, who was recognized by the Board as an expert in groundwater geology. Mr. Casselberry inspected the boundary between the Gillingham mine and the Kenemuth property and found no evidence of an active stream channel until 410 feet from the southern boundary of the mine site. Photos of this

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[1] A "swale" is defined as "a low-lying or depressed and often wet stretch of land." *Webster's Ninth New Collegiate Dictionary* (Merriam - Webster, Inc. 1989).

area, taken by Mr. Casselberry on October 13, 1998, illustrate an area of flat surface topography. (Ex. A - 9, 10, 11)[2] Mr. Casselberry further testified that U.S. topographic maps for the area in question do not show a stream channel on the Kennemuth property until 410 feet south of the Gillingham boundary.

Dr. L.R. Auchmoody, who holds a Ph.D. in soil science and forestry, also testified on behalf of the Association. He was recognized by the Board as an expert in soils and soil science. Dr. Auchmoody investigated the area south of the drainage pipes to the ponds. He found no evidence of flowing water, surface disturbance, or debris from flowing water. He encountered no hydric plants or mottling of soil, which would be indicative of water having been in this area; all the plants he encountered during his investigation were typical of a dry site. "Alluvial material" is material which has been moved by water. Dr. Auchmoody encountered no alluvial material until approximately 400 feet south of the mine site. Based on his investigation, Dr. Auchmoody concluded to a "high degree of certainty" that drainage does not occur from the Gillingham site to the Kenemuth property in the area which the Department and Milestone contend to be a natural drainage swale.

The Department and Milestone also presented expert testimony in an attempt to demonstrate that a water course does exist at the southern end of the Gillingham site and continues south onto the Kenemuth property. However, we find that this testimony does not rise to the degree of certainty as that presented by the Association's expert witnesses, as outlined above.

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[2] Exhibits introduced by the Association at the supersedeas hearing are designated as Ex. A- __; those introduced by the Department are designated as Ex. C- __; and those introduced by the permittee Milestone are designated as Ex. P- __. Those exhibits agreed to by all parties as Board exhibits are designated as Ex. B-__.

Roger Bowman, a mining engineer in the Department's Knox District Office, was recognized by the Board as an expert in mining engineering, engineering with respect to erosion and sedimentation controls, and design of mine drainage facilities. Mr. Bowman was responsible for examining the drainage patterns and calculating the drainage area at the Gillingham site. Mr. Bowman described the mine drainage area at the Gillingham site as being in the shape of a raindrop, converging in an area of depression at the southern edge of the Gillingham site. On cross-examination, Mr. Bowman admitted, however, that on his two visits to the site, he saw no wetlands in the area of the alleged swale or any indication in the soil that water flows through this area on a regular basis. Nor could he depict the swale in the series of photographs of the alleged swale area taken by Mr. Casselberry.

As noted earlier, on November 25, 1998 the Board conducted a site view of the Gillingham mine and that portion of the Kenemuth property bordering the mine. Although the site view does not constitute evidence on the record, its purpose was to familiarize the Board with the areas to be discussed at the supersedeas hearing. What was observed at the site view supports the evidence and testimony presented by the Association that no swale or channel of conveyance exists in the area in question.

When asked on cross-examination what constitutes a "water course," Mr. Bowman testified that it is an area where water converges during storm events and then continues to flow. Even under Mr. Bowman's definition, there must be some distinguishable area of convergence and conveyance. Such an area does not exist on the Kenemuth property. If we were to accept the Department's and Milestone's argument, we would be required to hold that simply because the Gillingham site slopes slightly toward the south, in the direction of Mrs. Kenemuth's property,

a conveyance channel exists on Mrs. Kenemuth's property for the discharge of Milestone's sedimentation and treatment ponds. As counsel for the Association pointed out during argument, if during a heavy rainfall water flows across one's front yard, does that turn one's property into a "water of the Commonwealth?" We cannot find that the Legislature intended such a result.

In its response to the petition, Milestone argues that the owners and lessees of the Gillingham site have a common law right to allow surface water to flow to natural drainage courses, citing *LaForm v. Bethlehem Township*, 499 A.2d 1373 (Pa. Super. 1985). In *LaForm*, the Pennsylvania Superior Court reiterated the law of surface waters in this jurisdiction:

> "Water must flow as it is wont to flow." Because water is descendible by nature, the owner of higher ground has an easement in lower land for the discharge of all waters that naturally rise in or flow or fall upon the higher.

Id. at 1377-78 (citing *Kauffman v. Griesemer*, 26 Pa. 407 (1856)). Quoting the Pennsylvania Supreme Court, the court in *LaForm* further recognized:

> "The owner of upper land has the right to have surface waters flowing on or over his land discharged through a natural water course onto the land of another. . . ."

LaForm, 499 A.2d at 1378 (citing *Chamberlin v. Ciaffoni,* 96 A.2d 140, 142 (Pa. 1953)). However, the court went on to say:

> . . .an upper landowner is liable for the effects of surface water running off his property. . .where he has A) diverted the water from its natural channel by artificial means. . .or B) unreasonably or unnecessarily increased the quantity (or changed the quality) of water discharged upon his neighbor. . . .

LaForm, 499 A.2d at 1378 (citations omitted).

The discharges from Milestone's sedimentation and treatment ponds fall into the above-stated exception. The water is being diverted from the ponds through discharge pipes to the area in question. The testimony at the hearing was that at least a portion of this water would not flow to the alleged swale area were it not discharged there by the pipes. In addition, the quality of at least some of the water will have changed by virtue of its passing through the mining area and treatment pond.

More important, discharges from a mine site are specially governed by the Clean Streams Law and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 - 1396.31, and are thereby limited by the requirements of these acts. As noted earlier, the Department may authorize mining discharges to "waters of the Commonwealth." Where a water of the Commonwealth does not exist, such a discharge is prohibited.

In deference to the Department and Milestone, we recognize that a "water of the Commonwealth" does not necessarily require a channel the size of the Allegheny River. It may constitute a mere rivulet or ditch. It may in cases constitute a swale, as the Department and Milestone point out. The common denominator in each of these cases is an existing distinguishable channel of conveyance. A "water of the Commonwealth" is not something to be invented out of necessity. It does not come into existence simply because one has obtained a permit to mine, and there is a need for a discharge area. A "water of the Commonwealth" must constitute more than simply an area downhill of a mine site.

The NPDES permit for the Gillingham mine authorizes a discharge of 4.5 million gallons per day, 3 days per month from the sedimentation pond onto the Kenemuth property. It further authorizes a discharge of 1.2 million gallons per day, 1 day per week from the treatment pond. (Ex. B-1) If the ponds were to be discharged together, this would result in a discharge of nearly 4000 gallons per minute onto the Kenemuth property for a 24 hour period.

The evidence indicates, however, that *no* discharge has occurred onto the Kenemuth property since the mine began operation. The experts for both Milestone and the Department testified that they do not anticipate that the discharges authorized by the NPDES permit will in fact occur. Witnesses for all three of the parties agreed that little or no water had ever entered the ponds during the mining operation. In addition, the evidence indicates that the ponds were designed to hold a larger capacity than required in order to avoid the need to discharge onto the Kenemuth property. Sydney Miles, the president of Milestone, testified that it was his goal not to discharge a drop of water onto the Kenemuth property. The evidence indicates that Mr. Miles has taken steps to reduce the impact of the mining on the surrounding community. Mining of the site is expected to be completed by February 1999.

Based on our finding that a "water of the Commonwealth" does not exist on the Kenemuth property near the southern boundary of the mine site, we hold that the Department erred in authorizing Milestone to discharge onto the Kenemuth property. The Association is entitled to a supersedeas on this issue. However, because there is no evidence that any discharge has occurred or is likely to occur from the Gillingham mine onto the Kenemuth property during the remainder of the operation, we will not suspend the permit. Milestone may continue to mine under its existing permit, but may not discharge onto the Kenemuth property. Should any discharge onto

the Kenemuth property occur, Milestone will be in violation of both its permit and this Order of the Board.

Remaining Issues

The remaining issues raised by the Association in its petition for supersedeas are the following: change in post-mining land use, storm water management, oil and gas wells, and protection of the hydrologic balance.

Based on the evidence and testimony presented by the parties, we find that a supersedeas is not warranted with regard to these issues.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ASHLAND TOWNSHIP ASSOCIATION OF CONCERNED CITIZENS	:	
v.	:	**EHB Docket No. 98-204-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILESTONE CRUSHED, INC., Permittee	:	

ORDER

AND NOW, this 18th day of December, 1998, Ashland Township Association of Concerned Citizens' Petition for Supersedeas is granted in part. That portion of the mining permit which authorizes a discharge onto property owned by Theda Kenemuth is suspended, and Milestone Crushed, Inc. is prohibited from discharging its sedimentation and treatment ponds onto the Kenemuth property. The remainder of the mining permit shall remain in effect.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: December 18, 1998

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

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