Environmental Hearing Board

Adjudications
and
Opinions

1992

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COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

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OF THE

ENVIRONMENTAL HEARING BOARD

1992

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1992.

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

ADJUDICATIONS

OPINIONS AND ORDERS

1992 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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M. DIANE SMI
SECRETARY TO THE

WAYNE DRILLING & BLASTING, INC. and DEMTECH, INC.	:	
v.	:	**EHB Docket No. 91-469-F**
	:	**(Consolidated proceeding)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 8, 1992**

OPINION AND ORDER SUR
PETITIONS FOR SUPERSEDEAS

By Terrance J. Fitzpatrick, Member

Synopsis

The Board affirms an earlier Order granting one petition for supersedeas and denying two others in a consolidated proceeding. With regard to the first petition, filed by Wayne Drilling & Blasting, Inc. (Wayne), the Board finds that the Department of Environmental Resources (DER) has taken an appealable "action" where it forbids Wayne from performing explosives services without first obtaining a permit to sell explosives. The Board further finds that DER exceeded its authority by taking this action because 25 Pa. Code §211.42 does not require a sales permit for persons engaged in performing explosives services. Therefore, this petition for supersedeas must be granted.

With regard to the second petition, also filed by Wayne, the Board finds that DER's warrantless search of Wayne's property did not contravene the

Fourth Amendment to the United States Constitution because Board precedent and Commonwealth Court precedent indicates that the Fourth Amendment does not apply in administrative proceedings. Moreover, it appears that Wayne consented to the search. Finally, the evidence derived from the inspection warranted DER's suspension of Wayne's sales license and cancellation of its magazine license. Therefore, the petition for supersedeas must be denied because Wayne is not likely to succeed on the merits of its appeal.

With regard to the third petition for supersedeas, filed by Demtech, Inc. (Demtech), the Board finds that the evidence justified DER's suspension of Demtech's purchase permit. Therefore, Demtech's petition must be denied.

OPINION

This proceeding involves three appeals, which have been consolidated. The appeal at Docket No. 91-469-F was filed by Wayne from an alleged action[1] of DER dated October 24, 1991 which forbade Wayne from selling explosives or explosives services until Wayne obtained a sales permit. The other two appeals were filed by Wayne at Docket No. 91-491-F and by Demtech at Docket No. 91-492-F from a DER action dated November 7, 1991 which: 1) suspended for 1 year Wayne's and Demtech's permits to purchase explosives, 2) denied Wayne's and Demtech's applications for sales permits,[2] and 3) cancelled Wayne's magazine license.

Wayne and Demtech are owned by Scott Gustafson (Transcript - "T." 333). Both companies are providers of explosives services, and both operate out of a site located in Tyler Hill, Wayne County, Pennsylvania. The DER actions, or alleged actions, at issue here arose from an unannounced inspection of the

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[1] DER contends that the document which Wayne seeks to appeal is not an appealable action. We will address this argument below.

[2] The Board lacks power to supersede DER permit denials. See U.S.P.C.I. of Pennsylvania, Inc. v. DER, EHB Docket No. 91-392-F (October 30, 1991). Therefore, we will not discuss the sales permit denials in this Opinion.

Tyler Hill site beginning at 4:00 a.m. on October 24, 1991 by officers of DER, various other state and federal agencies, and the Pennsylvania State Police. During this inspection, DER issued the document to Wayne and Demtech which is the subject of the appeal at Docket No. 91-469-F. The DER action dated November 7, 1991, which is the subject of the appeals at Docket Nos. 91-491-F and 91-492-F, was based upon a multitude of alleged violations of 25 Pa. Code Chapter 211 which DER personnel observed during the inspection.

Petitions for supersedeas were filed by Wayne or Demtech in connection with each of the three appeals. A hearing on these petitions was held on November 25-27, 1991. On December 10, 1991, the undersigned issued an Order granting the petition for supersedeas at Docket No. 91-469-F and denying the petitions filed at Docket Nos. 91-491-F and 91-492-F. This Opinion and Order affirms the December 10, 1991 Order.

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

1) Irreparable harm to the petitioner.

2) The likelihood of the petitioner prevailing on the merits.

3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(d)(2). In addition, the Board shall not issue a supersedeas where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. §7514(d)(2). Normally, a petitioner must show that all of the above factors warrant a supersedeas. Lower Providence Township v. DER,

1986 EHB 395. However, the petitioner need not demonstrate irreparable harm and likelihood of injury to the public if the petitioner shows that DER lacked authority to take the action at issue or if it is apparent that DER's action was unlawful. Westinghouse Corp. v. DER, 1988 EHB 857, East Penn Manufacturing Co. v. DER, EHB Docket No. 90-560-F (February 21, 1991), Wood Processors, Inc. et al. v. DER, EHB Docket No. 90-442-F (April 5, 1991).

We will discuss the three petitions for supersedeas individually.

1. The Petition for Supersedeas at Docket No. 91-469-F.

The granting of this petition for supersedeas in our December 10, 1991 Order was based upon our conclusion that DER's action exceeded its authority and was clearly unlawful; therefore, in this Opinion we will restrict our discussion to the merits of the appeal and will not discuss irreparable injury or the likelihood of injury to the public. Westinghouse, East Penn Manufacturing, Wood Processor's, supra.

Our review of the merits of this appeal reveals two issues: 1) was the document an appealable action, and 2) does DER have authority to require that persons providing explosives services obtain sales permits?

The document under appeal here was entitled "EXPLOSIVES REPORT." The body of the document reads as follows:

> There has been no sales permit issued to Wayne Drilling & Blasting, Inc. or Demtech since 1986-87 as per 25 Pa. Code 211.42(a): No person, firm, association, or corporation shall engage in the manufacture, storage, handling, use, or sale of explosives without obtaining a proper permit from the Department.
>
> Since no Sales Permit has been issued to Wayne Drilling & Blasting Inc. or Demtech it shall be forbidden for either company to engage in the sales of explosives or the sale of explosives services until the proper permit is issued from Harrisburg!!

Petitioner's Exhibit 4 (Exh. P-4).

Analyzing this language, it is impossible to accept DER's argument that the document does not impose any obligations upon Wayne and Demtech. The document clearly forbids Wayne and Demtech from engaging in the sale of explosive services. Use of the word "shall" indicates that the document is an appealable action. See e.g., Basalyga v. DER, 1989 EHB 388, 390. The fact that the document was entitled "EXPLOSIVES REPORT" does not require us to find that it is unappealable, because the document's title is not controlling. Chester County Solid Waste Authority v. DER, 1986 EHB 116, Glessner v. DER, 1988 EHB 773,775.[3]

Having concluded that the document is an appealable action, we next address whether DER may require persons providing explosives services to obtain a sales permit. We find that DER lacks such authority.

The obligation to secure a sales permit arises from 25 Pa. Code §211.42, which reads in relevant part:

> §211.42 Records of disposition of explosives.
>
> (a) No person, firm, association, or corporation shall engage in the manufacture, storage, handling, use, or sale of explosives without obtaining a proper permit from the Department.
>
> (b) Every person, firm, association, or corporation selling, giving away, or distributing explosives shall be referred to collectively as the seller in interpretation of this section. ...
>
> (c) The seller shall be required to have a

[3] When DER issues a letter or document which falls close to the line regarding appealability, it places the recipient of the document on the horns of a dilemma. If the recipient appeals, DER may file a motion to dismiss claiming that the document is unappealable. If the recipient does not appeal, however, it runs the risk that DER will contend at a later time that the document was appealable, and that the recipient waived the right to contest the contents of the document due to the recipient's failure to appeal.

> permit issued by the Department for the purchase, possession, and sale of explosives. This permit shall be required of jobbers, wholesalers, dealers, and retailers, whether or not they physically handle, store or have possession of the explosives. ...

The quoted language refers to the "sale of explosives" in subsections (a) and (c) and to "selling, giving away, or distributing explosives" in subsection (b). The phrase "sale of explosives services" is not found in this language.[4] Therefore, based upon the plain language of the regulations, we conclude that permits are not required for persons who perform explosives services. See, Sysak v. DER, 1989 EHB 126, 130.

DER argues, however, that the performance of explosives services necessarily entails the sale of explosives, because part of the price of explosives services is the cost of the explosives themselves. This argument is not persuasive. Any business which performs services will price its services to recover its overhead, but this does not mean that the physical items which are part of this overhead are "sold" to its customers.

DER also contends that its interpretation of the regulations is reasonable because it must be able to monitor and track commercial dealers in explosives. However, while such monitoring may be desirable from a policy standpoint, it does not justify the strained construction of the regulations which is necessary to achieve it. Therefore, we conclude, for purposes of ruling on this petition, that DER's interpretation of 25 Pa. Code §211.42 to require sales permits of companies performing explosives services is clearly erroneous.[5] Baumgardner v. DER, 1988 EHB 786.

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[4] The term "sale" typically refers to an exchange of goods for money. See, Black's Law Dictionary, p. 1503 (definition of "sale") (4th Ed. 1968).

[5] We note that the requirements for sales permits and purchase permits arise solely from 25 Pa. Code §211.42; there is no requirement for such permits in the statutes governing blasting and explosives. See 73 P.S.
footnote continued

2. The Petition for Supersedeas at Docket No. 91-491-F.

Our evaluation of this petition leads us to conclude that the petitioner, Wayne, is not likely to succeed on the merits of its appeal. Therefore, we will deny the petition on this basis without discussing irreparable harm and the likelihood of injury to the public. Leech Tool and Die Works, Inc. v. DER, 1989 EHB 177, 184.

DER's Order which is under appeal at this docket number, among other things, suspended Wayne's purchase permit and cancelled Wayne's magazine license. As stated above, these actions were based upon various alleged violations of the regulations at 25 Pa. Code Chapter 211 which DER found at the site.

The first issue raised by Wayne is regarding the legality of the inspection (Wayne prefers to call it a "raid") which DER conducted and which resulted in the DER action under appeal. Wayne contends that the search was unreasonable, in violation of its rights under the Fourth Amendment to the United States Constitution, because a warrant was not issued authorizing the search, citing Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534, 69 L.Ed. 262 (1981). Wayne also argues that the only source of authority for DER to inspect Wayne's property is stated on the face of Wayne's magazine license: "These premises are subject to inspections during normal business hours or hours of operation. Refusal to allow inspections may result in suspensions or revocation. ..." Exh. P-6.

We disagree with Wayne's arguments. With regard to the

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continued footnote
§§151-168. We also note that there are no standards in the regulations governing the granting of such permits.

constitutional issue, the Board stated in Torbert v. DER, 1989 EHB 834, 848-849 that the Fourth Amendment protection against unreasonable searches and seizures exists to deter official misconduct in criminal cases, and that the Amendment has little viability in administrative proceedings, citing Menosky v. Commonwealth, 121 Pa. Commw. 464, 550 A.2d 1372 (1988). In addition, even if the Fourth Amendment did apply here, it appears that the great majority of DER's evidence was obtained after Wayne's personnel arrived at work and opened the buildings, offices, and explosives magazines for inspection. Therefore, it appears that most of the evidence was obtained by DER during regular business hours, and that Wayne consented to the inspection.[6] This reasoning also disposes of Wayne's argument regarding the language on its magazine license.[7]

Having concluded that DER's inspection was legal, and, therefore, that the evidence produced by the inspection was admissible, we next address whether the evidence supports DER's actions here. We find that it does. DER presented evidence that Wayne stored "shapes" - a type of explosive - in a container known as the "toy-box" (T. 428, 430-432). This "toy-box" was kept in Wayne's garage (Id.). In addition, a shape was stored in Kirt Gustafson's office (T. 442-443). Both of these instances constitute violations of 25 Pa. Code §§211.32(a) (storage of explosives restricted to approved magazines), 211.35(16) (storage of explosives prohibited in work place), and 211.53(20)

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[6] The parties did not address the aspect of "consent" in their filings with the Board. This issue should be addressed in greater depth prior to deciding the merits of this appeal.

[7] While we have found that Wayne is unlikely to prevail on its illegal search argument, we cannot say that the issue is entirely free from doubt. Language in U.S. Supreme Court decisions indicates that the Fourth Amendment may apply in civil as well as criminal contexts. See, Marshall v. Barlows, Inc., 436 U.S. 307, 98 S. Ct. 1816, 1820, 56 L.Ed. 305 (1978). Moreover, as stated in the previous footnote, we expect the consent issue to be addressed by the parties prior to a final decision on this appeal.

(explosives shall not be stored where ; event of an accident, loss of life or property may result).[8] In addition, DER presented evidence that one of Wayne's trucks on the site had been parked overnight with explosives in the bed of the truck, and that there were also metal tools in the bed of the truck (T. 420-427). This instance constitutes a violation of 25 Pa. Code §§211.52(1) (shipments of explosives must be unloaded upon reaching their destination), 211.52(10) (metal tools prohibited in and among explosives), and 211.51(11) (explosives shall not be left unattended unless stored in a locked magazine). Based upon these instances alone, we cannot say that DER abused its discretion by suspending Wayne's purchase permit and cancelling Wayne's magazine license.

Therefore, Wayne is unlikely to succeed on the merits of its appeal, and we affirm our denial of Wayne's petition for supersedeas.

3. The Petition for Supersedeas at Docket No. 91-492-F.

The appeal at this docket number was filed by Demtech from DER's suspension of its purchase permit for 1 year and DER's denial of its sales permit. Demtech raises the same arguments as Wayne with regard to the alleged illegality of DER's actions. In addition, Demtech argues that the evidence pertains to Wayne's site and operations, not Demtech's, and that the record does not support piercing the corporate veil to hold Demtech responsible.

We disagree with Demtech's argument. Scott Gustafson, the sole owner of both Wayne and Demtech, testified that Demtech sometimes utilized Wayne's equipment and employees (T. 382-385). In particular, Scott Gustafson's

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[8] Wayne presented testimony that the shapes will not detonate unless a booster and a blasting cap are attached. (T. 217, 220-223.) This evidence may mitigate the severity of the violation, but it does not justify this method of storage of the shapes, which both Kirt and Scott Gustafson recognized was improper. (T. 313, 377-378.) Moreover, the magnitude of harm which can result from the mishandling of explosives warrants strict compliance with the regulations.

testimony reveals that the "toy box" was used by Demtech for a job in Minnesota, and that the shapes were placed in the toy box during this job (T. 349-352, 382-383). This evidence relates directly to Demtech as well as to Wayne. This evidence also justifies DER's one year suspension of Demtech's purchase permit, without regard to whether Demtech's corporate veil should be pierced.

Therefore, it appears that Demtech is unlikely to prevail on the merits of its appeal, and we affirm our denial of Demtech's petition for supersedeas.

ORDER

AND NOW, this 8th day of January, 1992, it is ordered that the Board's Order dated December 10, 1991, granting the petition for supersedeas at Docket No. 91-469-F and denying the petitions for supersedeas at Docket Nos. 91-491-F and 91-492-F, is affirmed.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: January 8, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

PENN-MARYLAND COALS, INC.	:	**EHB Docket No. 83-188-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 22, 1992

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of the Department of Environmental Resources' (Department) issuance of an abatement order is dismissed in part and sustained in part. The burden of producing evidence could not be shifted under 25 Pa. Code §21.101(d) to appellant because the Department did not show that appellant was or should have been in possession of the key facts relating to the discharges which were the subject of the abatement order. Evidence that appellant's contract operator had as its superintendent the same individual who had acted as superintendent for a mining company which transferred its mine drainage permit to appellant was insufficient to prove that appellant had such facts in its possession. Under §315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §619.315 (Clean Streams Law), the Department's order to appellant to abate four discharges on its permit area was proper.

As to the discharge not located on the appellant's permit area, the Department did not sustain its burden of proving that there was a hydrogeologic connection between the discharge and appellant's permitted area. As a result, the order was an abuse of discretion with regard to this discharge.

INTRODUCTION

This matter was initiated with the August 26, 1983, filing of a notice of appeal by Penn-Maryland Coals, Inc. (PMC) seeking review of a July 29, 1983, abatement order which was issued by the Department pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (SMCRA), and the Clean Streams Law. PMC conducted surface mining on a site known as the Kennel Strip in Southampton Township, Somerset County. The order directed PMC to treat five discharges allegedly on the site to meet the effluent limitations in 25 Pa. Code §87.102 and Mine Drainage Permit (MDP) 40A77SM4T.[1]

Then Board Member Anthony J. Mazullo, Jr., to whom the matter was assigned for primary handling, conducted a view of the premises prior to the start of the hearings on the merits on September 17-19, 1985.

Mr. Mazullo resigned from the Board before the parties filed their post-hearing briefs. PMC filed a motion to have Mazullo appointed as a hearing examiner for purposes of preparing a proposed adjudication, and that motion was denied at 1986 EHB 758. However, PMC was given the opportunity to file motions for view and oral argument, and PMC did so.[2] After the parties

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[1] The Department took a sample from each of the five discharges - Sample Numbers 4315877, 4315878, 4315879, 4315880, and 4315881. The discharges have been referred to by their last three digits during these proceedings - e.g. Seep 877.

[2] One of the reasons for inviting PMC to do so was to give it the opportunity to eliminate any prejudice PMC may have felt as a result of the Board's adjudicating the matter from a cold record. However, the Board does (footnote continued)

were given the opportunity to object and did not do so, the matter was reassigned to Chairman Woelfling. PMC's motion for view was granted, but its request for oral argument *en banc* was denied; instead, oral argument before the presiding Board Member was granted.[3] The view was conducted on December 9, 1986, and oral argument was heard on May 14, 1987.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is PMC, a Pennsylvania corporation with a mailing address of P. O. Box 411, Somerset.

2. Appellee is the Department, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, SMCRA, and the rules and regulations adopted thereunder.

3. On March 23, 1977, Department Mining Conservation Inspector (MCI) James E. McClure prepared a field engineer's report on Blue Lick Coal Company's (Blue Lick) application for a MDP to conduct surface mining on a 499 acre site in Southampton Township, Somerset County, known as the Kennel Strip.[4]

4. McClure took two samples (JM113 and JM114) of deep mine discharges at the Kennel Strip. (N.T. 331; Ex. C-13)

(continued footnote)
have the authority to render an adjudication on the basis of a cold record. Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

[3] See 1986 EHB 1110.

[4] References to "N.T." followed by a page number are references to the transcript of the hearings on the merits. Exhibits for the Department are denoted by "Ex. C-___", while exhibits for PMC are denoted by "Ex. A-___."

5. MDP 40A77SM4 was issued to Blue Lick on June 15, 1977, and Blue Lick began operations that same month. (N.T. 7-8, 473, 517; Ex. C-1)

6. Blue Lick was issued Mining Permits (MPs) 1657-2, 1657-2A, 1657-2A2, and 1657-2A3 for the Kennel Strip. (Ex. C-8)[5]

7. Blue Lick mined into an open cut from a previous stripping operation conducted by another miner in the 1950s. (N.T. 519-520)

8. On March 30, 1978, MCI Philip R. Rhoads prepared a report on Blue Lick's application to amend its MDP to include five additional acres. (N.T. 158; Ex. C-14)

9. Rhoads identified two old deep mine discharges, PR233 and PR234, which MCI McClure had not noted in his report on Blue Lick's application to amend its MDP. (N.T. 408; Ex. C-14)

10. Blue Lick's MDP was amended to incorporate the additional acreage. (N.T. 41, 158)[6]

11. Donald Barnes, the Department's Inspector Supervisor, first inspected the Kennel Strip on February 21, 1980, as an MCI. (N.T. 153-154, 159, 163)

12. Barnes inspected MP 1657-2 on the Kennel Strip on February 21, 1980; he walked the site, noted violations on his inspection report, and took two samples - one, Sample 4309060, from a sediment pond on the east-central portion of MP 1657-2 about 100-200 feet from what were later designated as Seeps 878, 879, and 880, and, the other, Sample 4309061, from the spoil on MP 1657-2. (N.T. 160, 163-164, 167-168, 180; Ex. C-15)

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[5] The MPs issued to Blue Lick were not introduced into evidence by either party. They are referred to in Ex. C-8.

[6] The Department also did not introduce this document into evidence. That the amendment occurred is inferred from other testimony.

13. The area near the sedimentation pond where Barnes took Sample 4309060 had recently been backfilled, several acres had been regraded, and there was vegetative growth from the previous planting season on the northern end of the MP. (N.T. 168-169)

14. Barnes did not recall seeing any other seeps near the sedimentation pond when he took his February 21, 1980, sample. (N.T. 167)

15. Barnes did not walk in the wooded area in the location of Seeps 878 and 879. (N.T. 160, 183-184)

16. On July 10, 1980, Blue Lick submitted its application to update its MDP to comply with the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1201 *et seq.* (N.T. 12, 15, 27; Ex. C-4)

17. Exhibit V to the update application required the applicant to indicate all springs, swamps, and mine discharges occurring within the affected area or within 1000 feet of it. (N.T. 459; Ex. C-4)

18. There were no discharges shown on Blue Lick's Exhibit V. (N.T. 460; Ex. C-9)

19. On September 3, 1980, Malcolm Crittenden, who was at that time employed by the United States Office of Surface Mining (OSM), conducted a partial inspection of Blue Lick's surface mines in response to a citizen complaint. (N.T. 46-48)

20. Crittenden contacted Bud Flyte of the Pennsylvania Fish Commission because degradation of a trout stream was a concern. (N.T. 58)

21. During the course of the September 3, 1980, inspection Flyte directed Crittenden to a seep near Legislative Route (LR) 55005, later designated as Seep 881, and Crittenden took three samples. (N.T. 49-50)

22. Although John Stoddard, superintendent of Blue Lick's operations at the Kennel Strip, advised Crittenden that Seep 881 only came into existence within six months of the inspection, Stoddard later testified that he discovered the seep in 1977 prior to Blue Lick's mining, that he advised Blue Lick's owner of the seep, and that he advised Crittenden that it pre-dated Blue Lick's operations. (N.T. 49-50, 470, 473-476; Ex. C-11)

23. Stoddard's testimony as to the date Seep 881 came into existence is not credible.

24. Stoddard dug a ditch from Seep 881 to the treatment pond on the Kennel Strip, directing it through a treatment barrel. (N.T. 55-56)

25. During the course of bulldozing the diversion ditch Stoddard encountered and broke out a tile drain in the area of Seep 881. (N.T. 477)

26. Crittenden conducted a follow-up inspection on September 18, 1980, and found Stoddard's remedial actions to be satisfactory. (N.T. 54-55, 77; Ex. C-12)

27. Barnes accompanied MCI Joel Pontorero to the site in November, 1980, but he doesn't recall if he observed Seep 881 at the time. (N.T. 195, 198)

28. Barnes inspected the site on December 10, 1980. (N.T. 199)

29. Barnes first observed Seep 881 along LR 53005 during a view of the site with Stoddard; the seep was flowing into a collection ditch and sediment pond. (N.T. 179, 198, 200)

30. When Stoddard told Barnes of his problem with Seep 881, Barnes advised him that he shouldn't have collected and treated the seep until the

Department determined who was responsible for it and that he should submit completion reports so the Department could make that determination. (N.T. 180)

31. The testimony of Barnes and Stoddard conflicts on the issue of whether Barnes characterized Seep 881 as pre-existing; Barnes' testimony is more credible. (N.T. 179, 195, 478, 486, 698)

32. By letter dated March 6, 1981, the Department, as part of its review of Blue Lick's update application, requested Blue Lick to locate all seeps, springs, and discharges within 1000 feet of the affected area. (N.T. 405, 467; Ex. C-25)

33. Blue Lick's consultant marked the location of additional mine seeps and a spring on Exhibit IV to the update application and submitted it to the Department on April 1, 1981. (N.T. 405, 467-468; Ex. C-25, C-26)

34. Exhibit IV showed Seep 881, as well as discharge JM113. (N.T. 405-406; Ex. C-10)

35. Although the Department was supposed to investigate the site prior to approving Blue Lick's update application, there is no documentation that such an investigation was ever performed. (N.T. 29, 31, 33, 35, 44)

36. In a document dated July 6, 1981, Blue Lick assented to the transfer of its MDP to PMC; in turn, PMC agreed to assume all of Blue Lick's responsibilities and obligations under the MDP upon transfer. (N.T. 25-26; Ex. C-6)

37. MCI Robert E. Burns first inspected Blue Lick's MDP on April 28, 1982, when, during the course of his inspection, he observed several discharges and took a number of samples. (N.T. 202-203, 209; Ex. C-16)

38. Burns was not certain of the location of the samples he took on April 28, 1982, and, because he was still undergoing orientation, he was unable to distinguish a new seep from an old seep. (N.T. 218, 257-258)

39. Burns did not observe Seeps 877, 878, or 879 on April 28, 1982. (N.T. 257, 260)

40. Blue Lick's MDP was transferred to PMC on May 27, 1982. (N.T. 10; Ex. C-6,C-7)

41. MP 102175-40A77SM4-01-0 was issued to PMC on that same date and Blue Lick's MPs were canceled. (N.T. 10-11; Ex. C-8)

42. The Department did not conduct any field study or investigation before the transfer of Blue Lick's MDP. (N.T. 40)

43. Burns inspected the MDP on June 1, 1982, and collected a sample (4325020) in the area of Seep 881, which was on the area of former MP 1657-2. (N.T. 203-204, 218-220; Ex. C-17)

44. Department hydrogeologist Joseph H. Schueck, who testified as an expert witness on behalf of the Department, conducted a hydrogeologic investigation of the discharges on what were formerly MPs 1657-2, 1657-2A, and 1657-2A2. (N.T. 311, 317-318, 322)

45. Schueck, accompanied by Burns and Pontorero, first visited the Kennel Strip in October, 1982. (N.T. 322-323)

46. Burns and Pontorero directed Schueck to Seeps 878, 879, and 881, as well as JM 113; Schueck was unaware of Seep 877. (N.T. 323-324, 328)

47. Because the Kennel Strip had been completely backfilled, Schueck was unable to observe any coal seams on the site. (N.T. 326)

48. During the course of his investigation, Schueck reviewed the MDP file for the Kennel Strip, including the field engineer's reports of Rhoads

and McClure (Ex. C-13, C-14); the mine drainage samples collected by McClure (JM 113 and JM 114), Rhoads (PR 233 and PR 234), Crittenden (Seep 881), and Burns (Samples 4325005 through 4325010 (Ex. C-16); the update maps (Ex. C-9, C-10); and drill logs. (N.T. 324, 327, 391-393)

49. McClure's report, which covered MPs 1657-2, 1657-2A, and 1657-2A2, was more relevant to Schueck's investigation than Rhoads' report, which covered the area west of Township Road (TR) 762. (N.T. 328)

50. The Kennel Strip is located on the Wellersburg syncline.[7] (N.T. 324-325)

51. The map submitted with Blue Lick's August 3, 1978, MP application shows a synclinal axis trending approximately 30 degrees east of north. (N.T. 325)

52. Two drill holes were on the southeast side of the synclinal axis and one on the northwest side; although the drill holes were on MPs 1657-2, 1657-2A, and 1657-2A2, the testimony failed to identify a particular drill hole with a particular MP. (N.T. 325)

53. Although Schueck concluded from the drill logs that the Pittsburgh and Morantown coal seams had been mined by Blue Lick and that the Pittsburgh seam had been previously deep mined, he could not determine the location of the seams solely on the basis of the drill logs. (N.T. 326, 393)

54. McClure's field engineer's report described JM113 and JM114 as drainage from an abandoned deep mine on the Pittsburgh coal seam. (N.T. 331; Ex. C-13)

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[7] A syncline is a folded rock structure in which the sides dip toward a common line, or axis. Webster's New Collegiate Dictionary (8th ed. 1976). It was necessary for the Board to resort to the dictionary because Schueck's definition of the term (or the transcription of it) was nonsensical.

55. Despite the indication in McClure's report that JM113 was located in the field, Schueck erroneously assumed, on the basis of convenience of sampling, that JM113 was discharging from the Pittsburgh seam crop line. (N.T. 332)

56. Schueck concluded that JM113 and Seeps 878, 879, 880, and 881 were toe of spoil discharges resulting from the interception of deep mine discharges and that such toe of spoil discharges could be expected in an operation of this size. (N.T. 333)

57. The two deep mine discharges, which existed prior to Blue Lick's mining, exhibited the characteristics of acid mine drainage (AMD) - high acidity, low alkalinity, and very low pH.[8] (N.T. 339-340)

58. Schueck's conclusions, which were incorporated in a January 5, 1983, report, were communicated to PMC, along with a request for an on-site meeting. (N.T. 334)

59. Burns inspected the site on January 26, 1983, and collected samples from the vicinity of Seeps 878, 879, 880, and 881, as well as from a gully on the southern edge of the MDP. (N.T. 221-226); Ex. C-18)

60. Burns did not fix these samples with nitric acid. (N.T. 227)

61. Mining Specialist (MS) John Wilk observed Seeps 877, 878, 879, 880, and 881 during the course of the January 26, 1983, inspection. (N.T. 298)

62. Burns conducted another inspection of the site on February 8, 1983, and took Sample 4325070 from the vicinity of Seep 881. (N.T. 233, 235, 276; Ex. C-19)

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[8] AMD also exhibits elevated sulfates and metals such as aluminum, manganese, and iron. (N.T. 319-321)

63. The Department and PMC met on-site on March 29, 1983, to discuss Schueck's hydrogeologic investigation. (N.T. 341-343)

64. PMC gave Schueck additional information regarding JM113 during the meeting, and, on the basis of that information, the Department relieved PMC of liability for JM113. (N.T. 334; Ex. C-24)

65. Wilk inspected PMC's MP on June 7, 1983; the MP covered the same area as MP 1657-2. (N.T. 292-293)

66. Wilk took five water samples during the course of his inspection on June 7, 1983:

a) Sample 4315877[9] was taken from a gully on the east end of the site below a contour ditch running across the permit area; the discharge sampled was within 50 feet of the MDP boundary. (N.T. 287-288, 294, 510)

b) Sample 4315878 was taken from the central portion of the site, to the right of the existing treatment basin, facing downslope, approximately 400 feet in, and 15 to 20 feet below the edge of the spoil in the brush of the woods. (N.T. 295, 306)

c) Sample 4315879 was taken approximately 20 to 25 feet to the left of Sample 4315878, facing downslope. (N.T. 295.

d) Sample 4315880 was taken, facing downslope, approximately 150 feet to the right of then-existing treatment facilities; it was coming out over the toe of spoil and running into a collection ditch to a small pond. (N.T. 296, 307)

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[9] These are the samples from which the seeps received their designations.

e) Sample 4315881 was taken 50 to 100 feet off LR 55005 and 700 to 800 feet downslope of its intersection with TR 762; it was being directed via a collection ditch to a treatment pond. (N.T. 296, 307)

67. The five seeps had the following quality for the indicated parameters (expressed in milligrams per liter (mg/l), with the exception of pH, which is expressed in standard units) on June 7, 1983:

	Seep 877	Seep 878	Seep 879	Seep 880	Seep 881
Total Acidity	244	228	290	350	150
Total Alkalinity	0	0	0	0	14
Aluminum (Al)	19	11	13	6	.1
Iron (Fe)	2	2	10	54	94
Manganese (Mn)	12.6	63	69	70	30
pH	3.2	3.8	3.3	3.2	5.3
Sulfates	415	1050	870	1380	1530

(Ex. C-22)

68. Blue Lick's and PMC's MDP contained standard conditions prohibiting discharges where the pH was less than 6.0 or greater than 9.0 (Standard Condition 10) and the iron content exceeded 7 mg/l (Standard Condition 11), and requiring that all water encountered during mining be treated to neutrality (Standard Condition 18). (N.T. 8; Ex. C-1, C-2, C-7)

69. Both Blue Lick's and PMC's MDP contained special conditions which required that all pools of water encountered be neutralized and dewatered (Special Condition 14) and that gravity discharges from previous mining that were encountered be treated to neutrality until eliminated (Special Condition 15). (N.T. 8; Ex. C-1, C-3, C-7)

70. The five seeps exhibited the characteristics of AMD. (N.T. 340, 359, 371)

71. All five seeps exceeded the pH requirements in Standard Condition 10 and the neutrality requirements of Standard Condition 18 and Special Conditions 14 and 15.

72. Seeps 879, 880, and 881 exceeded the iron content requirement in Standard Condition 10.

73. All five seeps exceeded the applicable effluent limitations in 25 Pa. Code §87.102[10] for acidity, manganese, and pH; Seeps 879, 880, and 881 exceeded the applicable effluent limitation for iron.

74. Schueck's conclusions regarding liability for Seeps 878 to 881 in his January 5, 1983, report, as well as the water quality analyses of the samples taken on June 7, 1983, formed the basis for issuance of the Department's July 29, 1983, abatement order. (N.T. 424, 425; Exhibit A to Notice of Appeal)

75. Burns conducted another inspection at the site on October 5, 1983, and took Sample 4325205 from the same location as Seep 881. (N.T. 239-240)

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[10] This regulation contained the following requirements:

(1) **Acid** There shall be no discharge of water which is acid.
(2) **Iron** There shall be no discharge of water containing a concentration of iron in excess of seven milligrams per liter.
(3) **Manganese** There shall be no discharge of water containing a concentration of manganese in excess of four milligrams per liter.

* * * * *

(5) **pH** The pH of discharges of water shall be maintained between 6.0 and 9.0,...

The regulation was amended subsequent to the issuance of the abatement order at issue here. See 20 Pa.B. 3383 (June 16, 1990).

76. Sample 4325205 exhibited the following quality:

Parameter	Concentration
Total Acidity	0
Total Alkalinity	72
Al	2
Fe	41.8
Mn	79.3
pH	6.7 *
Sulfates	1920

* Standard Units

(Ex. C-20)

77. An aerial photograph of MP 1657-2 was taken in October, 1983; Burns designated discharges and sample numbers on the photograph. (N.T. 249, 278-279, 297-298; Ex. C-21)

78. Seep 881 is a spring which pre-existed Blue Lick's mining operations; it was coming out of a terra cotta tile field when it was discovered. (N.T. 443-445)

79. Drill hole (DH) 30 is about 300 feet from Seep 881. (N.T. 349)

80. Based upon the drill hole data supplied in the update application submitted by Blue Lick in July, 1980, DH 30 is at a surface elevation of 1805 feet, very close to the crop line of the Pittsburgh seam. (N.T. 352; Ex. C-10)

81. At the point of DH 30, the surface elevation of the Pittsburgh seam was 1801 feet, while the elevation of the Morantown seam was 1740 feet. (N.T. 351; Ex. C-9)

82. The drill logs indicate that the distance in elevation between the Pittsburgh and Morantown seams ranged from 26 to 64 feet over the site. (N.T. 394)

83. Although John Stoddard testified that the distance between the Pittsburgh and Morantown seams was approximately 20 to 24 feet over the site

based on his supervising Blue Lick's operations and participating in "taping" the drill holes, his testimony was incredible in light of the drill logs. (N.T. 394, 471-472, 480-481, 483)

84. The elevation of Seep 881 is approximately 1780 feet. (N.T. 347348; Ex. C-10)

85. The recharge area of Seep 881 included the Pittsburgh seam and the overburden associated with it and the uppermost portion of the overburden between the Pittsburgh and Morantown seams. (N.T. 376)

86. Blue Lick mined the Pittsburgh and Morantown seams and, therefore, the recharge area for Seep 881. (N.T. 339, 471, 479, 488)

87. Mining through a recharge area increases the potential for formation of AMD where pyrites are associated with the coal and overburden, since the pyrites are exposed to air and water when the coal and overburden are broken up. (N.T. 339, 376)

88. Mining through a recharge area also changes the flow of water; where the water impacts mine spoil, it will tend to flow vertically through the spoil until it hits the pit floor and then flow down dip along the pit floor, which is the path of least resistance. (N.T. 377)

89. Blue Lick affected pyritic materials when it mined the Pittsburgh and Morantown seams. (N.T. 339)

90. A deep mine in the Pittsburgh coal seam was located on either side of TR 762 within the area of MP 1657-2A2; the portion on the eastern side of the road was stripped before Blue Lick and PMC began operations. (N.T. 448-449)

91. PMC was stripping the western side of this deep mine in January, 1984. (N.T. 449)

92. Schueck did not know whether the deep mine was fully drained at JM 114 or whether some of the drainage was discharging through Seep 881. (N.T. 449-450)

93. The mine drainage discharging at Seep 881 would have to travel through MP 1657-2A prior to discharging. (N.T. 451)

94. The monitoring data for Seep 881 show tremendous fluctuations in quality; these fluctuations are not natural and are indicative that the seep is receiving drainage from areas being mined. (N.T. 449, 463)

95. Seeps 878, 879, 880, and 881 are essentially toe of spoil discharges. (N.T. 353, 428)

96. The toe of spoil on MPs 1657-2, 1657-2A, and 1657-2A2 acts as an indicator of the location of the Morantown seam; the crop line of the Morantown seam would be within 50 feet of the toe of spoil and follow its configuration. (N.T. 393)

97. Because Seeps 878 and 879 are located just below or very close to the crop line of the Morantown seam, their recharge areas would include the Pittsburgh and Morantown seams. (N.T. 375-376)

98. Blue Lick extracted coal from the Pittsburgh and Morantown seams about 500 to 600 feet from Seeps 878 and 879. (N.T. 495-496)

99. Blue Lick pushed the spoil from the Pittsburgh and Morantown seams over the hill into the area of Seeps 878 and 879. (N.T. 495-496)

100. During the course of its mining the Pittsburgh seam on MP 1657-2 Blue Lick encountered several feet of water near a main mine heading, as well as pockets over the entire area. (N.T. 489-490)

101. As Blue Lick pushed spoil down the hill, the pockets of water would drain into the pit on the Pittsburgh seam, where it would be pumped to the ponds. (N.T. 363-364, 491)

102. Where there is pit water accumulation during mining, it is likely that, post-mining, the pits also will fill with water until the water finds a release point, such as a breach in the crop line or low point along the crop line, where the water will spill over and emanate at the toe of spoil. (N.T. 364)

103. The only water encountered by Blue Lick on the Morantown seam was surface water. (N.T. 340)

104. Blue Lick permitted the water to infiltrate the backfill and migrate through the operation; it tended to come out at low points, such as the toe of spoil, as with Seeps 878, 880, and 881. (N.T. 340)

105. In mining through the Pittsburgh and Morantown seams Blue Lick intercepted the flow of JM 114, since it no longer existed as a Pittsburgh seam deep mine discharge. (N.T. 338-339, 411-412)

106. Blue Lick's mining reaffected additional areas which, as evidenced by the pre-existing deep mine discharges, were potentially toxic. (N.T. 340)

107. Schueck first observed Seep 877 on the morning or day before his January 4, 1984, deposition. (N.T. 358, 402)

108. Seep 877 is located in the woods, beyond the toe of spoil, and appears to be a natural spring with a developed channel. (N.T. 361)

109. Schueck reviewed water quality data, Blue Lick's MDP file and the MDP file of 3S Coal Company. (N.T. 415-416)

110. Seep 877 is located very close to the Morantown crop line; its recharge area included both the Pittsburgh and Morantown seams. (N.T. 375-376)

111. Blue Lick and 3S Coal Company both mined within the recharge area of Seep 877. (N.T. 367-368)

112. Blue Lick, pursuant to MP 1657-2, extracted coal within 700 feet of Seep 877 and pushed spoil to about 150 to 200 feet of the seep. (N.T. 361, 498-499)

113. The Pittsburgh seam was mined by 3S to within 800 to 900 feet from Seep 877; 3S's permitted area encompassed 13 acres of the Pittsburgh coal seam along TR 311 to the east of the Blue Lick site. (N.T. 360-361, 362)

114. The MDP applications for both Blue Lick and 3S show two seams of coal; the Pittsburgh and a lower seam identified as the Morantown by Blue Lick and the Little Pittsburgh by 3S. (N.T. 417, 419)

115. Because of the distance between the Pittsburgh and the Little Pittsburgh in the 3S permit application, it is conceivable that the Morantown and the Little Pittsburgh are the same coal seam. (N.T. 417-418)

116. Blue Lick drilled for 3S during its mining operations and had drilled the Morantown seam for 3S. (N.T. 508)

117. While 3S mined what remained of the Pittsburgh seam on its permitted area, it mainly mined the Morantown seam. (N.T. 510)

118. Seep 877 is at an elevation of 1777 to 1780 feet. (N.T. 360)

119. The surface elevations for the Pittsburgh coal seam on the 3S site ranged between 1884 and 1934 feet. (N.T. 360)

120. The 3S site was generally up dip and to the south of Seep 877. (N.T. 422-423)

121. The water quality of Seep 877 differed slightly from that of the other four seeps in that the Mn concentration was somewhat lower. (N.T. 426)

122. Less Fe was discharged from Seep 877 over time than the other four seeps, although this is not necessarily indicative of a differing source, given the distance of Seep 877 from the toe of spoil. (N.T. 428)

123. At the time of the hearing on the merits, John Stoddard had been an employee of Commonwealth Coal for five years; Commonwealth Coal was a contract operator for PMC. (N.T. 470)

DISCUSSION

We begin our discussion by examining issues relating to the burden of proof. The Department, citing Hepburnia Coal Company v. DER, 1986 EHB 563, and Hawk Contracting and Adam Eidemiller v. DER, 1981 EHB 150, urges us to "shift the burden of proof and of proceeding" to PMC under 25 Pa. Code §21.101(d). On the other hand, PMC argues we lack authority to do so.

In Easton Area Joint Sewer Authority, *et al.* v. DER and Borough of Stockertown, 1990 EHB 1307, we construed 25 Pa. Code §21.101(d) consistent with Pennsylvania appellate court decisions holding that while the burden of proof or persuasion never leaves the party on whom it is originally placed, the burden of producing or going forward with evidence may shift during a hearing. In the case before us, 25 Pa. Code §21.101(b)(3) imposes the burden of persuasion on the Department. If, however, the Department produces evidence that environmental harm was taking place and PMC was or should have been in possession of facts relating to the damage, then the burden of producing evidence would shift to PMC under 25 Pa. Code §21.101(d). Marcon, Inc. v. Com., Dept. of Environ. Resources, 76 Pa. Cmwlth. 56, 462 A.2d 969 (1983).

Our decision in Hepburnia is on point. We found in Hepburnia that the burden of producing evidence could not be shifted under 25 Pa. Code §21.101(d) because it could not be established that the appellant should have been in possession of the crucial facts relating to the discharge at issue. Quoting Hawk Contracting, we listed some observations that any reasonably competent miner should make during mining. Those items included "the numbers of seams of coal mined, old deep mine workings encountered, the condition of the barrier between the properties, and groundwater encountered during mining." Hepburnia at 583. Under the circumstances of Hepburnia, we saw no reason to conclude that the appellant should have been in possession of the key facts concerning the discharge and refused to shift the burden.

A similar result must be reached in this appeal. The Department contends, and PMC does not dispute, that some degree of environmental harm is taking place and, therefore, that the requirement of 25 Pa. Code §21.101(d)(1) has been met. As for 25 Pa. Code §21.101(d)(2), the Department alleges that the key facts relative to the discharges - the seams of coal mined, the location of the old deep mine workings, and the groundwater encountered during mining - were ascertained by John Stoddard, who was superintendent of Blue Lick's operations on MP 1657-2 and later superintendent of PMC's operations on the same area. Crucial to the success of this argument is the Department's assertion that neither the key facts nor the person ascertaining them changed with the transfer of the MDP from Blue Lick to PMC because Stoddard was the superintendent of both mining operations. The Department does not advance any theory under which PMC can be charged with Stoddard's knowledge, nor does it assert any manner in which PMC should have directly ascertained possession of the alleged key facts.

Blue Lick, rather than PMC, performed the pre-mining exploration and drilling, geological and hydrogeological studies accompanying the MDP application, and the investigation required for the update application. Furthermore, Blue Lick conducted the actual mining on MP 1657-2. Although Stoddard was Blue Lick's superintendent, he was not an employee of PMC. Rather, he was an employee of Commonwealth Coal, PMC's contract operator. Under the circumstances, we cannot impute whatever knowledge he may have had to PMC and, thus, refuse to shift the burden of production of the evidence to PMC.[11]

We turn now to the substantive aspects of this appeal.

Seeps 878, 879, 880, and 881

Although PMC concedes that Seeps 878, 879, 880, and 881 are within the boundaries of its MDP, it argues that it cannot be held liable for treating the seeps unless the Department proves that they were affected by the mining operations of either Blue Lick or PMC. Consistent with this argument, PMC contends that since these discharges pre-dated Blue Lick's operations, PMC cannot be held liable for their treatment.

On the other hand, the Department alleges that a mine operator is liable for any discharges which originate on or flow through its MDP area regardless of the source of the discharges or the time they came into existence. Because PMC assumed all of Blue Lick's obligations when the Blue Lick MDP was transferred, PMC is now, the Department asserts, liable for treatment of the seeps. Moreover, the Department advances the theory that even if the seeps pre-existed Blue Lick's operations, the Department

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[11] As a result, it is unnecessary to decide PMC's claim that 25 Pa. Code §21.101(d) is inconsistent with the Administrative Agency Law, 2 Pa.C.S.A. §103 *et seq.*

established that Blue Lick's operations on MP 1657-2 and its amendments affected the seeps and Blue Lick and, therefore, PMC, as transferee, is liable for treatment of the seeps.

Although the Pennsylvania Supreme Court held in Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308 (1973) that the origin of polluted water was irrelevant to a determination of liability under §315(a) of the Clean Streams Law, the issue of whether a mine operator was liable for discharges which pre-dated its operations was still controversial and regarded as unsettled by the industry.[12] Any doubt regarding this issue was settled by the Commonwealth Court's decisions in Thompson & Phillips Clay Company v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 582 A.2d 1162 (1990), pet. for alloc. denied, No. 691 W.D. Allocatur Docket 1990 (Pa., Oct. 8, 1991), and Clark R. Ingram *et al.* v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 595 A.2d 733 (1991). Both decisions unequivocally held that for liability to attach under §315(a) of the Clean Streams Law, the only relevant issue is whether acid mine drainage is being discharged from the permitted area. In particular, Thompson & Phillips cites the Supreme Court's Harmar decision to conclude:

> Thus, the Supreme Court has squarely faced the issue of whether the source of the polluted water is critical to finding liability under Section 315(a) of the Law and has concluded that the source or origin is irrelevant; the decisive factor is the discharge. In the case before us, it is undisputed that acid mine drainage seeps from T & P's mine site. The fact that T & P's mine is not the origin of the pollution is irrelevant; T & P's mine site is the point from

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[12] Indeed, as noted by the Board in Ingram Coal Company *et al.* v. DER, 1990 EHB 395, causation was found to exist, in any event, in the decisions in which the issue arose.

> which the acid mine drainage is discharged into the waters of the Commonwealth, an act which is prohibited by statute.
>
> T & P argues that in all cases which precede it and which deal with the question of whether an operator must treat acid mine drainage emanating from its mine site, the operator in fact either caused the drainage or affected it in some manner. See *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A.2d 871 (1974) (*Barnes & Tucker I*); *Commonwealth v. Barnes & Tucker Co.*, 472 Pa. 115, 371 A.2d 461 (1977) (*Barnes & Tucker II*); *Harmar Coal*. Although each of the above-cited cases in fact involved some element of causation, neither the Law through its clear language nor the courts have held that a causal link is a prerequisite for the imposition of liability.
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> * * * * *
>
> We therefore conclude, based upon the foregoing discussion, that T & P is liable for the acid mine drainage seeping from its mine site even if there is no causal link between T & P's mining activities and the pollution.
>
> 582 A.2d 1162, 1164-1165.

Here, the parties do not dispute that Seeps 878, 879, 880, and 881 are on PMC's MDP area. The evidence establishes that the four seeps do not meet the effluent limitations at 25 Pa. Code §87.102(c) or the terms and the conditions of the MDP relating to the quality of drainage discharged from the site. Thus, it was not an abuse of discretion for the Department to order PMC to treat Seeps 878, 879, 880, and 881 to meet the effluent limitations specified in PMC's MDP and 25 Pa. Code §87.102. John Percival v. DER, 1990 EHB 1077.

Seep 877

Seep 877 is not within the area of PMC's MDP. Thus, in order for PMC to be liable for treating it, the Department must prove that there is a causal connection between Blue Lick's/PMC's mining operations and the seep, Hepburnia

Coal Company, *supra*. Based on the evidence presented, we cannot conclude that such a connection is present here.

The Department's assertion that Blue Lick/PMC is responsible for Seep 877 is based solely on the expert testimony of Joseph Schueck, a Department hydrogeologist. In conducting his investigation, Schueck reviewed water quality data, the Blue Lick/PMC MDP file, and the file for an adjacent mining operation to the east of the Kennel Strip along TR 311 conducted by 3S Coal Company. The maps in the Blue Lick/PMC MDP file note a Drill Hole 28 in the Morantown seam at elevation 1765, thereby placing it approximately 400 feet from Seep 877. Relying on his experience that the toe of spoil is usually within 50 feet of the crop line and that the crop line should follow the configuration of the toe of spoil, Schueck located Seep 877, which he testified was at an elevation of 1777 to 1780 feet, close to the Morantown crop line. He opined that the recharge area for Seep 877 was topographically and stratigraphically higher than it and would include the Pittsburgh and Morantown seams and that there were two distinct possible sources for Seep 877 within the recharge area - the Blue Lick/PMC site and the 3S mine site. He then concluded that Blue Lick's operations on MP 1657-2 were the source of Seep 877.

The evidence is clear that Blue Lick mined both the Pittsburgh and Morantown seams to a distance of about 700 feet from Seep 877 and that it pushed spoil to about 150 to 200 feet of Seep 877. The evidence is disputed, however, as to what seams were mined by 3S. Schueck relied on 3S's MDP file, which indicated that 3S was to mine the Pittsburgh and what was referred to as the Little Pittsburgh seams; the Little Pittsburgh was 14 to 19 feet below the Pittsburgh seam. The surface elevations for the Pittsburgh seam on the 3S MDP

ranged from 1884 to 1934 feet, a difference in elevation from Seep 877 of approximately 100 to 150 feet. Schueck's opinion regarding Seep 877 was based solely on the relative elevations of the 3S and Blue Lick/PMC sites.

Schueck, however, did not know which seams 3S had, in actuality, mined. Given the distance between the Pittsburgh and Little Pittsburgh seams in the 3S MDP file, it is conceivable that the Little Pittsburgh and Morantown seams are one and the same. Even more telling is that Mr. Stoddard observed 3S mining the Morantown seam. We will give his direct evidence more weight.

Given the evidence concerning the seams mined by both 3S and Blue Lick/PMC and the water quality data for Seep 877, which is slightly different than that for the other four seeps, we cannot conclude that the Department has proved by a preponderance of the evidence that there was a hydrogeologic connection between Seep 877 and Blue Lick/PMC's operations. Since it is equally probable that 3S affected Seep 877, we cannot sustain the Department's order.[13] Midway Sewerage Authority v. DER, EHB Docket No. 90-231-E (Adjudication issued August 26, 1991).

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof in an appeal of an order to abate a pollutional condition. 25 Pa. Code §21.101(b)(3)

3. Before the burden of production of the evidence could be shifted from the Department to PMC, the Department had to offer evidence that PMC

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[13] Since the Department has failed to sustain its burden of proving a hydrogeologic connection between Seep 877 and the Blue Lick/PMC operations, we must, of necessity, reject its alternate argument that PMC is liable for Seep 877 because it is a statutory nuisance pursuant to §§3, 307(c), and 401 of the Clean Streams Law. For PMC to be held liable for abating a nuisance not on its ming site, the Department must prove that PMC somehow caused or contributed to the nuisance, which it has failed to do.

should have been in possession of the key facts relating to the discharge. The mere fact that an employee of PMC's contract miner was also employed by Blue Lick, PMC's predecessor, does not impute knowledge of mining conditions to PMC.

4. The operator of a coal mine is liable for any discharges on his permitted area, even if the discharges pre-dated his activities and regardless of whether the operator affected the discharges or increased the pollution load. Clark R. Ingram *et al.* v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 595 A.2d 733 (1991).

5. Mine drainage which did not meet the requirements of 25 Pa. Code §87.102 and the terms and conditions of PMC's MDP was being discharged at Seeps 878, 879, 880, and 881.

6. The Department did not abuse its discretion in issuing the July 29, 1983, order to PMC to abate the discharge of acid mine drainage at Seeps 878, 879, 880, and 881.

7. In order for an operator to be held liable for abating a discharge off its permitted area, the Department must establish a hydrogeologic connection between the discharge and the operator's activities on its permitted area, Hepburnia Coal Company v. DER, 1986 EHB 563.

8. The Department failed to establish by a preponderance of the evidence that there was a hydrogeologic connection between Seep 877 and the mining operations of Blue Lick/PMC.

9. The Department's issuance of the July 29, 1983, order to PMC to abate the acid mine drainage discharge at Seep 877 was an abuse of discretion.

O R D E R

AND NOW, this 22nd day of January, 1992, it is ordered that PMC's appeal is sustained with regard to Seep 877 and dismissed with regard to Seeps 878, 879, 880, and 881.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann did not participate in this decision.

DATED: January 22, 1992

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
George Mahfood, Esq.
Pittsburgh, PA
bl

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BOA

SOLOMON RUN COMMUNITY ACTION COMMITTEE	:	
	:	
v.	:	EHB Docket No. 90-483-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
RICHLAND TOWNSHIP SUPERVISORS, Permittee	:	Issued: January 24, 1992

OPINION AND ORDER
SUR MOTION FOR NON-SUIT

By Richard S. Ehmann, Member

Synopsis

Appellant citizens group has standing to challenge the Department of Environmental Resources' ("DER") approval of a revision to Richland Township's ("Richland") Official Plan for sewage services ("Official Plan") where at least one of the group's members resides or owns property in Richland adjacent to the site covered by the approved revision and where DER reviewed the group's private request for a revision to Richland's Official Plan pursuant to 25 Pa. Code §71.14(a) simultaneously with its review of the approved revision. Where it is undisputed that the revision is for new land development, we review DER's approval against the requirements contained in 25 Pa. Code §71.54, the section of DER's regulations governing its approval of new land development revisions. The Board grants a motion for compulsory non-suit where the appellant failed to establish a prima facie case that DER abused its discretion in approving the revision.

OPINION

Background

Solomon Run Community Action Committee ("SRCAC") commenced this action on November 9, 1990 requesting this Board to review DER's October 30, 1990 approval of Richland's revision to its Official Plan for sewage services under the Pennsylvania Sewage Facilities Act ("SFA"), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. The revision was for the Johnstown Galleria development ("Galleria"), a shopping mall to be located in Richland, Cambria County. DER's approval was granted only for Phase I of the Galleria development and was for interim sewage services by way of the Highland Sewer and Water Authority's ("HSWA") Industrial Park Pump Station, with treatment to be provided by the Windber Area Authority's ("WAA") Ingleside Sewage Treatment Plant ("Ingleside Plant"). DER's approval was further based upon Richland's commitment (included as part of the approved plan revision) to prepare a comprehensive plan update for the Solomon Run/Sandy Run/Mount Airy area of Richland in accordance with the time schedule approved as part of the plan revision. Additionally, DER's approval stated DER would hold Richland responsible for implementing the sewage disposal program described in the plan.

The parties filed a joint stipulation of facts with the Board on April 22, 1991. A hearing on the merits was then held on April 30, 1991 and May 1, 1991 before Board Member Richard S. Ehmann, at which SRCAC appeared without counsel.[1] At the close of SRCAC's case, Richland raised SRCAC's

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[1]We note that throughout this entire appeal SRCAC has chosen to remain a pro se appellant. SRCAC chose to have Mr. Larry Mummert, a member of the (footnote continued)

lack of standing to appeal and also moved for a compulsory non-suit to be entered against SRCAC on the basis of its failure to sustain its burden of proof, with DER joining in the motion. Board Member Ehmann advised the parties that as a single board member he could not issue a ruling which would be dispositive of the appeal and that the appellees must decide whether they wanted to proceed with the merits hearing. They elected to present their case because of expediency concerns and the hearing proceeded without objection by SRCAC.

We received SRCAC's post-hearing brief on September 6, 1991, Richland's brief on September 27, 1991, and DER's brief on October 1, 1991. On October 11, 1991, SRCAC filed a Rebuttal Memorandum. Richland's brief readvances its allegation concerning SRCAC's standing and its motion for a compulsory non-suit. DER's brief likewise renews the non-suit motion. As standing is a jurisdictional matter, one which determines whether the Board can decide the issues raised by this appeal, it can be raised at any time. Del-Aware Unlimited, Inc. v. DER et al., 1990 EHB 759. Further, Richland and DER are correct in their assertion that SRCAC bears the burden of proving by a preponderance of the evidence that DER acted arbitrarily or capriciously, contrary to law, or abused its discretion. 25 Pa. Code §21.101(a) and (c)(3). Mr. and Mrs. John Korgeski v. DER et al., EHB Docket No. 86-562-W (Adjudication issued June 13, 1991). Thus, before we can proceed to adjudicate this matter, we must consider whether SRCAC has standing to appeal

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(continued footnote)
SRCAC, act on behalf of the committee at the hearing. We repeatedly advised SRCAC to retain counsel because we are aware that a lay person who proceeds pro se in an appeal assumes the risk that his lack of expertise in legal matters will work to his detriment. Appeal of Ciaffoni, 124 Pa. Cmwlth. 407, 556 A.2d 504 (1989); Michael F. and Karen L. Welteroth v. DER and Clinton Township Board of Supervisors, 1989 EHB 1017.

and whether SRCAC has made out a prima facie case, examining the facts to which the parties have stipulated, the exhibits which they have stipulated for admission as Board exhibits, the transcript of testimony offered in SRCAC's case-in-chief, and the exhibits offered in SRCAC's case-in-chief.

SRCAC'S STANDING TO APPEAL

SRCAC's standing to appeal depends on whether SRCAC has a direct and substantial interest which has an immediate causal connection to the challenged action. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); Wirth v. DER, 1990 EHB 1643. In dealing with citizens groups, the Board has found representational standing to exist where one or more of the group's members is suffering harm which is sufficient to meet the requirements of William Penn, supra. See Del-Aware, supra, and Throop Property Owners Association v. DER, et al., 1988 EHB 391.

The site of the proposed Johnstown Galleria mall is along U.S. Route 219 near an interchange with State Route 56 (B Ex. 36; N.T. 76-77).[2] The Solomon Run area is located in Richland to the north and east of the Galleria site, adjacent to the site, at a somewhat lower elevation (B Ex. 36; N.T. 25, 30). It is located on the opposite side of a hill from the Galleria site along the Sandy Creek watershed (B Ex. 36; N.T. 30). Some of the homes in the Solomon Run area are located in an area called Mount Airy Drive (N.T. 40). Under Richland's Official Plan, the 1970 Cambria County Comprehensive Water and Sewer Plan as updated by various revisions, the Solomon Run area was to be provided with a municipal sewage system connected by a gravity line to an

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[2] "N.T." followed by a page number is a reference to a page in the volume of transcript of the April 30, 1991 and May 1, 1991 hearing. "B Ex." indicates a stipulated Board Exhibit and "Stip." indicates the parties' joint stipulation.

interceptor at Elton and served by WAA by 1972; however, at the time of the hearing, the Official Plan had not been implemented and this area still had individual on-lot sewage systems. (Stip. ¶5; B Exs. 13, 29; N.T. 39, 52, 224, 239).

SRCAC's notice of appeal shows the appellant to be SRCAC, Peter Fedash, Chairman, Shirley Mummert, Secretary. SRCAC was formed at a meeting of residents and property owners of the Solomon Run/Mount Airy Drive section of Richland as a non-profit organization to represent these residents and property owners in seeing that any proposed sewage plan for the Galleria include their properties as well. (Stip. ¶1; N.T. 23-24, 36, 37, 39). Stipulated Board Exhibit 5 reflects that Shirley Mummert is a resident and property owner in Richland.

The parties have stipulated that shortly before Richland submitted the Galleria planning module for DER, SRCAC had submitted to DER a private request for a revision to Richland's Official Plan pursuant to 25 Pa. Code §71.14(a). Under the appropriate circumstances, this section provides a person who is a resident or property owner in a municipality the opportunity to request DER to order the municipality to revise its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage needs. An examination of Board Exhibit 5 shows Shirley Mummert, on behalf of SRCAC, sought revision of Richland's Official Plan inter alia because it was not being implemented and SRCAC contended it was inadequate to meet the sewage disposal needs of the residents and property owners of the Solomon Run area of

Richland which were also unaddressed by the proposed Galleria sewage system. DER and Richland have both stipulated that there is need for a municipal sewage system in the Solomon Run/Mount Airy Drive area (N.T. 274-275).

We have previously recognized that a portion of DER's role under the SFA is to ensure that municipalities execute their planning responsibilities. Edward J. and Patricia B. Lynch v. DER, 1990 EHB 388. Moreover, the regulations contemplate public input on sewage planning; this includes input regarding DER's review of proposals for sewering of adjacent areas. In the situation we have before us, DER simultaneously reviewed the township's proposed revision to its Official Plan and SRCAC's private request for a revision of that plan to provide for the sewage needs of the area adjacent to the area covered by the proposed Galleria revision (N.T. 231). SRCAC, through its member Shirley Mummert, has alleged a direct and substantial interest which has an immediate connection to DER's approval of the Galleria planning module. While we would not find SRCAC to have representational standing to allege the revision to the Official Plan does not meet the sewage needs of the entire Richland Township, the group has a substantial interest in DER's approval of the plan revision as it bears upon their adjacent properties in the township.

MOTION FOR NON-SUIT

The Board's rules of practice and procedure at 25 Pa. Code §21.86 require a majority of the Board members to enter a final order. We have thus previously ruled that where a single Board Member presides over a merits hearing, the Board may consider an appropriately timed motion for compulsory non-suit, such as the one before us, after the close of the hearing. County of Schuylkill, et al. v. DER and City of Lebanon Authority, Permittee, EHB

Docket No. 90-124-W (Opinion issued January 3, 1991); Welteroth, supra. If SRCAC, the party with the burden of proof and the initial burden of proceeding, failed to make out a prima facie case, the Board may grant the motion. County of Schuylkill, at 6. The motion must be viewed in the light most favorable to SRCAC, the non-moving party, and should be granted only if SRCAC's case is clearly insufficient. Id.

The motion asserts that SRCAC failed to establish DER's approval here amounted to an abuse of its discretion or was contrary to law. At the hearing SRCAC advanced several grounds on which it believed its appeal should be sustained. These grounds are again set forth in SRCAC's brief, which does not directly respond to the motion.

The following facts are established by the parties' joint stipulation, B Ex. 35, the joint Board Exhibits, and the testimony offered by SRCAC. On May 9, 1990, Richland made available for public comment a planning module for the Galleria, containing eight alternatives to provide sewage to the Galleria (Stip. ¶12; B Ex. 4). The planning module indicated Alternative 4, which called for transmission of 166,000 gallons per day ("gpd") of sewage via HSWA's interceptor and treatment at WAA's Ingleside Plant, was the alternative the township selected (Stip. ¶ 12; B Ex. 4). Under Alternative 4, to get sewage from the Galleria to HSWA's interceptor, a gravity sewer system cannot be utilized; instead the sewage must be pumped uphill to the interceptor via a sewage pumpstation (B Exs. 9, 36). Shortly thereafter, SRCAC submitted its private request to DER pursuant to 25 Pa. Code §71.14(a) (Stip. ¶13). SRCAC also commented on the Galleria planning module by letter dated June 7, 1990, requesting DER and Richland to perform a study of the existing sewage situation in the Solomon Run area (Stip. ¶14; B Exs. 6, 8).

On June 19, 1990, Richland submitted the Galleria planning module to DER for approval (Stip. ¶¶16-17; B Ex. 8).[3] Upon its review, DER requested additional information; thus, Richland submitted "Supplement No. 1", which was a preliminary outline of the plan update for the area where the Galleria is to be located and included cost estimates and a map showing where sewerage facilities could be located (Stip. ¶18; B Ex. 9). DER also requested that Richland respond to SRCAC's June 7, 1990 request for study of the existing sewage situation in the Solomon Run area (Stip. ¶19; B Ex. 10). Moreover, DER provided a copy of this request to SRCAC and suggested that SRCAC review the planning module, including Supplement No. 1 (Stip. ¶20; B Ex. 11). There is no evidence that SRCAC ever conducted such a review, and Peter Fedash testified on cross-examination by DER that he was not aware of any such action by SRCAC (N.T. 82).

On August 1, 1990, a meeting was held at which Peter Fedash and Shirley Mummert, representatives of DER, Richland, and the Galleria developer were present (Stip. ¶21; N.T. 48). The representatives of SRCAC expressed their views on the planning module, their concerns about the Solomon Run area, and their concern that their sewage needs were being "skipped" (Stip. ¶21; N. T. 52). Following this meeting, SRCAC sent a letter to DER dated August 9, 1990 which stated that SRCAC was neither for nor against the Galleria but was

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[3]The planning module submitted to DER (B Ex. 8) contains some variations from the planning module which Richland made available for public comment (B Ex. 4). The module which was submitted to DER differs as to certain flow volumes and contains additional maps and documents setting forth commentary on the proposed plan. For purposes of the Board's review, however, both versions of the planning module consider use of the same alternatives for wastewater handling facilities and both select the same Alternative 4. As it is DER's approval of the planning module reflecting Richland's selection of Alternative 4 which is before us for review, we need not concern ourselves with the slight variations between B Exs. 4 and 8.

concerned about the sewage needs of its members and the residents and landowners represented by SRCAC (Stip. ¶21; B Ex. 12). Later, on August 27, 1990, Richland submitted to DER a second supplement to the Galleria planning module ("Supplement No. 2"), which considered the provision of sewage services to the Solomon Run/Mount Airy area as well as the Galleria site and considered three additional alternatives (Alternatives 9, 10 and 11) to provide such services (Stip. ¶22; B Ex. 13). On September 14, 1990, SRCAC submitted comments on Supplement No. 2 to DER (Stip.¶24; B Ex. 15). These comments suggested that alternatives other than Alternative 4 would better serve the long term needs of SRCAC and the Solomon Run residents and landowners it represents (B Ex. 15). DER subsequently met with representatives of Richland, HSWA, and WAA to discuss the Galleria planning module as supplemented and the future sewage needs of the surrounding area of the township (Stip. ¶29). As a result of this meeting and in accordance with a request by DER, Richland submitted a third supplement to the planning module ("Supplement No. 3") which included a narrative to provide for phased development of the Galleria, committed Richland to conduct a plan update to address the sewage needs of the Solomon Run/Sandy Run/Mount Airy area adjacent to the Galleria site, and provided a timetable for completion of this study (Stip. ¶31; B Ex. 24). DER then took the action which generated this appeal, approving the Galleria's use of Alternative 4 as proposed by Richland and subjected to public comment, except the total volume of sewage was reduced to 66,000 gpd from 166,000 gpd and the location for conveyance and treatment of this gallonage has been made on an interim basis only (Stip ¶33).

Before attempting to examine each of SRCAC's allegations, we note that the group's desire is to slow the Galleria development so that the mall

developer can be used as a vehicle to pay a disproportionate share of the bill for a municipal sewerage system to serve the Solomon Run area. SRCAC claims that DER "fast-tracked" the Galleria, allegedly in violation of law. Clearly SRCAC would have liked to have seen the mall's development schedule held in abeyance until the township has a plan for municipal sewerage service in this area ready to be implemented. Its notice of appeal suggests the committee views "capital investment by developers" as a supplement to governmental funding of sewage projects and contributions by landowners. At the merits hearing, Peter Fedash testified on behalf of SRCAC that the group's concerns were that the original Official Plan had not been put into effect by Richland and that the Solomon Run area needs sewers which the Galleria plans were not addressing (N.T. 52-53). Although Fedash admitted on cross-examination by Richland that DER has ordered Richland to conduct a study, which is what SRCAC sought, he testified the group would not want Phase I of the Galleria project to be approved until after completion of the study, and would want the study to explore the possibility of a regional wastewater collection and treatment plant at Lambs Bridge or at the Sandy Run reservoir (N.T. 64, 66-67, 74). Further, Fedash testified that the committee is concerned that the interim system approved by DER will not generate any revenue and that money will be wasted on the Galleria's interim system which could be better used to shoulder the cost of implementing a sewage system for the Solomon Run portion of Richland (N.T. 70, 73-74). It is evident from Fedash's testimony that SRCAC desires to use the Galleria development as a means of boosting the economy of the community and increasing the property values of the group's members by having the Galleria developer shoulder a substantial share of the costs of implementing the sewer system best meeting their need. While we can

understand the committee's desire for a municipal sewage system for the property owners it represents, we do not find it reasonable for SRCAC to expect DER to await the results of the townshipwide study before approving only an interim sewage plan for the Galleria or for the Galleria to be held financial hostage to fund more than its proportionate share of the costs of implementing a plan to sewer this entire area which Richland is now developing. DER's regulations impose time limits on DER's review of planning modules for official plan revisions, such as the Galleria, which mandate DER's prompt action and DER cannot lawfully just sit on this proposal. See 25 Pa. Code §71.32(b) and §71.54(d) and (e).

SRCAC requests us to review DER's approval as if it is on a permanent basis rather than interim, arguing that the term "interim" in DER's October 30, 1990 approval pays only "lip service" to the request made by SRCAC because it believes a signed agreement between the Galleria developer and WAA indicates "permanent" service and treatment and because the manager of WAA, George Schrock, testified that the agreement between WAA and the developer is on a permanent basis. Neither this agreement nor Mr. Schrock's testimony was part of SRCAC's case-in-chief. When its case is tested by a motion such as that before us, SRCAC cannot rely on these matters or on its unsupported conjecture regarding an agreement between WAA and the developer. It must have prima facie evidence in its case-in-chief, which it does not. For this reason, we reject SRCAC's suggestion that we review DER's approval as if it were on a permanent basis rather than interim.

SRCAC's brief contains many other unwarranted contentions which have no evidentiary basis and are often redundant. For example, SRCAC does not support with any evidence upon which we could find an abuse of DER's

discretion its allegations that it is "irrational and arbitrary for [DER] to use a band-aid approach of approving an interim Phase I Plan for the Galleria shortly before Election Day in a gubernatorial election year" and that it was "illogical for [DER] to recognize the need for an Official Plan update for a substantial section of the Township and to then approve a major new land development revision." In ruling on the merit of the motion before us, this Board does not review in a vacuum the rationality or logic of DER's actions, but reviews the evidence presented by SRCAC at the merits hearing to see whether it makes a prima facie showing of an abuse of DER's discretion.

Moreover, a review of SRCAC's evidence does not show any support for its argument that the Galleria planning module should have addressed the need for the developer of the Galleria to help foot the bill for a regional sewage treatment plant but did not do so and that DER should have considered the developer's potential capital contribution toward a regional treatment plant but did not do so. Likewise, SRCAC did not present any testimony to show DER promised the committee an opportunity to present a twelfth alternative at a meeting which was then never held, or that the breach of such a promise by DER would be an abuse of the agency's discretion as SRCAC alleges. SRCAC also failed to offer evidentiary support for its contention that DER arbitrarily and capriciously rejected alternatives which it recognized were viable.

Many of SRCAC's other contentions are nothing more than accusations based on matters which SRCAC is asking us to surmise, as opposed to solid legal findings which we should draw from the evidence produced by SRCAC at the hearing. For instance, SRCAC asserts without evidentiary basis that the "1970 official plan" was not among the alternatives considered because of the construction time needed to "fast track" the Galleria. SRCAC further claims

that the study's result was preconceived and that the developer of the Galleria had inside information as to the study's results prior to the study being undertaken. It points to the expense which would allegedly be involved in altering the mall's floors and parking lot, once built, to change the Galleria's sewage system from the interim plan, but it presented no evidence at the hearing to establish that it will be expensive for the developer to alter the approved interim sewage plan, that the interim plan will necessarily become permanent, or that the study's results were in any way predetermined. SRCAC also contends without any support in the evidence that DER was required to but did not contact Adams and that the reason DER did not do so was DER's desire to control the study's result by eliminating Adams' input. Again, this claim is a mere unsupported accusation based upon conjecture rather than being drawn from SRCAC's evidence. Additionally, SRCAC contends without any supporting evidence or citation to the regulations that DER could not have properly evaluated the alternatives without contacting Adams and that DER did not contact Adams, thus amounting to an abuse of DER's discretion. There was no prima facie evidence in SRCAC's case-in-chief to establish this claim, either.

Although SRCAC alleges DER failed to comply with the requirements of various sections of its regulations, the committee never shows how these sections bear upon DER's approval of the planning module. There are two sections of the regulations in Chapter 71 of the regulations which deal with DER's review of official plan revisions: §71.32 and §71.54. Section 71.32 broadly governs DER's approval of official plan revisions, while §71.54 deals with DER's approval of revisions for new land development. Both Richland and DER's briefs allege DER complied with §§71.32 and 71.54 in approving the

Galleria planning module. It is undisputed that the Galleria planning module is for new land development and that the requirements of DER's regulations governing revisions for new land development (25 Pa. Code §§71.51 - 71.55) are applicable to this planning module. Thus, we will examine DER's approval according to §71.54, which requires DER to consider the requirements of §71.32(d) in approving or disapproving an official plan revision. Section 71.54 also provides in pertinent part:

> (a) No proposed plan revision for new land development will be approved by the Department unless it contains the information and supporting documentation required by the [SFA], the Clean Streams Law and regulations promulgated thereunder.
> (b) No proposed plan revision for new land development will be considered for approval unless accompanied by the information required in §71.53(d) (relating to municipal administration of new land development planning requirements for revisions).
> (c) When a municipality does not have an approved official plan, or fails to revise or implement an official plan when required:
> (1) Section 71.32(f) (relating to Department responsibility to review and act upon official plans) applies.

SRCAC contends the requirements of §71.31(b) were not met because the Cambria County Planning Commission ("Planning Commission") was not given alternatives 9, 10 and 11 to review. Section 71.31 applies to the planning module at issue here and DER's review thereof by virtue of §71.32(d)(2). Under the requirement of §71.32(d)(2), DER must consider whether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency. SRCAC's witness, Bradford Beigay, who is the Planning Director of the Planning Commission, testified at the hearing that the Planning Commission had reviewed and commented on the

Galleria planning module (N.T. 164), and a letter dated March 30, 1991 from Mr. Beigay to Glenn Learn of L. Robert Kimball and Associates is contained in the planning module (B Ex. 8) setting forth the Planning Commission's comments. Mr. Beigay's letter states that the Planning Commission finds the proposed collection, conveyance, and treatment of the Galleria sanitary sewerage to be in compliance with the Cambria County Comprehensive Water and Sewer Plan. Alternatives 9, 10, and 11 were subsequently submitted to DER. SRCAC did not introduce any evidence or cite any statute or regulation to show that every piece of additional information submitted to DER after its receipt of a proposal approved by a Planning Commission must be resubmitted to the Planning Commission for its review, nor do we know of any such requirement. Such a process would substantially lengthen the revision review process and would at least inferentially appear contrary to the time constraints imposed thereon in the regulation. SRCAC has not made out a prima facie case on this point.

SRCAC further contends DER failed to adequately consider the committee's comments on the proposed revision in violation of the requirements of §71.32(d)(2). Section 71.32(d)(2) requires DER to consider whether the municipality has adequately considered questions raised in the comments of the general public. Although SRCAC does not point to evidence it introduced to show its comments, the Galleria planning module (B Ex. 8) contains the comments which were made by SRCAC, as well as other people, in response to the public notification. The planning module identifies SRCAC's comments as SRCAC's letter, dated June 7, 1990 and signed by Shirley Mummert on behalf of the committee. This letter suggests that a study of the proposed mall and the Solomon Run area adjacent to it be conducted to identify existing

malfunctioning on-site sewage disposal systems in order to evaluate whether the proposed Galleria sewage system is in the best interest of the Solomon Run area residents. Peter Fedash admitted on cross-examination by Richland that DER ultimately directed Richland to conduct a study of the sewage needs of the Solomon Run area, which is what the committee had requested through its comments (N.T. 64). Thus, SRCAC has not made a prima facie showing that DER did not consider whether Richland had adequately considered the committee's comments.

Next, SRCAC contends DER failed to observe the requirements of §71.32(d)(7),[4] which directs DER to consider in approving a plan revision whether other municipalities have submitted necessary revisions to their plans for approval by DER, but only where the plan revision includes proposed sewage facilities connected to or otherwise affecting sewage facilities of other municipalities. SRCAC asserts, without any citations to the evidence, that §71.32(d)(7) requires plan revisions by municipalities other than Richland which participate in the WAA because the Galleria revision includes treatment at WAA's Ingleside Plant, which is connected to or affects sewage facilities of other municipalities. While the parties stipulated that WAA is a municipal authority comprised of several municipalities in both Somerset and Cambria counties, SRCAC introduced no evidence in its case-in-chief to show the Galleria revision includes proposed sewage facilities connected to or otherwise affecting sewage facilities of municipalities other than Richland. WAA's Ingleside Plant may in fact be connected or have such an affect on

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[4]Both SRCAC's post-hearing brief and notice of appeal allege a violation of §71.32(7). Since no such section of 25 Pa. Code exists, we will assume that SRCAC means §71.32(d)(7) because the contents of this section are the same as those argued by SRCAC to be contained in SRCAC's "§71.32(7)."

sewage facilities of other municipalities, but it was SRCAC's burden to show us this and also to show us what revisions would be necessary for such other municipalities and that they were not submitted to DER. SRCAC's brief, by contending that no evidence was presented to show that other municipalities had updated their plans, misapprehends the legal requirement that as SRCAC bears the burden of proof, it must prove its case by a preponderance of the evidence. DER did not have the burden of showing it complied with §71.32(d)(7) in this appeal; rather, SRCAC was required to initially offer prima facie evidence of DER's non-compliance. SRCAC did not sustain this burden.

Section 71.53(d)(1) states that no plan revision for new land development will be considered complete unless it includes the information contained in §71.52. SRCAC argues the Galleria planning module was inconsistent with the provisions of §71.52 (2) [sic] and §71.52(a)(3).[5] Section 71.52(a)(2) provides:

> (a) An official plan revision for new land development shall be submitted to the Department in the form of a completed sewage facilities planning module provided by the Department and shall include, but not be limited to, the following information:
>
> (2) The relationship of the proposed development to existing sewage needs, proposed sewage facilities and sewage management programs in an area delineated by the municipality, including identification of:
>
> (i) The areas included in, and adjacent to, the project which are in need of improved sewage facilities.
>
> (ii) Existing and proposed sewage facilities for remaining acreage or delineated lots not included in the project.
>
> (iii) Existing sewage facilities and sewage management programs in the area.

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[5]Since no §71.52(2) of 25 Pa. Code exists, we will assume that SRCAC means §71.52(a)(2), which has the same content as SRCAC's "71.52(2)."

(iv) Other proposed sewage facilities and sewage management programs-public and private-in the area.
(v) The method for integrating the proposal into the comprehensive sewage program in the area as reflected in the approved official plan.

SRCAC argues in its brief that it is inconsistent with the logic of this section for the Department to acknowledge the need for an update of Richland's Official Plan and to simultaneously approve Phase I of the Galleria on even an interim basis. It contends DER's approval "stacks the deck" against SRCAC and the residents and landowners it represents by giving the Galleria's developer, Richland's supervisors, and HSWA and WAA an incentive to opt for a study result that will make permanent the approved interim method of treatment. In further support of its contention, SRCAC argues the township's engineers have endorsed a continuation of the approved interim plan. Nothing was offered by SRCAC in its case-in-chief to support its claim that the Galleria planning module does not comply with the requirements of §71.52(a)(2). SRCAC's evidence did not show that the Galleria planning module, as approved, lacked the information required by §71.52(a)(2). This was SRCAC's burden. Moreover, implicit in this portion of SRCAC's argument is the concept that DER can never approve a plan revision when sewage disposal will be through an interim system if, at the same time, it requests an update of the entire plan. Nothing in these regulations supports such an absolute bar on DER's approval of interim facilities.

Next, turning to SRCAC's argument regarding §71.52(a)(3), we observe that section further requires the completed planning module to include:

(3) An analysis of technically available sewage facilities alternatives identified by the municipality and additional alternatives identified by the Department, including whether each alternative:
(i) Meets the technical requirements of this part.

(ii) Is consistent with local and areawide comprehensive water quality management plans for the area.
(iii) Is consistent with sewage planning policies and decisions of the municipality.
(iv) Is consistent with the municipalities' comprehensive land use plan for the area.
(v) Incorporates and is consistent with the requirements of §§71.21 and 71.31 (relating to content of official plans; and municipal responsibility to review, adopt and implement official plans).

SRCAC contends that the Galleria planning module did not comply with subsection (a)(3)(ii) of this section because DER could not have properly evaluated the planning module in connection with local and areawide comprehensive water quality management plans for the area. SRCAC bases this claim on its assertion that these plans were never found, since when SRCAC requested to see them, the plans were not made available to the committee. Contrary to SRCAC's assertion, the 1970 Comprehensive Water and Sewer Plan for Cambria County is not missing, but is stipulated Board Exhibit 29. Additionally, SRCAC presented no evidence in its case-in-chief to show that the planning module is inconsistent with the 1970 Comprehensive Plan.

As to sections 71.52(a)(3)(iii)-(iv), SRCAC argues that DER's "interim" approval of the Galleria planning module and its requirement of a study in itself shows that the planning module is inconsistent with Richland's sewage planning policies and decisions and that it is inconsistent with Richland's comprehensive land use plan for the area. Contrary to SRCAC's belief, the mere fact that DER has approved an interim facility and has directed Richland to undertake a study is not evidence that the information required by §71.52(a)(3)(iii)-(iv) was not included in the planning module. SRCAC cannot simple assert that the planning module does not comply with these regulations; it must present evidence to prove its assertion. SRCAC did not

offer any evidence in its case-in-chief to establish the planning module did not comply with §71.52(a)(3)(iii)-(iv). Thus, it has not made a prima facie showing on this argument.

SRCAC further contends that the Galleria planning module does not comply with §71.52(a)(3)(v) because it is not consistent with the requirements of §§71.21 and 71.31, citing only "the reasons more fully set forth above". Nothing in SRCAC's evidence presented in its case-in-chief shows that the planning module is inconsistent with §71.21 (relating to the content of official plans). As to whether the Galleria planning module is consistent with §71.31, SRCAC only asserts the planning module did not comply with §71.31(b) and (c). We have previously ruled in this Opinion that SRCAC has not made out a prima facie showing that the requirements of §71.31(b) were not met. SRCAC contends that DER failed to observe the requirements of 25 Pa. Code §71.31(c), which provides that a municipality shall submit evidence that documents the publication of a proposed plan adoption action at least once in a newspaper of general circulation in the municipality. The Galleria planning module (B Ex. 8) includes a proof of publication in the Johnstown-Tribune Democrat newspaper, and, thus, SRCAC has not made a prima facie showing on this point. Further, the SRCAC claim that publication of an earlier February 5, 1990 Galleria planning module was not made is of no consequence because DER took no action on that planning module and returned it to Richland (N.T. 133).

In a series of somewhat redundant arguments, SRCAC claims that the supplements to the Galleria planning module (B Ex. 8) and the changes to the module which were made by DER's conditional approval thereof, compared to what was originally submitted to DER, were so significant as to amount to an "entirely new plan". It contends that additional publications of the proposed

plan adoption action should have been made so that the public could comment on the changes. SRCAC did not present any evidence to establish the approved Galleria planning module was so different from the planning module submitted to DER as to amount to a new plan. Moreover, it offers no case law, statute section, or regulation upon which it can base this assertion of mandatory republication, nor does our review of Chapter 71 of the regulations produce support for SRCAC's position.

Finally, SRCAC argues DER's approval of the Galleria revision is inconsistent with §71.32(f)(3) of the regulations. Under §71.54(c), this section would only be applicable to DER's approval of the Galleria planning module if Richland does not have an approved official plan or has failed to revise or implement an official plan when required. Here, the parties have stipulated that Richland has an official plan which is B Ex. 29. Further, SRCAC introduced no case-in-chief evidence which shows Richland was required to revise or implement its official plan (prior to the direction to do so in DER's conditional approval of this revision) and failed to do so. Thus, SRCAC's argument that the requirements of §71.32(f)(3) were not met fails to establish even a prima facie case.

Although we recognize that SRCAC appeared before us without the benefit of legal counsel, we must hold it to the same burden of proof requirements as we would any party appearing before us who was represented by legal counsel. SRCAC did not make out a prima facie showing that DER acted arbitrarily or capriciously, contrary to law, or abused its discretion in this matter. We therefore grant the motion for compulsory non-suit advanced by Richland and DER.

O R D E R

AND NOW, this 24th day of January, 1992, it is ordered that the motion for compulsory non-suit of Richland Township and DER is granted and the appeal of Solomon Run Community Action Committee is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 24, 1992

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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For Appellant:
Shirley J. Mummert, Secretary SRCAC
Johnstown, PA

For Permittee:
Patrick T. Kiniry, Esq.
Johnstown, PA

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M. DIANE SMIT
SECRETARY TO THE B

BETHENERGY MINES, INC.	:	
	:	
v.	:	EHB Docket No. 90-050-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 30, 1992

OPINION AND ORDER
SUR
MOTION TO STRIKE

By Joseph N. Mack, Member

Synopsis

Where testimony which is objected to by one of the parties at hearing is not stricken, it remains part of the record and may form the basis for the expert opinion of another witness.

OPINION

An appeal was filed by BethEnergy Mines, Inc. ("BethEnergy") on January 26, 1990 from an order issued by the Department of Environmental Resources ("DER") on December 27, 1989 charging BethEnergy with adversely affecting stream flow as a result of its mining operation.

A hearing on this matter was held over the period beginning June 3, 1991 and ending July 3, 1991.

At the close of hearing, counsel for DER made an oral motion to strike a portion of the testimony presented by Kenton Boltz, BethEnergy's expert witness in the field of geophysics. DER's counsel moved to strike that portion of the testimony concerning Mr. Boltz's opinion as to the existence of secondary porosity prior to mining and the existence of terrain conductivity profiles

n the absence of BethEnergy's mining activity.

The presiding Board member held that a ruling would be made on DER's otion after reviewing the transcript of Mr. Boltz's testimony, and directed ER to file a written motion and supporting brief following receipt of the anscript. DER filed its motion and supporting brief on December 23, 1991. thEnergy filed a response on January 14, 1992.

The basis for DER's objection is its contention that Mr. Boltz's inion regarding the existence of secondary porosity prior to mining and rrain conductivity profiles in the absence of mining is not based on evidence the record. Specifically, DER contends that Mr. Boltz's opinion is based on the findings of Dr. Donald Streib with respect to lineaments[1] and natural acturing, but that Dr. Streib's testimony on this subject was not admitted the hearing. DER refers us to numerous cases which hold that expert testimony st be based either on personal knowledge or upon the admitted testimony of her witnesses. See Earlin v. Cravitz, 264 Pa. Super. 294, 399 A.2d 783 (1979); ster v. McKeesport Hospital, 260 Pa. Super. 485, 394 A.2d 1031 (1978); Hussey May Department Stores, Inc., 238 Pa. Super. 431, 357 A.2d 635 (1976). DER gues that since Mr. Boltz's opinion was based not on personal knowledge but the findings of Dr. Streib, whose testimony regarding lineaments and natural acturing was excluded at the hearing, there is no evidence in the record serve as the basis for Mr. Boltz's opinion and, therefore, it should be ricken.

In response, BethEnergy disputes DER's contention that the record ntains no support for Mr. Boltz's opinion, and directs our attention to

---

Lineaments" were described by Dr. Streib as "visual representations of centrations and orientations of natural fractures." (Transcript, p. 1700) reinafter, a page in the transcript will be referenced as "T." followed the page number.)

various pages in the transcript where Dr. Streib provided testimony on lineaments and fracturing. For example, in his discussion of aerial photographs which he had reviewed, Dr. Streib stated, "The major thing I was looking [for] at the time was lineaments..." (T. 1554-1555) When asked during cross examination if he could determine when certain fracture planes were created, Dr. Streib responded as follows:

> Well, I can tell you that they weren't there recently, because when you see a fracture in a rock, a bedrock, a sandstone, that's not the same type of thing that one normally associates with longwall subsidence.
>
> Now, that's what a natural fracture is going to look the same, but there certainly is nothing there that was indicative of having been recently formed. (T. 1630)

However, the primary dispute centers on that portion of Dr. Streib's testimony contained on pages 1699-1700 of the transcript. When asked on redirect examination if he observed what he concluded in his opinion to be natural fractures, Dr. Streib replied that the area in question is "heavily naturally fractured". (T. 1699-1700) Dr. Streib then testified as follows:

> Well, the lineaments that you see are the visual representations of concentrations and orientations of natural fractures, indicating that in that area the rocks are generally considerably more fractured.
>
> Densities are much greater than you'd find in an area that does not have and is the case in many Appalachian areas.... (T. 1700)

At that point, counsel for DER interjected stating that Dr. Streib was testifying to matters outside the scope of cross examination. The presiding Board member sustained the objection, stating, "I think that this is well beyond the scope of cross..." and "...we are going to stop at this point on this examination." (T. 1700) No further pursuit of redirect examination regarding lineaments and natural fractures was then allowed.

DER contends that because Dr. Streib's testimony on redirect examination regarding lineaments and natural fracturing was found to be objectionable it was thereby excluded from the record. In contrast, BethEnergy argues that although further redirect examination of Dr. Streib regarding lineaments and natural fracturing was not allowed following the presiding Board member's ruling, all testimony on this subject up to that point remains part of the record. BethEnergy asserts that before testimony may be purged from the record, the objecting party must move for it to be stricken.

We agree with BethEnergy's position on this matter and find that the testimony of Dr. Streib on lineaments and natural fractures remains part of the record.

As noted by the Pennsylvania Supreme Court:

> Once evidence is admitted, it is well settled: "Where either party to a proceeding discovers at any time that improper testimony has been inadvertently admitted, he may have the error corrected by applying to the Court to have the evidence stricken..."

Jones v. Spidle, 446 Pa. 103, 106-07, 286 A.2d 366, 367-68 (1971) (Citations omitted); See also B.D.B., Inc. v. Commonwealth, Pennsylvania Liquor Control Board, 67 Pa. Cmwlth. 72, 445 A.2d 1360 (1982). In Al Hamilton Contracting Company v. DER, EHB Docket No. 85-392-W (Opinion and Order Sur Motion to Strike Expert Opinions issued November 14, 1991), the question of timeliness of objections was discussed. That decision stated as follows:

> The ground for the objection is oftentimes apparent from the question itself, in which case, to be timely, the objection should be made before the answer. [Citation omitted] In certain circumstances, however, it is not feasible to object to a question before the witness answers, and counsel must resort instead to a motion to strike.

Id. at p. 4.

In the present case, Dr. Streib responded to a question posed by counsel for BethEnergy and began a discussion of lineaments and fractures.

At that point counsel for DER objected and a ruling was made that no further questioning could be done on redirect examination regarding lineaments and fracturing. However, no motion was made to strike the testimony of Dr. Streib up to that point. Therefore, that testimony remains part of the record.

Because the record contains testimony by Dr. Streib on the subject of lineaments and natural fracturing, there is a foundation in the record for Mr. Boltz's expert opinion. As to the weight to be accorded to Mr. Boltz's testimony based on the aforesaid testimony of Dr. Streib, that is a matter for the Board to decide in adjudicating this appeal.

Because we have determined that the record contains a basis for Mr. Boltz's expert testimony, we must deny DER's motion to strike.

O R D E R

AND NOW, this 30th day of January, 1992, it is hereby ordered that DER's motion to strike a portion of Mr. Boltz's testimony is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 30, 1992

cc: **Bureau of Litigation:**
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Western Region
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M. DIANE SMITH
SECRETARY TO THE BOARD

MANOR MINING AND CONTRACTING CORP.	:	
	:	
v.	:	**EHB Docket No. 91-110-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 31, 1992**

OPINION AND ORDER SUR
MANOR MINING AND CONTRACTING CORP.'S
MOTION TO STRIKE DEPARTMENT'S
RESPONSE TO REQUEST FOR ADMISSIONS

By Richard S. Ehmann, Member

Synopsis

Manor Mining and Contracting Corp.'s ("Manor") Motion To Strike Department's Response To Request For Admissions, seeking to strike the Department of Environmental Resources' ("DER") responses as untimely filed, is granted where DER's responses were filed nearly 90 days after it received Manor's Request For Admissions and no extension of the deadline for answering the Request For Admissions was agreed to by the parties or ordered by the Board.

OPINION

The above-captioned appeal is an appeal from a DER administrative order dealing with mine safety concerns at Manor's Manor 44 Mine located in Clearfield County.

In the course of this appeal's pre-hearing proceedings and on May 7, 1991, Manor mailed to DER a Request For Admissions. At the same time and under the same letter, Manor also filed a Request For Production Of Documents

and Interrogatories. Under cover of a letter dated August 5, 1991, DER's counsel mailed DER's response to the Request For Admissions to this Board. We received it on August 6, 1991.

Thereafter on September 17, 1991, we received Manor's Motion To Strike Department's Response To Request For Admissions. On October 17, 1991, we received DER's Objections To The Appellant's Motion To Strike Department's Response To Admissions.

Manor's Motion contends that pursuant to Pa.R.C.P. 4014, DER had only 30 days in which to timely respond under oath to Manor's Request For Admissions. It says DER's response was not filed until nearly 60 days after the due date for the filing of this response and, thus, under Pa.R.C.P. 4014, the Request For Admissions are deemed admitted. Manor argues that it did not grant DER any extension of time to file answers to the Request For Admissions and never discussed the Request For Admissions in any fashion with counsel for DER, although Manor admits it did discuss the need for timely responses to the Request For Production Of Documents and Interrogatories with DER's counsel.

In DER's Objections to Manor's Motion, DER acknowledges discussions about additional time to respond to Manor's discovery requests and states its counsel assumed that Manor's agreement to an extension applied to the Request For Admissions, too. DER's Objections do not deny the untimeliness of its response, the lack of any discussion of the Request For Admissions or the fact that there was no extension by Manor of the deadline for filing DER's responses to Manor's Request For Admissions.

Nothing in either the Motion or the Objections records exactly what extensions were sought by DER or agreed to by Manor. The only writings dealing with discovery extensions are attached as Exhibits C and D to Manor's

Motion. They are two letters from Manor's counsel dated July 1, 1991 and reflect that even the extension discussion mentioned therein occurred after expiration of the thirty day period set forth in Pa.R.C.P. 4014 for answering a Request For Admissions. The lack of any such favorable record, coupled with DER's failure to deny the allegation in Manor's Motion that Manor never discussed the Request For Admissions with DER, leaves the Board no choice but to sustain Manor's Motion. Energy Resources Inc. v. DER, 1990 EHB 901; Kerry Coal Company v. DER, EHB Docket No. 90-333-E (Opinion issued January 29, 1991); and Larry D. Heasley et al. v. DER et al., EHB Docket No. 90-311-MJ (Consolidated) (Opinion issued March 25, 1991).

This result does not change as a result of DER's argument that Manor's delay in filing the instant Motion shows Manor had agreed to the extension that DER's counsel assumed into existence. The filing date of Manor's Motion To Strike, as long as it is after the thirty day period provided in Pa.R.C.P. 4014, has no significance as to the Motion's validity in this appeal's circumstances. Even if Manor waited until after it could review DER's belated response, this only shows it did wait, not that an extension was given. This may have been wise "lawyering" by Manor's counsel or merely happenstance. In either circumstance it proves nothing because Manor could have filed this Motion as recently as yesterday or any time after early June, too.

DER's Objections also argue that under Pa.R.C.P. 4014, this Board has the power to allow longer periods of time to respond to Requests For Admissions. From this, DER asserts we should deny the Motion and treat DER's Responses to the Request For Admissions as timely. Pa.R.C.P. 4014(b) provides that a matter is deemed admitted unless within thirty days of the request "or

within such shorter or longer time as the court may allow" the response is filed.[1] For this Board to have set a longer response time for DER's answers, we would have had to have a request for same filed on behalf of DER in a reasonably timely fashion which contained some justification for the longer period. We have never received such a request except inferentially within DER's Objections to Manor's motion, which is obviously too late.

Accordingly, we enter the following order.[2]

ORDER

AND NOW, this 31st day of January, 1992, Manor's Motion To Strike Department's Response To Request For Admissions is granted and the individual admissions contained in Manor's Request For Admissions are deemed admitted by DER.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 31, 1992

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[1]Under Pa.R.C.P. 4014(b), answers are to be verified by the party. Manor also objected that DER's answers were not verified but merely signed by its counsel. DER did not get around to filing its verification with us until October 24, 1991. However, we have not addressed this issue in this opinion since we have found even the unverified answers were untimely.

[2]Having ruled on this motion in this fashion, we have not passed upon the sufficiency of DER's individual but untimely responses to the Request For Admissions which Manor asked us to do in the appeal in the event we did not sustain its Motion To Strike.

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Central Region
For Appellant:
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M. DIANE SM
SECRETARY TO THE

BOYERTOWN AUTO BODY WORKS	:	
	:	
v.	:	**EHB Docket No. 91-321-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 31, 1992**

OPINION AND ORDER
SUR
APPLICATION FOR RECONSIDERATION

Robert D. Myers, Member

Synopsis

Reconsideration of an order dismissing an appeal is denied when the only reason cited for appellant's failure to comply with Board Orders (including a Rule to Show Cause) is appellant's "erroneous impression" that a stipulation with DER had suspended Board proceedings.

OPINION

We have been requested, by a timely-filed Application, to reconsider our Order of November 26, 1991 dismissing Boyertown's appeal as a sanction for failing to comply with Board Orders. Pre-hearing Order No. 1, issued on August 5, 1991, required Boyertown to file its pre-hearing memorandum on or before October 21, 1991. Boyertown did not comply. As a result, on October 28, 1991, a Rule was issued directing Boyertown to show cause by November 18, 1991 why its appeal should not be dismissed as a sanction. The Rule specifically stated that receipt of the pre-hearing memorandum by November 18,

1991 would act to discharge the Rule. Boyertown neither responded to the Rule nor filed its pre-hearing memorandum. As a consequence, the appeal was dismissed on November 26, 1991.

The only reason stated in the Application to justify Boyertown's disregard of our Orders is the "erroneous impression" that a stipulation with DER had suspended Board proceedings. While we have the power to reconsider our Orders under 25 Pa. Code §21.122(a), that power is exercised only for "compelling and persuasive reasons" and is generally limited to two specific instances which are not present here. The reason stated in the Application is not enough to warrant reconsideration.

ORDER

AND NOW, this 31st day of January, 1992, it is ordered that the Application for Reconsideration of Boyertown Auto Body works is denied.

ENVIRONMENTAL HEARING BOARD

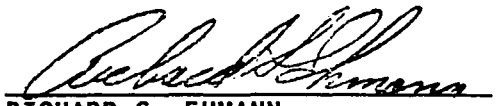
Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

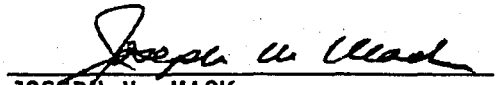
Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 31, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

R.E.M. COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-536-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 31, 1992**

OPINION AND ORDER
SUR RULE TO SHOW CAUSE AS TO
TIMELINESS OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

This Board must dismiss this appeal for want of jurisdiction because it was filed with the Board more than thirty days after R.E.M. Coal Company ("REM") received the Commonwealth of Pennsylvania Department of Environmental Resources ("DER") civil penalty assessment, which is the subject of this appeal. REM's timely mailing of its appeal to the wrong location is not good cause for this Board to grant REM leave to file its appeal *nunc pro tunc*.

OPINION

On October 28, 1991, DER assessed a civil penalty in the amount of $45,000 against REM pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b), for alleged

violations of these statutes asserted within the Civil Penalty Assessment to have occurred at REM's Karimor Mine, which is located in Redbank Township, Clarion County.

On December 9, 1991 this Board received REM's appeal from this assessment and assigned that appeal the instant docket number. According to the face of REM's Notice of Appeal, REM received DER's Civil Penalty Assessment on October 30, 1991.

Because the untimely filing of an appeal divests this Board of jurisdiction to hear same under Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), and because simple arithmetic suggests December 9th is more than the maximum thirty days to appeal under 25 Pa. Code §21.52(a), as measured from October 30, 1991, the Board issued REM a Rule To Show Cause why this appeal should not be dismissed as untimely. That Rule was returnable on January 8, 1992.

On January 8, 1992 REM filed its Response To Show Cause Order. The Response admits receipt of DER's Civil Penalty Assessment on October 30, 1991 and states that the appeal was first mailed to the Board and postmarked November 27, 1991. It then states that the appeal was mailed to an address listed on the appeal form, but the appeal was returned to REM's counsel on December 4, 1991 "because the forwarding order expired". REM then states it complied with all procedures but the Board did not timely receive this appeal because there was no forwarding of this mail to the Board's current address.

REM's Response does not state it is in the nature of a Petition For Leave To Appeal *Nunc Pro Tunc*. However, this appeal had to have been filed with us by November 29, 1991 to be timely if REM received this assessment on October 30, 1991 as stated in both its Notice Of Appeal and its Response, so it is clearly untimely, and, absent allowance of an appeal *nunc pro tunc*, we

it is clearly untimely, and, absent allowance of an appeal *nunc pro tunc*, we lack jurisdiction over it. American States Insurance Company v. DER, 1990 EHB 338; Rostosky, *supra*.

For an appeal *nunc pro tunc* to be authorized by this Board, the appellant must comply with 25 Pa. Code §21.53(a). This means that good cause to grant leave to appeal must be shown. The courts have made it clear this means fraud or a breakdown in the processes of this Board must be shown by REM. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986). Negligence or a mistake by an appellant or its counsel does not excuse a failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980).

This Board's address has been 101 South Second Street, Suites Three-Five, Harrisburg, Pennsylvania, 17101, since May of 1988. It is exactly this address which DER set forth in its Civil Penalty Assessment (attached to REM's Notice Of Appeal) as the address of this Board and the place at which appeals from the assessment must be filed. Moreover, our address appears within the Board's rules of procedure as published at 25 Pa. Code §§21.32(e) and 21.120(b). Finally, when our address changed notice thereof was provided in the Pennsylvania Bulletin on April 23, 1988. See 18 Pa. Bull. 1964. Thus, REM's mailing of the appeal to the Board's former and now incorrect address is not good cause to allow an appeal *nunc pro tunc*. Cadogan Township Board of Supervisors v. Commonwealth, DER, 121 Pa. Cmwlth. 18, 549 A.2d 1363 (1988); Kerry Coal Company v. DER, 1990 EHB 1206. Accordingly, we have no option but to make this Rule absolute and enter an Order dismissing this appeal as untimely.

ORDER

AND NOW, this 31st day of January, 1992, it is ordered that this Board's Rule To Show Cause dated December 19, 1991 is made absolute and the appeal of REM is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 31, 1992

cc: **Bureau of Litigation**
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For Appellant:
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Western Region

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M. DIANE SMITH
SECRETARY TO THE BOARD

R.E.M. COAL COMPANY :
:
v. : EHB Docket No. 91-550-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: January 31, 1992

OPINION AND ORDER
SUR RULE TO SHOW CAUSE AS TO
TIMELINESS OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

Where the face of R.E.M. Coal Company's ("REM") Notice Of Appeal indicates the appeal was taken more than thirty days after the Appellant received notice of the Department of Environmental Resources ("DER") action, thus making it untimely, and in response to the Board's Rule To Show Cause why its appeal should not be dismissed as untimely filed, REM states only that it initially and timely mailed the appeal to the wrong address for the Board, the appeal is untimely and must be dismissed for lack of jurisdiction.

OPINION

On October 28, 1991, DER assessed a civil penalty in the amount of $22,500 against REM pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b), for alleged violations of these statutes asserted within the Civil Penalty Assessment to

have occurred at REM's Corsica Tipple, which is located in Limestone Township, Clarion County.

On December 9, 1991 this Board received REM's appeal from this assessment and assigned that appeal the instant docket number. According to the face of REM's Notice of Appeal, REM received DER's Civil Penalty Assessment on October 30, 1991.

Because the untimely filing of an appeal divests this Board of jurisdiction to hear same under Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), and because simple arithmetic suggests December 9th is more than the maximum thirty days to appeal under 25 Pa. Code §21.52(a), as measured from October 30, 1991, the Board issued REM a Rule To Show Cause why this appeal should not be dismissed as untimely. That Rule was returnable on January 8, 1992.

On January 8, 1992 REM filed its Response To Show Cause Order. The Response admits receipt of DER's Civil Penalty Assessment on October 30, 1991 and states that the appeal was first mailed to the Board and postmarked November 27, 1991. It then states that the appeal was mailed to an address listed on the appeal form, but the appeal was returned to REM's counsel on December 4, 1991 "because the forwarding order expired". REM then states it complied with all procedures but the Board did not timely receive this appeal because there was no forwarding of this mail to the Board's current address.

REM's Response does not state it is in the nature of a Petition For Leave To Appeal *Nunc Pro Tunc*. However, this appeal had to have been filed with us by November 29, 1991 to be timely if REM received this assessment on October 30, 1991 as stated in both its Notice Of Appeal and its Response, so it is clearly untimely, and, absent allowance of an appeal *nunc pro tunc*, we

lack jurisdiction over it. American States Insurance Company v. DER, 1990 EHB 338; Rostosky, *supra*.

For an appeal *nunc pro tunc* to be authorized by this Board, the appellant must comply with 25 Pa. Code §21.53(a). This means that good cause to grant leave to appeal must be shown. The courts have made it clear this means fraud or a breakdown in the processes of this Board must be shown by REM. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986). Negligence or a mistake by an appellant or its counsel does not excuse a failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980).

This Board's address has been 101 South Second Street, Suites Three-Five, Harrisburg, Pennsylvania, 17101, since May of 1988. It is exactly this address which DER set forth in its Civil Penalty Assessment (attached to REM's Notice Of Appeal) as the address of this Board and the place at which appeals from the assessment must be filed. Moreover, our address appears within the Board's rules of procedure as published at 25 Pa. Code §§21.32(e) and 21.120(b). Finally, when our address changed, notice thereof was provided in the Pennsylvania Bulletin on April 23, 1988. See 18 Pa. Bull. 1964. Thus, REM's mailing of the appeal to the Board's former and now incorrect address is not good cause to allow an appeal *nunc pro tunc*. Cadogan Township Board of Supervisors v. Commonwealth, DER, 121 Pa. Cmwlth. 18, 549 A.2d 1363 (1988); Kerry Coal Company v. DER, 1990 EHB 1206. Accordingly, we have no option but to make this Rule absolute and enter an Order dismissing this appeal as untimely.

ORDER

AND NOW, this 31st day of January, 1992, it is ordered that this Board's Rule To Show Cause dated December 19, 1991 is made absolute and the appeal of REM is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: January 31, 1992

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Western Region

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RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

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M. DIANE SMITH
SECRETARY TO THE BOARD

WESTTOWN SEWER COMPANY, WESTTOWN TOWNSHIP, Intervenor and CHESTERFIELD DEVELOPMENT CORPORATION, Intervenor	:	
v.	:	EHB Docket No. 91-269-E (Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 4, 1992

OPINION AND ORDER
SUR APPEALABILITY OF
DEPARTMENT OF ENVIRONMENTAL RESOURCES'
LETTER OF JUNE 7, 1991

By Richard S. Ehmann, Member

Synopsis

A letter from the Department of Environmental Resources ("DER") which imposes no obligations upon the recipient and seeks to remind the recipient of its obligations under the law does not constitute an action appealable by a non-recipient third party.

OPINION

On June 7, 1991, DER wrote a letter to Westtown Township ("Westtown") which states in full:

> This letter is a follow-up to our May 8, 1991 meeting regarding the Westtown Sewer Company.
>
> Available information now indicates that an actual hydraulic overload exists at the Westtown Sewer Company wastewater treatment plant.
>
> We wish to remind you of the requirements of Section 94.21 Municipal Wasteload Management Regulations and of your responsibilities under this section which states in part

> that "No building permit shall be issued by any governmental entity which may result in a connection to overloaded sewerage facilities or increase the load to those facilities from an existing connection."
>
> If you should have any questions, please feel free to contact this office.

A copy of this letter was sent to Westtown Sewer Company ("WSC"). Even though this letter was not addressed to WSC and did not direct any actions by WSC, WSC appealed therefrom to the Board, referring to this letter as a "Moratorium Order" and challenging the bases for DER's conclusion that WSC's plant was hydraulically overloaded.

On January 7, 1992, after a further review of DER's letter, the Board ordered all parties to file Briefs with it addressing the question of whether or not the letter constitutes a final action or adjudication by DER.[1] In contravention of that Order, Chesterfield Development Corporation has remained silent, filing no brief, and Westtown's counsel has merely written a letter to the Board stating he will file no Brief (in the apparent, though mistaken, belief that filing such a brief was optional). WSC and DER have filed the required Briefs and they both contend that DER's letter was appealable.

The Board has taken the unusual action of requiring these Briefs because if this letter is not a final action of DER, then, as a Board, we lack jurisdiction to hear this appeal. Swatara Township Authority v. DER, 1987 EHB 757; Township of Franklin v. DER, 1987 EHB 293; Sandy Creek Forest, Inc. v. Commonwealth, DER, 95 Pa. Cmwlth. 457, 505 A.2d 1091 (1986); Ed Peterson and James Clinger v. DER, 1990 EHB 1224.

---

[1] The appeal from this letter is consolidated with another WSC appeal from a DER letter to WSC dated August 14, 1991. This August 14, 1991 letter is discussed below. Neither the parties nor this Board has questioned the appealability of that letter.

In its Memorandum In Response To Board's Order, WSC says that letters of this type have consistently been held by the Board and the Courts to be appealable, just as similar actions imposing bans have been held appealable. WSC contends that the cases cited above, all of which were cited in the Board's order to the parties to brief this issue, are distinguishable because they did not involve any present infringement on any existing "permit or other activities".

DER's Brief, though untimely filed, argues DER's letter is an adjudication. It argues this letter informed Westtown that DER found that as of June 7, 1991, WSC's plant was hydraulically overloaded. DER also contends each of the cited cases is distinguishable, either factually or legally. Further, DER argues the instant letter is not merely an unappealable notice of violation but represents a formal determination that a hydraulic overload exists and, as a result, duties are imposed on WSC by automatic operation of 25 Pa. Code §94.21(a).

Pursuant to the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, the Board has the power and duty to hold hearings and issue adjudications under 1 Pa.C.S. Ch. 5, Subch. A, on orders, permits, licenses, or decisions of DER. Actions of DER are appealable only if they constitute "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" as defined at 25 Pa. Code §21.2(a). Plymouth Township v. DER, 1990 EHB 974. "Adjudications" are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of the parties. 2 Pa.C.S.A. §101. An "action" is defined in 25 Pa. Code §21.2(a) as follows:

> Action--Any order, decree, decision, determination or ruling by the Department affecting personal or property

> rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

Not every action of DER is an adjudication or final action, however. As Judge Paladino wrote in Sandy Creek Forest, Inc., *supra*: "A letter from an agency stating what the law requires is not a final action or adjudication and is not appealable." Id. at ____, 505 A.2d 1093. It is clear that the paragraph advising Westtown of its responsibilities under 25 Pa. Code §94.21 does only this. It merely informs Westtown of what these regulations require of it if there is an overload. As such, that paragraph is not appealable. See Township of Franklin, *supra*; Perry Township Board of Supervisors v. DER, 1986 EHB 888; and Basalyga v. DER, 1989 EHB 388.

However, DER argues the letter is appealable because DER says it is DER's finding of a hydraulic overload at WSC's sewage treatment plant and that obligations arise for WSC as a result. This letter is not directed to WSC. The letter also does not indicate any absolute decision or final DER finding of overload. It is not conclusive, but hedges, saying only that current information shows an overload exists. Moreover, recitation of DER's finding of a violation of a law, such as an existing overload, constitutes only a notice of violation. M.C. Arnoni v. DER, 1989 EHB 27. A DER finding of violation of a statute is not appealable if that is all that is stated in DER's notice thereof. Ed Peterson, *supra*.

An appeal very similar to that before us now is Swatara Township Authority, *supra*. There, DER wrote a letter saying it had determined that

Harrisburg's sewage treatment plant would soon be overloaded. DER's letter directed Harrisburg to submit a plan under 25 Pa. Code §94.22 to prevent this from occurring and said DER would not approve planning modules for projects connecting to an overloaded interceptor sewer in Swatara Township until bids were let for construction of the facilities to eliminate the overload. There, also, this Board held the letter was unappealable as it merely advised the township of DER's future conduct and did not reject any planning modules. In accord, see York Township v. DER, 1986 EHB 515. In this appeal DER's letter did not threaten future action against WSC, nor did it direct WSC or Westtown to do anything.

The same cannot be said for the August 14, 1991 letter from DER to WSC mentioned in footnote 1 above. There DER states:

> The reports established that your sewage treatment facility is hydraulically overloaded. It will be necessary for [WSC], as permittee, to comply with Section 94.22 of Chapter 94. This section requires that the permittee ... .

There DER makes a clear finding of overload and directs WSC to undertake actions in response thereto. That the August 14, 1991 letter is appealable to this Board is not challenged. It is essential in our review of the June 7, 1991 letter and DER's analysis thereof to consider both letters because of the clear differences between the two. Of critical import is the absence in DER's brief of any explanation of why it was necessary for DER to prepare and send this second letter to WSC if its first letter did all it now contends. If the first letter was so clearly the appealable action, then the second letter is redundant. The August 14, 1991 letter is not redundant, however, if the June 7, 1991 letter was not intended by DER to be appealable when it was issued. Moreover, the case law cited above would say the June 7, 1991 letter is not

appealable since it imposed no duties or obligations on Westtown or WSC. Finally, DER is well aware of our decisions on the appealability of its actions, and we must conclude the June 7, 1991 letter was written with them in mind and, thus, that the August 14, 1991 letter was not intended to be redundant but was to be DER's action which WSC could and did challenge.

We are also not convinced to the contrary by the cases cited in WSC's brief. WSC cites us two cases which could be argued to be on point. In Commonwealth, DER v. Borough of Carlisle et al., 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974), DER issued an Order banning all connections to the Carlisle Borough Sewer System Authority's sewer system and the Borough appealed. In East Pennsboro Township Authority et al. v. Commonwealth, DER, 18 Pa. Cmwlth. 58, 334 A.2d 798 (1975), the appeal also arose when a ban on all further connections was ordered by DER. Both cases deal with appeals arising from administrative orders issued by DER. Here it is clear that DER has not ordered a ban on connections. Although DER is empowered to issue such orders under 25 Pa. Code §94.31 and §94.32, DER clearly has not acted under either section in either of the two letters under appeal. When and if it does so, such an order is appealable to this Board, but until it does, these cases are not on point as to the issues now before us. WSC cites no cases supporting its contention that letters of this type are consistently held to be appealable, and the cases cited above demonstrate this is not correct in any case. It also fails to show how this letter to Westtown infringes on its "permit or other existing activities". Just because WSC says this does not make it so, particularly in light of the pending appeal of the August 14, 1991 letter.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 4th day of February, 1992, it appearing that DER's letter of June 7, 1991 is neither an adjudication nor a final action of DER and thus that WSC may not appeal therefrom to this Board, it is ordered that the appeal at Environmental Hearing Board Docket No. 91-269-E is dismissed for want of jurisdiction and the appeal at Environmental Hearing Board Docket No. 91-386-E is unconsolidated therewith.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

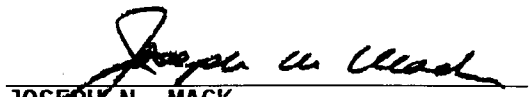
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: Februrary 4, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

KENNAMETAL, INC.	:	**EHB Docket No. 87-227-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 6, 1992

OPINION AND ORDER SUR PETITION FOR STAY PENDING APPEAL

By Maxine Woelfling, Chairman

Synopsis

The Board has authority pursuant to Pa.R.A.P. Nos. 1701(b)(1) and 1781(a) to stay an adjudication pending review by the Commonwealth Court. A petition for stay is denied where the petitioner fails to cite any authority which would arguably support its position that the Board erred in precluding it from contesting the necessity for submission of a closure plan or the provisions of the closure plan in its appeal of an order to implement the plan.

OPINION

The background of this matter is set forth in the Board's November 27, 1991, adjudication dismissing Kennametal, Inc.'s (Kennametal) appeal of the Department of Environmental Resources' (Department) May 14, 1987, order directing Kennametal to implement a modified plan to close two hazardous waste impoundments at its facility in Bedford Township, Bedford County. Kennametal has petitioned the Commonwealth Court for review of the Board's decision at

No. 2748 C.D. 1991. Presently before the Board for disposition is Kennametal's January 21, 1992, petition for stay pending review, which was filed in accordance with Pa.R.A.P. 1781(a).

Kennametal alleges that it has satisfied the criteria for grant of a stay pending appeal. More specifically, it contends that it is likely to succeed on the merits of its appeal to the Commonwealth Court, as the Board committed errors of law in applying the doctrine of administrative finality to preclude Kennametal from challenging either the necessity for or content of a hazardous waste closure plan in an appeal of an order to implement the plan. Kennametal argues that it will suffer irreparable harm because it will be forced to comply, at great cost, with a closure plan, the necessity for which may be overturned if Kennametal succeeds on the merits of its appeal. Finally, Kennametal asserts that there will be no harm to the public because the lagoons at issue are secure and there are no releases of hazardous wastes.

The Department, predictably, opposes Kennametal's request. It alleges that the Board has no authority to issue a stay pursuant to Pa.R.A.P. No. 1781(a) and that Kennametal's petition is essentially a petition for supersedeas which must be evaluated in light of the Board's rules of practice and procedure at 25 Pa. Code §§21.76 - 21.78. The Department concludes by urging the denial of Kennametal's petition for both procedural and substantive deficiencies.

The position taken by the Department regarding the Board's authority to issue a stay pending appeal is inconsistent with the position it took in Louis J. Novak, Sr., *et al.* v. DER, 1987 EHB 965. Moreover, it is also directly contrary to the language of Pa.R.A.P. Nos. 1701(b)(1) and 1781(a).

These two rules, when read together, clearly authorize the Board to stay its adjudications pending review by the Commonwealth Court. In particular, Pa.R.A.P. No. 1701(b)(1) states:

> **(b) Authority of a Trial Court or Agency After Appeal.** After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:
>
> (1) Take such action as may be necessary to preserve the status quo, correct formal errors in papers relating to the matter, cause the record to be transcribed, approved, filed and transmitted, grant leave to appeal in forma pauperis, grant supersedeas, and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.
>
> (emphasis added)

As for the issue of what standards must be applied to Kennametal's request, we believe that standards articulated by the Pennsylvania Supreme Court in Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983), are the applicable standards. While we have found no decision which specifically addresses what standards a government unit, as opposed to a court, is to apply in evaluating a petition for stay pending review pursuant to Pa.R.A.P. No. 1781(a) it would seem logical that the Process Gas criteria would also apply. Furthermore, in light of the Commonwealth Court's holding in Chambers Development Company *et al.* v. Department of Environmental Resources *et al.*, 118 Pa. Cmwlth. 97, 545 A.2d 404 (1988), that the Board's standards for grant of a supersedeas are not inconsistent with the Process Gas standards, the practical result is the same whether we apply 25 Pa. Code §21.78 or Process Gas.

All of this aside, Kennametal's petition must be denied because it has failed to cite any authority which would arguably support its position that it has a probability of success on the merits of its position that the

Board erroneously held that because of its failure to appeal the Department's previous actions Kennametal could not attack the necessity for submission of a hazardous waste closure plan or the contents of the modified closure plan. Indeed, the weight of precedent clearly goes in the opposite direction, e.g. James E. Martin v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 548 A.2d 672(1988), citing Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976), and Department of Environmental Resources v. Williams and Liefsta Development Corporation, 57 Pa. Cmwlth. 8, 425 A.2d 87 (1981). Thus, it is appropriate to deny Kennametal's petition for this reason. Tri-State Asphalt v. Department of Transportation, ___ Pa. Cmwlth. ___, 582 A.2d 55 (1990).

Because Kennametal has failed to cite any legal authority to arguably support its position that it is likely to succeed on the merits of its claim that the Board erred, it is unnecessary to consider its claims of irreparable injury and lack of harm to the public. In any event, those claims, too, are unsupported by citations to authority or affidavits.

O R D E R

AND NOW, this 6th day of February, 1992, it is ordered that Kennametal's petition for stay pending review is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: February 6, 1992

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TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE I

EMPIRE COAL MINING AND DEVELOPMENT, INC.	:	
	:	
v.	:	**EHB Docket No. 91-115-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 11, 1992**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

An applicant for a surface mining permit based its right to enter and mine on a written agreement with the surface owner and a written agreement with the mineral owner. The agreement with the surface owner expired while the application was pending and the applicant then claimed that its right to mine was not dependent thereon, referring to an unnamed court decision but providing no abstract of title or other documentation. The Board holds that DER was justified in denying the application.

OPINION

On March 18, 1991 Empire Coal Mining and Development, Inc. (Appellant) filed a Notice of Appeal from a February 12, 1991 letter of the Department of Environmental Resources (DER) denying Appellant's Surface Mining Permit Application, Number 49900102, for a 60-acre tract of land in Mount Carmel Township, Northumberland County (Mining Site). The denial letter

contained several reasons for DER's action, including Appellant's alleged failure to file documents reflecting its right to use the surface of the Mining Site.[1]

On April 19, 1991 DER filed a Motion for Summary Judgment with supporting affidavits and legal memorandum. Appellant filed its Response, accompanied by an affidavit and legal memorandum, on May 24, 1991. DER filed a Reply Memorandum on June 6, 1991. While a number of factual disputes are raised, the facts upon which this Opinion and Order are based are undisputed.

DER's Motion is based upon section 4(a)(2)F of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(a)(2)F, and Chapter 86 of DER's regulations at 25 Pa. Code.

The statutory provision requires permit applicants to submit the "written consent of the landowner" to entry upon the land by the applicant and the Commonwealth prior to, during, and for five years after, the mining operations. The regulatory provisions beginning at 25 Pa. Code §86.61 are an outgrowth of this requirement. Section 86.61 states that the applicant shall submit information, *inter alia*, on the "ownership and control of the property to be affected by the operations." The information to be submitted under §§86.61, 86.62 and 86.64 is to be looked upon as a "minimum" requirement. Section 86.62(a)(1) calls for the identification of record holders of

---

[1] Appellant had filed the Application on December 28, 1989 in obedience to a Consent Order and Agreement (CO&A) dated July 28, 1989, between Appellant and DER. The CO&A recited that Appellant commenced surface mining on the Mining Site on or about April 1, 1988 under the mistaken assumption that an October 22, 1987 letter from DER's Williamsport Regional Solid Waste Manager had given the necessary approval. The terms of the CO&A, *inter alia*, required Appellant to post bonds and apply for a permit but permitted mining to continue until the Application had been given final DER action. Appellant, apparently, continued to mine until the Application was denied on February 12, 1991.

interests in the "coal to be mined and areas to be affected by surface operations and facilities." Section 86.64 provided as follows at the time of DER's action:

> §86.64. Right of entry.
>
> (a) Each application shall contain a description of the documents upon which the applicant bases his legal right to enter and commence coal mining activities within the permit area and whether that right is the subject of pending court litigation.
>
> (b) The application shall provide for lands within the permit area:
>
> (1) a copy of the written consent of the current surface owner to the extraction of coal by surface mining methods; or
>
> (2) a copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods and an abstract of title relating the documents to the current surface land owner.

DER's permit application form contains Module 5 entitled Property Interests/Right of Entry. Section 5.1, which focuses on the permit area, instructs the applicant to provide the following:

> (a) the names and addresses of every current legal or equitable owner of record of the property and the coal to be mined; the holders of record of any leasehold interest in the property or the coal to be mined; and any purchaser of record under a real estate contract of the property or the coal to be mined.
>
> (b) the documents which the applicant bases the legal right to enter and commence coal mining activities and whether that right is subject or pending court litigation.
>
> (c) a Consent of Landowner (indicate whether it is contained in this application or will be submitted with a successive bonding phases.)

In its Application, Appellant responded to the Module 5, section 5.1(a) requirements by identifying Susquehanna Coal Company (Susquehanna) under "Legal Owner of Property", the County of Northumberland (County) under "Coal Ownership" and Mount Carmel Township (Township) under "Leasehold Interest."[2] In response to section 5.1(b), Appellant submitted a "Coal Lease for Surface Mining" between Susquehanna and Appellant, along with two addenda,[3] and an "Official Land Lease for Strip Mining" between the County and Appellant, dated November 20, 1987. Appellant submitted, with respect to section 5.1(c), a "Contractual Consent of Landowner" between Susquehanna and Appellant, dated December 7, 1987 and recorded in the County on December 18, 1987.[4]

By the Coal Lease for Surface Mining, Susquehanna leased to Appellant the "several seams of coal underlying (and the surface and subsurface overlying) the [Mining Site], which Lessee [Appellant] may mine and remove by the strip mining methods only...." The Coal Lease had an initial term of one year from November 12, 1987. While the typed document contained provisions for one-year extensions, the blanks were not filled in on the copy provided to us. Since the Coal Lease did not terminate until November 11, 1990, see *infra*, the parties either had some agreement on extensions or renewed the Coal

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[2] Attached to Module 5, section 5.1(a) is an Amended Lease Agreement, dated August 19, 1983, between Susquehanna and the Township, pertaining to a landfill maintained by the township on the same tract of land as the Mining Site.

[3] The Coal Lease itself is undated. The addenda both are dated November 12, 1987 and refer to the Coal Lease as bearing the same date. Therefore, we will consider the Coal Lease to have been entered into on November 12, 1987.

[4] Another Contractual Consent of Landowner, between the same parties and pertaining to the same tract, is part of DER's Motion. This document is dated December 28, 1987 and, apparently, had a map attached to it. In all other respects it appears identical to the one dated December 7, 1987. We will consider only the one filed by Appellant as part of its Application, since the minor modifications in the later document will not affect our decision.

Lease, by mutual consent, at the end of each successive one-year term.[5]

Under the Official Coal Land Lease for Strip Mining, the County leased to Joseph Sotonak and Dennis Molesevich, "T/A Empire Coal Mining and Development Co...., a Partnership,"[6] the "right to strip mine and remove coal" from the Mining Site situated "within the boundaries of the Mt. Carmel Township Landfill area...." This Lease had an initial term of one year (November 20, 1987 to November 19, 1988) with an option in the lessees to renew for nine additional one-year terms.

Pursuant to the Contractual Consent of Landowner (DER's form), Susquehanna acknowledged in bold print that Appellant "has the right to enter upon and use the [Mining Site] for the purpose of conducting surface mining activities." In addition, Susquehanna irrevocably granted to Appellant and the Commonwealth a broad and all-encompassing right of entry onto the Mining Site.

DER sent a review letter to Appellant on July 30, 1990 specifying 37 matters that needed to be clarified. Among them were two items pertaining to Module 5 - the correct lease agreement numbers and signature dates in section 5.1(b) and the original recorded Consent of Landowner and accompanying map in section 5.1(c). Apparently, these two items were taken care of by Appellant. Subsequently, DER received a copy of a letter, dated September 17, 1990, from Joseph J. Prociak, Susquehanna's legal counsel, to Appellant. In the letter, Prociak informed Appellant of the upcoming expiration of the Coal Lease on November 11, 1990, of Susquehanna's unwillingness to agree to any further

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[5] The Coal Lease referred to the Amended Lease Agreement with the Township and required Appellant to refrain from any interference with the landfill operations.

[6] The discrepancy between the entity named in this document and that named in the Application is not discussed because it was not used by DER as a basis for denying the Application.

extensions and of Appellant's duty to vacate the premises by the expiration date.

In a letter dated November 19, 1990, DER advised Appellant that certain matters specified in the July 30, 1990 letter remained unresolved. In addition, DER referred to the September 17, 1990 letter from Prociak and instructed Appellant to "update" Module 5, section 5.1(b) by submitting a "copy of the renewed signed lease, and lease number from the landowner." These matters were to be submitted by December 15, 1990 or the Application would be denied. Appellant's response to this letter, received by DER on December 18, 1990, included only one document pertaining to Module 5 - a copy of an October 25, 1990 letter from Appellant's legal counsel, W. Boyd Hughes, to Prociak.

In his letter, Hughes set forth his opinion that Appellant "does not need a lease with Susquehanna as the surface owner since the right to enter upon the surface and disturb the surface in order to strip mine coal owned by the mineral owner not only has been reserved to the owner of the mineral but has been subsequently reaffirmed by the Pennsylvania Supreme Court." While no case name or citation was given, the reference was to a case that, allegedly, involved the same tract of land as the Mining Site. DER received a copy of Prociak's reply letter of November 19, 1990, disputing Hughes' opinion, and demanding that Appellant vacate the premises and pay overdue royalties.

On or about January 30, 1991 a conference was held by telephone among several DER officials and Appellant's president, Dennis Molesevich. Unresolved problems with the Application were discussed and Molesevich was informed that a denial was imminent. One of the problems concerned Appellant's right to enter the Mining Site and carry on mining activities in

view of the termination of the Coal Lease with Susquehanna. Molesevich maintained that Susquehanna's consent was unnecessary but that, in any event, Susquehanna's signed Consent of Landlord was on record and in DER's hands.[7] On February 12, 1991 the same DER officials advised Molesevich by telephone that a denial letter was being issued. In the denial letter, DER devoted several paragraphs to what it calls Appellant's "Right to Use Surface of Proposed Permit Area," and then concluded with the following language.

> Empire now appears to take the position that it does not need a surface lease from Susquehanna Coal Company, the undisputed owner of the surface estate, in order to extract coal from the site by the surface mining method. That assertion is inconsistent with Empire's original application, which attempted to satisfy the requirements of 25 Pa. Code §86.64(b) by attaching a copy of a surface lease with Susquehanna Coal Company rather than by presenting title documents that reserve to the owner of the mineral estate the right to conduct surface mining. Furthermore, since the termination of Empire's surface lease by Susquehanna Coal Company and the Department's November 19, 1990 request for an update of Module 5.1b, Empire has not submitted a single title document to the Department. Empire's application does not include either (1) a current, effective written consent of the surface owner to the extraction of coal by the surface mining method, or (2) title documents expressly granting or reserving to the mineral estate owner the right to extract coal by the surface mining method. As a result, the application does not satisfy the requirements of 25 Pa. Code §86.64(a) or (b), and the Department therefore must deny the application under 25 Pa. Code §86.37(1) and (7).

It is clear that, in order to obtain a permit, Appellant had to establish its right to enter onto the Mining Site and remove the coal by surface mining. The documents filed with the Application fulfilled this

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[7] These details of the conference call are derived from Molesevich's affidavit. DER has neither affirmed nor denied these allegations and, as a result, we do not know if there is any dispute concerning them. Since we are to view the situation in the light most favorable to the non-moving party, *Robert C. Penoyer v. DER*, 1987 EHB 131, we will accept Molesevich's version for purposes of disposing of DER's Motion.

requirement. When informed, prior to action on the Application, that one of the documents on which Appellant relied was no longer in effect, DER properly instructed Appellant to provide a substitute. This could have been accomplished by the filing of a new document in which Susquehanna granted the right to surface mine (25 Pa. Code §86.64(b)(1)) or an abstract of title connecting Appellant to a document of conveyance establishing the right to surface mine (25 Pa. Code §86.64 (b)(2)).

Appellant contends that it satisfied this requirement by providing DER a copy of Hughes' October 25, 1990 letter to Prociak. In its Notice of Appeal and Response to DER's Motion, Appellant cites *Mount Carmel R. Co. et al. v. M.A. Hanna Co.*, 371 Pa. 232, 89 A.2d 508 (1952), as upholding Appellant's right to surface mine the "Jesse Brooks Tract" without the consent of the surface owner.[8] That case involved the right of M. A. Hanna Co. to surface mine coal beneath a right-of-way owned and occupied by the railroad. Hanna claimed the right on the basis of reservations and restrictions contained in an 1891 document establishing the right-of-way. Since the grantor in that document (Hanna's predecessor in title) owned both the surface and the minerals, legal principles relating to the severance of the two estates were specifically stated to be irrelevant. Whether coal could be removed by surface mining or had to be removed by deep mining turned, the Supreme Court said, on "the interpretation of the *words* of the document...." 89 A.2d 508 at 510 (italics in original). Their interpretation of the words found that surface mining was permissible.

How this decision endows Appellant with the right to engage in surface mining on the Mining Site is an enigma. We have no certain proof that

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[8] We assume that this is the unnamed case referred to in Hughes' October 25, 1990 letter to Prociak.

the Mining Site is part of the Jesse Brooks Tract. While the Official Coal Land Lease for Strip Mining between the County and Appellant indicates that the mining operation is to be located on the "Jesse Brooks Tract," we have no way of knowing whether this is the same tract as that involved in the *Hanna* case. Appellant maintains that we "must take judicial notice of the fact that there is only one Jesse Brooks Tract in Northumberland County since it is an original warrantee or patent as issued and therefore the portion of the Jesse Brooks Tract which [Appellant] has the right to mine" is the same as that involved in the *Hanna* case.

This is certainly not a matter of universal knowledge; and we are not at liberty to supplement the record "by conducting a title search through any such extended concept of judicial notice": *Active Amusement Company v. Zoning Board of Adjustment*, 84 Pa. Cmwlth. 538, 479 A.2d 697 at 701 (1984). Besides, the *Hanna* case involved a right-of-way 60 feet wide running through the tract and occupying in the aggregate no more than 30 acres. Even if we accept Appellant's unsupported contention that the Mining Site is on the same Jesse Brooks Tract as mentioned in the *Hanna* case, we would have to conclude that the 60-acre Mining Site occupies much more of the tract than the right-of-way. Since the ruling in the *Hanna* case construed the document establishing the right-of-way, the rights adjudicated related solely to that 60-feet wide strip of land. The ruling cannot be extended to other portions of the tract without proof that the same words were used in other documents tied to those portions. No such proof is before us.

Appellant also contends that the Contractual Consent of Landowner signed by Susquehanna, recorded in Northumberland County and filed with DER, continued to satisfy the requirements of 25 Pa. Code §86.64(b)(1) even after

the Coal Lease for Surface Mining terminated. Part of that document irrevocably grants to Appellant and the Commonwealth the right to enter the Mining Site prior to, during, and for five years after, mining operations take place, but the purpose is for "inspecting, studying, backfilling, planting and reclaiming the land and abating pollution...." Certainly this right of entry is not affected by the termination of the Coal Lease.

The same cannot be said, however, with respect to the part of the document in which Susquehanna acknowledges that Appellant "has the right to enter upon and use the land for the purposes of conducting surface mining activities." Construing that language to give Appellant a never-ending right to enter and mine, in our opinion, would be unreasonable in the extreme. We are reinforced in this conclusion by the language near the end of the document which states that the "Consent shall not be construed to impair any contractual agreement between" Appellant and Susquehanna. It is that underlying agreement which formed the basis for Susquehanna's acknowledgement of Appellant's right to mine. If Appellant's right terminated under that unimpaired agreement, Susquehanna's acknowledgement did also. The Consent was no longer effective to satisfy 25 Pa. Code §86.64(b)(1).

We can grant summary judgment when the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). With respect to whether Appellant satisfied the requirements of SMCRA and Chapter 86 of the regulations, pertaining to its right to enter and surface mine the Mining Site, there are no disputes as to any material facts and DER is entitled to judgment as a matter of law. Since this failure of Appellant

furnished adequate basis for DER's denial of the Application, we will dismiss the appeal without considering the other reasons DER cited in its denial letter and which Appellant challenged in this appeal.

ORDER

AND NOW, this 11th day of February, 1992, it is ordered that DER's Motion for Summary Judgment is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 11, 1992

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M. DIANE SMITH
SECRETARY TO THE BOA

APPROVED COAL CORPORATION	:	
	:	
v.	:	EHB Docket No. 91-193-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 13, 1992

OPINION AND ORDER SUR
DEPARTMENT OF ENVIRONMENTAL RESOURCES
MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

Where the applicant for a coal mining license elects not to challenge the merits of the Department of Environmental Resources ("DER") denial of its application for the license and instead appeals from DER's refusal to return the $500 application fee on a theory of *quantum meruit*, the Board must grant DER's Motion To Dismiss for lack of jurisdiction because this Board is not legislatively authorized to exercise judicial powers in equity and *quantum meruit* relief is equitable in nature. However, since the Board of Claims is authorized to deal with quasi-contractual issues according to 61 Pa. Code §851.2, we will transfer this appeal to that forum for resolution pursuant to 42 Pa.C.S. §5103, rather than dismissing it outright.

OPINION

On May 15, 1991, Approved Coal Corporation ("Approved") filed its appeal with this Board from DER's April 16, 1991 letter denying Approved's

application for a Surface Mining Operator's License because Approved's application was not completed correctly and Approved had failed to remedy the alleged deficiencies therein after notice from DER . DER's license denial letter alleges DER took this action pursuant to the Surface Mining Conservation and Reclamation Act, ("Coal Act") the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, and the Non-Coal Surface Mining Conservation and Reclamation Act, ("Non-Coal Act"), the Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S. §3301 *et seq.* This letter also recites a right to appeal that decision to this Board.

Approved's Notice Of Appeal is less than clear as to what was being challenged, since it says at one point that Approved is appealing a denial of Incidental Coal Extraction Permit No. 02900903 by letter from DER dated April 24, 1991. However, in listing the reasons for this appeal, Approved's Notice says Approved remitted $500 to DER in connection with the application for a Surface Mining Operator's License, the license has become unnecessary because DER's delay in issuing the Incidental Coal Extraction Permit prevented Approved from obtaining that permit, and Approved "seeks return of the $500 remitted for said Surface Mining Operator's License".

Approved's Pre-Hearing Memorandum clears up what is sought here by again indicating Approved seeks return of this $500 "under the theory of *quantum meruit*." Counsel for Approved further confirmed that the merits of DER's denial of the permit application were not at issue before the Board during the hearing on the merits of this appeal. (T-14 and 15) [1] In Approved's Post-Hearing Brief filed with us on January 8, 1992, it only argues for return of the license application fee under a *quantum meruit* and does not

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[1] This is a reference to pages in the transcript of the hearing on the merits of this appeal.

challenge the merits of the license denial. Accordingly, under Lucky Strike Coal Company et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988), it is only this fee issue which is before the Board for adjudication.

At the beginning of the hearing on the merits of this appeal held on November 25, 1991, DER asserted that this Board lacked the jurisdiction to hear this appeal. DER asserts that this Board lacks both equitable powers and the authority to adjudicate contract or quasi-contract claims. DER's contention is that Approved's "*quantum meruit*" appeal seeks return of this money on an equitable theory of implied contract, which is properly a matter to be addressed by the Commonwealth's Board of Claims, and that, in any case, since this Board lacks equitable powers, we can not grant the relief sought because *quantum meruit* (unjust enrichment) is an equitable remedy. (T-7 through T-10)

Since sustaining such an argument would be a final action of this Board which can only be taken by the Board *en banc* rather than a single Board member, the parties were directed to brief this issue in their Post-Hearing Briefs. (T-14)

After the testimony was concluded and transcripts thereof filed with this Board, the parties filed Post-Hearing Briefs which in part addressed this issue. Because DER's argument has merit and the Board lacks jurisdiction over this matter we have not prepared findings of fact or conclusions of law, but leave this task to the appropriate forum.

In its Post-Hearing Brief DER argues correctly that Section 3(a) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7513(a), creates an administrative tribunal with jurisdiction to hear appeals from "orders, permits, licenses or decisions of the Department".

DER then goes on to point out that in the past this Board has held we lack jurisdiction over civil causes of action, citing Bob Groves-Plymouth Co. et al. v. DER, 1976 EHB 266, and Berwind Natural Resources v. DER, 1985 EHB 356. Berwind, *supra*, is not on point. In Berwind, *supra*, we denied a Motion For Leave To Join Additional Defendants because our rules do not allow compulsory joinder and the Board was not legislatively empowered to adjudicate rights between private parties (parties and unjoined entities).

Despite the above, DER is correct that we cannot hear the instant appeal as framed by Approved. In Bob Groves, *supra*, we granted a motion to dismiss an appeal as moot where the Borough of Ambler, as a co-recipient of a DER Order, had expended funds to correct the problem raised on DER's Order and objected to dismissal until it recovered its costs from the other recipient of DER's Order. In so doing, we said it appeared that the proper remedy for Ambler was an assumpsit action in a Court of Common Pleas and we could not adjudicate Ambler's claims *vis à vis*, Bob Groves. Moreover, we have stated more than once that this Board is not authorized to rule on contract questions. City of Harrisburg v. DER, 1988 EHB 946; Montgomery County v. DER, et al., EHB Docket No. 91-053-E (Opinion issued December 3, 1991).

However, this appeal is not one involving contract interpretation. Approved's Pre-Hearing Memorandum and Post-Hearing Brief assert quasi-contractual theories of recovery which sound in equity. State Farm Mutual Automobile Insurance Co. v. Jim Bowe & Sons, Inc., 372 Pa. Super. 186, 539 A.2d 391 (1988); Lichtenfels et al. v. Bridgeview Coal Co. et al., 366 Pa. Super. 304, 531 A.2d 22 (1987), petition denied, 517 Pa. 631, 539 A.2d 811 (1988); McGraw-Edison v. Workmen's Compensation Appeal Board (Ardeno et al.), 120 Pa. Cmwlth. 19, 547 A.2d 1290 (1988). This Board is not statutorily

empowered to exercise judicial powers in equity. Marinari v. Commonwealth, DER, 129 Pa. Cmwlth. 569, 566 A.2d 385 (1989); Westinghouse Electric Corporation v. DER, 1990 EHB 575. Thus, we cannot grant the quasi-contractual relief sought by Approved.

A review of Approved's Brief on this point offers us no enlightenment, since it says Approved can find no cases addressing the issue of "refund of an Application Fee for a Surface Mining Operator's License". Approved nevertheless urges that this jurisdiction is derived from this Board's authority to administer and enforce the above mentioned statutes, The Clean Streams Law, ("Clean Streams Law") the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177 as amended, 71 P.S. §510-17;[2] and the Rules and Regulations promulgated by the Environmental Quality Board pursuant to these Acts. However, it is not this Board which is empowered to administer these acts and regulations, but, rather, it is DER which has been so empowered. This is spelled out explicitly in Section 510-17; Section 2 of the Coal Act, 52 P.S. §1396.3(a); Section 5 of the Non-Coal Act, 52 P.S. §3305, and Section 5 of the Clean Streams Law, 35 P.S. §691.5. Our authority to act is spelled out in Section 4 of the Environmental Hearing Board Act, *supra*, and, as stated above, it is not as broad as Approved argues.

This does not mean we must dismiss this appeal, however. 42 Pa.C.S. §§5103(a) and (d) provide:

> (a) **General rule** - If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not

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2 Approved's citation of this section as part of the Act of June 7, 1923, P.L. 498, as amended, 71 P.S. §510-17, appears incorrect.

> quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of the Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.
>
> (d) **Definition** - As used in this section "tribunal" means a court or district justice or other judicial officer of this Commonwealth vested with the power to enter an order in a matter, the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency.

Section 5103 of the Judicial Code (42 Pa.C.S. §§5103(a) and (d)) allows the transfer of an appeal from this Board to another tribunal with the jurisdiction to hear same. See Thomas Fahsbender v. DER, 1988 EHB 417; Fisher v. Findlay, 319 Pa. Super. 214, 465 A.2d 1306 (1983); Kim v. Estate of Elizabeth G. Heinzenroether, 37 Pa. Cmwlth. 328, 390 A.2d 874 (1978); Presock v. Davis, 1 D&C 4th 218 (1989). Pursuant to Section 4 of the Act of May 20, 1937, P.L. 728, No. 193, as amended, 72 P.S. §4651-4 and 61 Pa. Code §851.2, it appears that the Board of Claims has authority to hear and determine all claims against the Commonwealth, including claims arising from action or inaction by Commonwealth employees giving rise to an implied contract to compensate the claimant. Accordingly, under the authority of 42 Pa.C.S. §5103(a) the better procedure for this Board to follow is to transfer this appeal to the Board of Claims for disposition. In so doing, we make no findings as to the merit of Approved's contention or the lack thereof.

O R D E R

AND NOW, this 13th day of February, 1992, it is ordered that the instant appeal is transferred to the Commonwealth of Pennsylvania's Board of Claims pursuant to 42 Pa.C.S. §5103.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 13, 1992

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M. DIANE SMITH
SECRETARY TO THE BO

LYCOMING SUPPLY, INC.	:	
	:	
v.	:	**EHB Docket No. 91-245-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 13, 1992**

OPINION AND ORDER
SUR CROSS-MOTIONS FOR
SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

Where there are no verified pleadings of record with the Board, the parties have engaged in no discovery in the appeal and have then filed unverified cross-motions for summary judgment which are unsupported by any affidavits, the cross-motions must both be denied because they each fail to establish that there are no genuine issues of material facts, let alone what the facts underlying the appeal are.

OPINION

On May 23, 1991, DER issued a $21,000 civil penalty assessment against Lycoming for alleged violations by Lycoming of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA), and the regulations promulgated thereunder at a site in Hazle Township, Luzerne County.

On June 20, 1991, Lycoming appealed therefrom to this Board. The factual allegations set forth in its Notice of Appeal are not verified.

Thereafter, Lycoming filed its Pre-Hearing Memorandum and made several factual assertions therein but that filing also contains no verification. Our docket shows no evidence of any discovery by either party. We have no record of depositions, interrogatories or requests for admission.

After the filing of Lycoming's Pre-Hearing Memorandum, DER filed its unverified Motion For Summary Judgment and supporting brief. Therein DER says:

> Lycoming's Pre-Hearing Memorandum sets out the factual issue it wishes to litigate and, for purposes of the Motion only the Department does not dispute the facts pertinent to that factual issue.

Of course, Lycoming filed a Brief In Response To DER's Motion, a Cross-Motion For Summary Judgment and a Brief supporting same. As could be guessed, a search of these three "filings" by Lycoming fails to disclose even one verification. Not to be outdone, however, counsel for DER has filed an Answer to Lycoming's Motion in which DER admits and denies the allegations in the Lycoming Motion. Counsel for DER also filed a Brief in opposition to Lycoming's Motion but, again, there are no verifications of DER's averments.

As pointed out in the first sentence of DER's Brief In Support Of Motion For Summary Judgment: A summary judgment may be granted only when the pleadings, depositions, answers to interrogatories, responses to requests for admission, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to Judgement as a matter of law. Robert L. Snyder et al. v. Department of Environmental Resources, ___Pa. Cmwlth. ___, 588 A.2d 1001 (1991). The key to these motions is obviously that the factual

positions of the parties are fixed through verified pleading, verified or sworn discovery and affidavits so that the legal issues may be addressed based upon such a factual background.

Here, we have no factual background whatsoever. A notice of appeal is not a pleading under Pa.R.C.P. 1035 because it contains more than factual averments; its averments are conclusory at best and its factual averments are unverified. See Dorothy E. Hendrickson et al. v. DER, 1989 EHB 1148. The parties have conducted no discovery, filed no affidavits and failed to verify the allegations in their motions and responses. Moreover, DER's statement that for purposes of its Motion it will admit the facts as asserted by Lycoming does not create a factual backdrop, where the "facts" as asserted by Lycoming are themselves unsworn or unverified.

When we cannot get past the first part of the test of this class of motions, i.e., the lack of a genuine issue of material facts, we never reach the point of being able to judge the merits of the legal issues. Concerned Residents Of The Yough, Inc. v. DER, 1990 EHB 38; Monessen, Inc. v. DER, 1990 EHB 465. That is the case here, and, accordingly, we enter the following Order.

ORDER

AND NOW, this 13th day of February, 1992, it is ordered that DER's Motion For Summary Judgment and Lycoming's Motion For Summary Judgment are denied. Further, DER is ordered to file its Pre-Hearing Memorandum in this matter on or before **February 28, 1992.**

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: February 13, 1992

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M. DIANE SMIT
SECRETARY TO THE E

HANOVER TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 91-508-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and ALEX E. PARIS CONTRACTING COMPANY,	:	
INC., Permittee	:	
AES BEAVER VALLEY, INC., Intervenor	:	**Issued:** February 19, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

The permittee's motion to dismiss is granted. Although issuance of a permit to operate a landfill does not excuse a permittee from complying with local zoning ordinances, there is no requirement under the Solid Waste Management Act that DER's permit decisions must take into account local zoning laws. Finally, as to the Township's objection that the permit does not give it the right to inspect the permitted site, there is nothing in the Solid Waste Management Act which would entitle the Township to such right of inspection.

OPINION

This matter was originated by Hanover Township's (Township) filing of an appeal on November 21, 1991 from the granting by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of Permit No. 300936 to Alex E. Paris Contracting Company, Inc. (Paris) to operate a residual waste landfill in Hanover Township, Beaver County, Pennsylvania in accordance with Article 5 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380,

as amended, 35 P.S. §6018.101 et seq (SWMA). The appeal lists three specific objections:

> 1. That the permit does not take into account the zoning of the area of the permitted site.
>
> 2. That the permit fails to take into account that the Township has passed a resolution to enact a curative amendment and is in the process of drafting it.
>
> 3. That the permit does not give the appellant Township the same rights to inspect the permitted site as DER has reserved for itself in the permit.

Permittee Paris filed a motion to dismiss the appeal on December 6, 1991 on the basis that none of the grounds set out in the Township's appeal state a claim upon which this Board may grant relief. The Board on December 9, 1991 notified the Township and DER that any objections to the motion to dismiss were due in the Board's office no later than December 26, 1991. DER responded on December 20, 1991, concurring with Paris' motion. To date the Board has received no response from the Township.

The first matter on appeal deals with the question of whether the DER has an obligation to consider the local zoning ordinances when granting a permit for a particular site under the SWMA. The Township states as follows in its appeal:

> Objection No. 1. Permit No. 300936 does not take into account the fact that the location of a residual waste landfill at this site is in violation of the Zoning Ordinance of Hanover Township, Beaver County, Pennsylvania.

Even if we accept this statement as true on its face, the Board does not have any basis for sustaining the appeal based upon prior precedent, including but not limited to, Borough of Taylor v. DER and Amity Sanitary Landfill, 1988 EHB 237, and Hilltown Township Board of Supervisors v. DER and Buxmont Refuse Services, Inc., 1988 EHB 1009. In each of these cases, the appellant township took the position that it was an abuse of discretion for DER to issue a permit under the SWMA when there were existing zoning or land

use ordinances affecting the site for which the permit was issued. In Borough of Taylor, the Board held that while the municipality may regulate the location of a solid waste management facility through its zoning ordinances, DER has the authority to regulate the design and operation of the facility. DER does not have the responsibility or authority to implement local zoning ordinances in its permitting decisions, and there is no requirement in the SWMA that DER decisions must be in compliance with or in deference to such local ordinances. While issuance of a permit for the operation of a solid waste facility does not excuse the permittee from complying with local zoning ordinances, that is a separate matter from DER's review under the SWMA. See also, Larry D. Heasley v. DER, EHB Docket No. 90-311-MJ (Consolidated) (Opinion and Order Sur Permittee's Motion for Partial Summary Judgment issued November 7, 1991.)

In the instant case, DER was not precluded from issuing the subject permit to Paris under the SWMA merely because Paris did not or may not have complied with the local zoning ordinance. We will therefore grant Paris' motion to dismiss with respect to the first objection stated in the Township's appeal.

The second objection of the Township's appeal reads as follows:

> Objection No. 2. Permit No. 300936 does not take into account the fact that Hanover Township, Beaver County, Pennsylvania passed a resolution to enact a curative amendment on September 7, 1991, and is presently in the process of drafting same.

The Township did not see fit to amplify this in any way in its notice of appeal or when given the opportunity to respond to Paris' motion to dismiss. If the Township is referring to an amendment to its zoning ordinance, this objection is dismissed for the reasons set forth above. If, on the other hand, the proposed "curative amendment" pertains not to zoning but to another local ordinance, we fail to see how DER could have abused its discretion in issuing this permit by failing to consider an amendment which has not yet been enacted

and which the Township is simply "in the process of drafting". Therefore, we will grant Paris' motion to dismiss with respect to the second of the objections stated in the Township's appeal.

Lastly, Paris seeks to have us dismiss the third part of the appeal wherein the Township complains that the permit does not provide for participation by the Township in the inspection of the site during the operation of the solid waste landfill on an equal basis with DER or in the same manner. We agree with Paris that there is nothing in the SWMA which addresses the Township's objection or which would entitle the Township to the same right of inspection as DER. Nor has the Township elected to respond to this matter. Because the Township has provided us with no grounds for its objection, and further because we can find nothing in the SWMA which would mandate such an inspection right, we grant Paris' motion to dismiss with respect to the third objection of the appeal.

In conclusion, we find that the Township's appeal has failed to state any grounds upon which relief can be granted and we, therefore, enter the following order:

O R D E R

AND NOW, this 19th day of February , 1992, it is ordered that the motion to dismiss filed by Alex E. Paris Contracting Company, Inc. is granted, and the appeal of Hanover Township, docketed at 91-508-MJ is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Member

DATED: February 19, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

PENNSYLVANIA-AMERICAN WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-122-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 20, 1992

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

By Joseph N. Mack, Member

Synopsis

The Department of Environmental Resources' Bureau of Dams and Waterway Management is empowered by the Dam Safety and Encroachments Act and 25 Pa. Code §105.113 to incorporate a low flow release rate into a dam modification permit. In establishing release schedules for dams constructed prior to August 28, 1978, DER may use the Q7-10 formula, provided it is utilized in conjunction with the criteria contained in 25 Pa. Code §105.113(c). Where DER has disregarded several factors set forth in 25 Pa. Code §105.113(c) and §105.113(a) in calculating a release rate for a dam constructed prior to August 28, 1978, it has not acted in accordance with the requirements of the regulations, and the appeal is sustained.

Procedural History

This matter involves an appeal by Pennsylvania-American Water Company ("PAWC") of a permit issued to PAWC on March 5, 1990 by the Department of

Environmental Resources ("DER") under the Dam Safety and Encroachments Act ("DSEA"), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. PAWC obtained the permit for the purpose of performing repair work on the Philipsburg No. 3 Dam in Rush Township, Centre County. The appeal, filed March 22, 1990, challenges a special condition in the permit imposing a minimum flow release requirement.

On November 21, 1990, PAWC filed a motion for summary judgment asserting that DER, in calculating the minimum flow release rate, had improperly used the formula set forth in 25 Pa. Code §105.113(b). PAWC argued that the formula contained in §105.113(b) was required for all dams and reservoirs constructed after August 28, 1978, whereas the Philipsburg No. 3 Dam was built prior to that date. In an Opinion and Order issued December 18, 1990, the motion was denied on the basis that DER was not precluded from using the formula of §105.113(b) for dams built prior to August 28, 1978.

A hearing was held on January 14, 1991, and post-hearing briefs were filed by each of the parties on April 24, 1991. Reply briefs were submitted on May 17, 1991. Any issues not preserved in the post-hearing briefs are deemed to have been abandoned. Laurel Ridge Coal, Inc. v. DER, 1990 EHB 486. The record consists of one volume of transcript, eighteen joint exhibits ("Ex. J-__"), four appellant exhibits ("Ex. A-__"), and two Commonwealth exhibits ("Ex, C-__").[1]

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[1]A reference to "T. __" herein is to a page in the transcript. A reference to "J.S. __" is to a stipulated fact under section (e) of the parties' Joint Stipulation filed with the Board on December 21, 1990.

FINDINGS OF FACT

1. The appellant is Pennsylvania-American Water Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its registered corporate office at 800 West Hersheypark Drive, Hershey, Pennsylvania 17033. (J.S. 1)

2. The Commonwealth of Pennsylvania, Department of Environmental Resources is the executive agency of the Commonwealth vested with the duty and authority to administer the Dam Safety and Encroachments Act, 32 P.S. 693.1 et seq.; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated pursuant to each. (J.S. 2)

3. PAWC is a public utility providing water service in the Moshannon Valley in Centre and Clearfield Counties, Pennsylvania. (J.S. 3, 4)

4. PAWC services approximately 5200 customers in the Moshannon Valley area. (J.S. 4; T. 13)

5. PAWC's water supply is obtained mainly from Philipsburg Dam No. 3 (sometimes herein referred to as "Dam No. 3" or "the dam") which is located on Cold Stream. (J.S. 5)

6. The dam was constructed in or about 1903. (J.S. 6)

7. A sufficient quantity of water is not available from Cold Stream to meet the demands of PAWC's customers year-round; therefore, PAWC supplements its supply from three wells and from Blue Spring which is pumped into Philipsburg Dam No. 3. (J.S. 5; T.14)

8. PAWC, by letter dated July 6, 1989 from O'Brien and Gere Engineers, Inc., applied for a permit to rehabilitate the Philipsburg Dam No. 3 on Cold Stream in Rush Township, Centre County. (J.S. 6)

9. The proposed modifications included (1) the construction of a new concrete spillway, outlet channel, and spilling basin, (2) overlaying the existing downstream slope of the earth embankment with roller compacted concrete, and (3) constructing a new channel and concrete weir measuring device downstream of Dam No. 3's 30-inch corrugated metal drain pipe. (J.S. 7)

10. PAWC's action in repairing the dam would not catch or withdraw more water, or change the stream flow conditions which have existed for many years. (J.S. 8)

11. When DER receives a dam permit application, the Chief of the Project Review and Evaluation Section of the Bureau of Dams and Waterway Management assigns it to an engineer for review; he also notifies certain state and federal agencies and other bureaus within DER and provides them with an opportunity to submit comments. (T. 94)

12. Notification of PAWC's application was sent to various agencies and bureaus for comment. (T. 96)

13. In response, the United States Department of the Interior's Fish and Wildlife Service, the Williamsport Regional Office of DER's Bureau of Water Quality Management, the Environmental Review Section of DER's Division of Rivers and Wetlands Conservation, and the Pennsylvania Game Commission stated they had no objection to issuance of the permit. (Ex. J-2, J-4, J-5, J-7)

14. The Pennsylvania Fish Commission and DER's State Water Plan Division recommended that a low flow release requirement be incorporated in the permit, primarily because of a trout fishery located in Cold Stream downstream of the dam. (T. 96; Ex. J-13 and J-14)

15. Thomas Denslinger, Chief of the Ohio River Basin Section, is the individual in the State Water Plan Division who reviewed the information

:oncerning PAWC's permit application and who recommended that a low flow release be incorporated into the permit. (T. 133, 136)

16. When permit applications are submitted by facilities that are not operating under an existing release requirement, DER reviews the application to determine whether a release requirement would be appropriate. (T. 118, 37)

17. The purpose of a low flow release is for the protection of water quality, fish and aquatic life, and instream and downstream usage, and to enhance recreational usage. (T. 95)

18. The engineer assigned to review PAWC's permit application was Arthur Alter of DER's Bureau of Dams and Waterway Management ("Bureau of Dams"). T. 91-93)

19. In response to the State Water Plan Division and Fish Commission's comments, Mr. Alter calculated a low flow release rate, taking into consideration the following factors: the purposes of a low flow release, the yield of the reservoir, and the feasibility of incorporating a low flow release into Dam No. 3 without requiring changes in the plumbing. (T. 97-98)

20. The first figure at which Mr. Alter arrived was a release rate of 00,000 gallons per day. (T. 98) Mr. Alter discussed this figure with Mr. enslinger of the State Water Plan Division and both agreed it was high given he safe yield of the reservoir. (T. 98)

21. The "safe yield" of a reservoir is the amount of water that can be btained from the reservoir through a certain statistical period. "Net safe ield" is the safe yield minus the amount of water lost through evaporation. T. 39-40)

22. The daily net safe yield of Dam No. 3 over a 50-year drought event (i.e. the longest continuous period of drought contemplated within a 50-year span) is 1.08 million gallons. (T. 56, 58)

23. Mr. Alter and Mr. Denslinger recalculated the low flow release rate, using data contained in Water Resources Bulletin No. 15 ("Bulletin 15"), which took into account differing geology in the area. (T. 98-99) This resulted in a release rate of 363,000 gallons per day. (T. 98)

24. The Bureau of Dams' Division of Dam Safety issued the permit on March 5, 1990. (Ex. J-1)

25. A low flow release rate of 363,000 gallons per day was incorporated as a special condition to the permit issued to PAWC. (Ex. J-1)

26. In calculating the release rate, Mr. Alter used what is known as the "Q7-10 formula" of 25 Pa.Code §105.113(b). (T. 120-122)

27. The Q7-10 formula does not take into account the storage capacity of a reservoir. (T. 127)

28. After calculating the release rate for PAWC's permit using the Q7-10 formula, Mr. Alter compared that figure with the capacity of Dam No. 3. (T. 127)

29. The net storage capacity of Dam No. 3 is 8.9 million gallons, which is the equivalent of approximately five to six days' supply of water for the Moshannon Valley. The normal storage capacity for a public water system is a three to six month supply. (T. 37)

30. The system's peak to average ratio of water demand by customers is low. (T. 38) Consumption cannot be substantially reduced during a drought period. (T. 39)

31. An Analysis of Drought Supply ("Drought Analysis") for Dam No. 3 was prepared in December 1990 by Richard W. Riethmiller, a consultant in the

Utilities Division of Burgess & Niple, Ltd., an engineering consulting firm. (T. 35, 36; Ex. J-18)

32. The Drought Analysis reviews the effect that the required release will have on PAWC's ability to serve its customers in the Moshannon Valley, particularly in the event of a drought period. (Ex. J-18)

33. After a 5-year drought event, the percentage of water remaining in Dam No. 3 would be 83% with the releases compared to 100% without the releases. (Ex. J-18, p. 14; T. 48)

34. After a 10-year drought event, the percentage of water remaining in the dam would be 68% with the releases compared to 98% without the releases. Ex. J-18, p. 13; T. 47-48)

35. After a 20-year drought event, the percentage of water remaining in the dam would be 45% with the releases compared to 93% without the releases. Ex. J-18, p. 12; T. 46-47)

36. After a 50-year drought event, the percentage of water remaining in the dam would be 17% with the releases compared to 76% without the releases. Ex. J-18, p. 11; T. 44-45)

37. Dam No. 3 would not run dry even in the event of a 50-year drought event. (T. 140; Ex. J-18, p. 11)

38. With supplemental sources, Dam No. 3 could possibly have enough water to supply PAWC's customers in the event of a 50-year drought event. T. 50-51)

39. On occasion in the past, DER has granted relief from release requirements to water suppliers during times of severe drought. (T. 104, 105)

40. The purpose of a reservoir is to augment supply during periods of time when inflow is less than demand. (T. 141)

41. A reservoir supplying a public water system should contain at least a 30-day supply as a buffer zone in the event of drought or other emergency. (T. 45) Dam No. 3 does not have the capacity for a 30-day supply. (T. 51-52)

42. The safe yield of Dam No. 3 is provided mainly by the sustained inflow of Cold Stream, rather than storage capacity of the reservoir. (Ex. J-18, p. 10)

43. Dam No. 3 would require no change in the plumbing structure to allow for a release. The drainpipe underneath the dam can be used for this purpose. (T. 97, 126)

44. The flow through the drainpipe has not varied considerably over the last 25 years. (T. 21)

45. The quality of the water in Dam No. 3 is very good, with low turbidity, low levels of iron and manganese, and an absence of taste or odor problems. (T. 63-64)

46. "Detention time" is the amount of time water remains in a reservoir before it is withdrawn. During this time, settling occurs, resulting in lower, more consistent levels of turbidity. (T. 75)

47. The more quickly a water supply is drawn down and the shorter the detention time, the higher the turbidity levels. (T. 76-77) This may result in higher levels of iron and manganese, taste and odor problems caused by decaying organic debris, and high chlorine levels. (T. 77, 79, 80)

48. The water treatment plan for Dam No. 3 is not designed to treat high turbidity levels. (T. 77, 78)

49. If Dam No. 3 routinely began experiencing higher levels of turbidity and/or concentrations of iron and manganese, it would be necessary to install flocculation and sedimentation devices at the treatment plan. (T. 78-79)

50. Dam No. 3 experienced no problems with high turbidity or elevated manganese and iron levels during drought conditions in 1988. (T. 82)

51. No aquatic life studies were conducted or considered by DER in setting the minimum flow release requirement. (T. 108-109)

52. A fish kill at a hatchery in Tomtit Run, which flows into Cold Stream downstream of the dam, which occurred in 1988 was likely caused by lack of oxygen in the water of Tomtit Run due to a severe drought in the area. (T. 25, 110-111, 145) Water from the dam does not flow past the hatchery. (T. 25)

53. No water quality studies were conducted or considered by DER in setting the minimum flow release requirement. (T. 109)

54. The Bureau of Dams' Division of Dam Safety, which issued the permit, is not an expert on water quality matters. Such matters are normally within the expertise of the Bureau of Water Quality Management. (T. 109-110)

55. The Bureau of Water Quality Management made no recommendation that a low flow release requirement be inserted into the permit. (T. 110)

56. No drought analyses, such as those contained in the Drought Analysis prepared by Mr. Riethmiller, were prepared or reviewed by DER in setting the minimum flow release requirement. (T. 112)

57. Part of Mr. Alter's responsibility in issuing the permit was to determine whether PAWC could meet the needs and purposes of the reservoir while complying with the release requirement. (T. 112)

58. At the time the dam permit was issued containing the release requirement, DER did not know what the remaining water supply would be in the event of a 50- or 20-year drought or at any point throughout the year. (T. 112)

59. With respect to water usage, Dam No. 3 has a 27% rate of unaccounted-for water. (T. 154-156) The target rate generally accepted by DER for unaccounted-for water is 20%. (T. 142)

60. The unaccounted-for water at Dam No. 3 is higher than PAWC's other systems, but is comparable to that of other water systems in the surrounding area. (T. 156) The higher unaccounted-for rate may be due to rugged terrain and mine subsidence in the area. (T. 156)

DISCUSSION

The issue on appeal is whether DER properly acted within its discretion and in accordance with the applicable statute and regulations in setting a minimum flow release requirement as a condition of PAWC's permit and, if so, whether the amount of the release requirement was properly calculated. Since PAWC is challenging a condition of the permit, it carries the burden of proof. 25 Pa.Code §21.101(a); Western Pennsylvania Water Co. and Armco Advanced Materials Corp. v. DER, EHB Docket No. 88-325-E (Consolidated) (Adjudication issued February 22, 1991).

Section 9(b) of the DSEA provides that DER "may impose such permit terms and conditions regarding construction, operation, maintenance, inspection and monitoring of the project as are necessary to assure compliance with [the DSEA] and other laws administered by [DER], the Pennsylvania Fish Commission and any river basin commission..." 32 P.S. §693.9(b).

The regulations, at 25 Pa.Code §105.113(a), provide as follows:

> **§105.113. Releases.**
>
> (a) The Department will impose general and special conditions regarding release rates in a permit for a dam or reservoir that it deems necessary to maintain stream flows for the purposes of protection of public health, water quality control, conservation of fisheries and

> aquatic habitat, improvement of recreation and protection of instream and downstream water uses. The appropriate release rates for the dams and reservoirs shall be established in accordance with subsections (b) and (c).

Thus, DER clearly has the authority to establish release rates in a permit issued under the DSEA where it deems it necessary for the protection of public health, aquatic life, water quality, or instream/downstream uses. In calculating release rates for dams constructed after August 28, 1978, DER is required to use the formula contained in 25 Pa. Code §105.113(b), which is known as the "Q7-10 formula." For dams constructed prior to August 28, 1978, such as Dam No. 3, there is no established formula which must be used. Instead, DER is to set a "reasonable schedule for release rates" taking into consideration the following factors:

> (1) The purposes stated in subsection (a) and the particular needs of instream and downstream water uses on the affected stream.
>
> (2) The capacity of existing release works at the dam and feasibility of potential modification of the release works.
>
> (3) The yield of the reservoir, and its capability to meet release requirements and satisfy the purposes and uses of the reservoir.
>
> 25 Pa. Code §105.113(c)

DER is not precluded from using the Q7-10 formula in setting release rates for dams constructed prior to August 28, 1978, so long as the criteria of 25 Pa. Code §105.113(c) are followed. See Pennsylvania-American Water Co. v. DER, 1990 EHB 1649.

In acting on PAWC's application, DER solicited comments from various internal offices as well as other state and federal agencies. (F.F. 12, 13) Although the modifications proposed by PAWC would not result in the withdrawal

of more water from the stream or a change in stream flow conditions, PAWC's application provided an opportunity for DER and the other agencies notified to review whether a low flow release rate would be appropriate for Dam No. 3. (F.F. 10, 16) In determining that a low flow release rate was appropriate, DER considered comments submitted by the Pennsylvania Fish Commission and its own State Water Plan Division, which recommended that a low flow release rate be imposed. (F.F. 14)

Arthur Alter of DER's Bureau of Dams calculated the rate of release for the dam. (F.F. 18, 19) He took into consideration the following factors when calculating the rate: the purposes of a low flow release, the yield of the dam, and whether a low flow release could be implemented without necessitating changes in the plumbing structures of the dam. (F.F. 19) After calculating the rate using the Q7-10 formula, Mr. Alter compared that figure with the capacity of the dam in order to determine the reasonableness of the rate. (F.F. 28) In arriving at an initial rate of 900,000 gallons per day, Mr. Alter consulted with Thomas Denslinger of DER's State Water Plan Division. Both determined the rate to be too high given the safe yield of Dam No. 3. (F.F. 20) Mr. Alter and Mr. Denslinger then recalculated the rate using data from the Water Resources Bulletin No. 15 which factored in the differing geology of the area. (F.F. 23) This resulted in the figure of 363,000 gallons, which was the release rate inserted into PAWC's permit. As noted previously, the Q7-10 formula may be used for calculating a release rate for a dam built prior to August 28, 1978, such as the dam in question, provided that DER also considered the factors contained in 25 Pa.Code §§105.113(a) and (c) in determining a reasonable rate. Therefore, we next turn to DER's consideration of the factors set forth in sections (a) and (c) of §105.113.

DER's purpose in instituting a low flow release rate for Dam No. 3 was the protection of a fishery located downstream of the dam. (F.F. 14, 19) This decision was based upon the recommendation of its own State Water Plan Division and the Pennsylvania Fish Commission. (F.F. 14) Conservation of a fishery is clearly one of the purposes set forth in 25 Pa.Code §105.113(a) for instituting a low flow release schedule. Therefore, DER's purpose in requiring a release schedule for Dam No. 3 was in accordance with the intent of §105.113(a). Yet, by DER's own admission, it conducted no aquatic life study in the stream, nor did it review the findings of any such study which may have been performed by another agency. (F.F. 51) Nor does it appear from the evidence and testimony presented at hearing that DER relied on any such study or review by the Fish Commission or the State Water Plan Division, which had made the recommendation. Although counsel for DER stated that limited studies of this nature were performed by the Fish Commission after PAWC's appeal was filed, no one from the Fish Commission testified as to the findings of these studies. (T. 129) Rather, it appears that DER made the decision that a low flow release was necessary for conservation of the fishery, but went no further than this initial determination in calculating the rate of release. Thus, it appears that no consideration was given as to whether the actual release rate inserted into PAWC's permit was sufficient to accomplish the purpose it was designed to achieve.

Another factor to be considered under §105.113(a) is water quality. Mr. Alter acknowledged that the Division of Dam Safety, which issued the permit, is not an expert in water quality matters. (T. 54) As for the Bureau of Water Resources Management ("BWRM") (of which the State Water Plan Division is a part), the BWRM did not consider itself to be competent in the area of water

quality in an appeal involving Western Pennsylvania Water Company. See Western Pennsylvania Water Co., supra, at p. 44-45. Rather, such matters are normally within the expertise of the Bureau of Water Quality Management ("BWQM"). (F.F. 54) When solicited for comments regarding PAWC's permit application, the BWQM made no recommendation regarding a low flow release requirement. (F.F. 55) The Division of Dam Safety made no further inquiry of the BWQM regarding the subject of water quality before incorporating the release rate into PAWC's permit. Nor were any water quality studies conducted or even considered by the Division of Dam Safety in establishing the release rate in question. (F.F. 53) Thus, we find that DER did not properly take water quality into consideration in setting the release rate schedule for Dam No. 3, as required by 25 Pa.Code §105.113(a) and (c).

Nor did DER consider the effect of the low flow release on PAWC's ability to meet the needs of its customers in the event of a drought period. No drought analyses were prepared or examined by DER in its review. (F.F. 56) DER was unable to state what the remaining water supply in the dam would be in the event of an extended period of drought if the release requirement were incorporated. (F.F. 58) Although Mr. Alter testified that in the past DER has on occasion granted relief from release requirements to water suppliers during times of severe drought (F.F. 39), there is no guarantee that any such relief will be granted in the event of future drought. Thus, we find that DER did not fully consider the dam's ability to meet the release requirements while still satisfying its primary purpose, as required by 25 Pa.Code §105.113(c)(3).

In summary, §105.113(c) of the regulations requires that when DER ets a release rate schedule in a permit for a dam constructed prior to ugust 28, 1978, it must take into consideration the factors set forth in §105.113(a) and (c). As noted previously in this discussion, although DER id review some of the factors enumerated in sections (a) and (c) of §105.113, t completely disregarded others, including water quality, conservation of isheries and aquatic life, and the dam's ability to meet the proposed release equirement while still satisfying the purposes and uses of the dam. Most otably, although the stated purpose for incorporating the release requirement nto PAWC's permit was the protection of a fishery located downstream of the am, DER never even performed or reviewed any aquatic life studies to deter- ine whether the proposed release rate would achieve the aforestated goal. F.F. 14, 51)

In conclusion, we find that DER does have the power to set low flow elease rates in permits issued under the DSEA, for the purposes set forth n 25 Pa.Code §105.113(a). Moreover, we find that DER may utilize the Q7-10 ormula of 25 Pa.Code §105.113(b) when establishing release rates for dams onstructed prior to August 28, 1978; however, in doing so, DER must abide y the requirements of 25 Pa.Code §105.113(c), and take into consideration he factors set forth therein, as well as those found in paragraph (a) of 105.113. Because DER disregarded a number of the factors of §§105.113(a) nd (c) when calculating the release rate in question, we cannot find that ER acted properly and in accordance with the regulations in establishing the elease rate set forth in PAWC's permit. Therefore, we find that PAWC has met ts burden of proof in this appeal, and the minimum flow release rate set forth s a special condition of PAWC's permit is hereby found to be invalid.

CONCLUSIONS OF LAW

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

2. PAWC bears the burden of proof in this appeal of a special condition of its permit. 25 Pa.Code §21.101(a).

3. DER has the power to impose minimum flow release conditions in permits issued under the DSEA. 32 P.S. §693.9(b); 25 Pa.Code §105.113(a).

4. In calculating release rates for dams constructed prior to August 28, 1978, DER must consider the factors set forth in §105.113(a) and (c).

5. In calculating release rates for dams constructed prior to August 28, 1978, DER may use the Q7-10 formula provided that the calculation results in a reasonable schedule of rates taking into consideration the factors listed in §105.113(a) and (c).

6. DER did not take into consideration all of the factors of 25 Pa.Code §105.113(a) and (c) when calculating the release rate incorporated into PAWC's permit. In particular, DER disregarded the following factors: water quality, conservation of fisheries and aquatic life, and the dam's ability to meet the proposed release requirement while still maintaining the uses and purposes of the dam.

7. DER did not act in accordance with the regulations at 25 Pa.Code §105.113(c) in determining the minimum flow release requirement incorporated as a special condition to PAWC's permit.

8. PAWC has met its burden of proving that the release rate established by DER was an abuse of discretion and not in accordance with 25 Pa.Code §105.113(c).

O R D E R

AND NOW, this 20th day of February , 1992, it is hereby ordered that the appeal of Pennsylvania-American Water Company at Docket No. 90-122-MJ is sustained, and the special condition which is the subject of this appeal is stricken from the permit.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
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DATED: February 20, 1992

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE

DONALD ZORGER	:	
	:	
v.	:	**EHB Docket No. 90-321-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 20, 1992

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

By Joseph N. Mack, Member

Synopsis

The Department of Environmental Resources ("DER") met its burden of proving that the appellant burned demolition waste without a permit in violation of the Solid Waste Management Act. We hold further that DER did meet its burden of proving the reasonableness of the civil penalty assessed against the appellant for this violation.

Background

This matter involves an appeal filed by Donald Zorger ("Mr. Zorger") on July 30, 1990, challenging a Civil Penalty Assessment in the amount of $5000 issued to Mr. Zorger by DER on June 28, 1990. The civil penalty was assessed in response to a notice of violation issued to Mr. Zorger on May 31,

1990, which charged Mr. Zorger with violation of §610(3) of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., at §6018.610(3). Specifically, the May 31, 1990 notice of violation was issued to Mr. Zorger for burning demolition waste without a permit. In this appeal, Mr. Zorger is challenging both the reasonableness of the civil penalty as well as the fact of the violation for which the penalty was assessed. Mr. Zorger asserts that no permit was needed for the activity which is the subject of the May 31, 1990 notice of violation.

A hearing was conducted on February 19, 1991, with both parties represented by counsel. The record consists of nine exhibits, introduced by DER, and a transcript of 113 pages. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The appellant is Donald Zorger, an individual with an address of P. O. Box 14, R.D. #1 Grampian, Pennsylvania 16838. (Notice of Appeal; T. 70)[1]

2. The appellee is the Department of Environmental Resources, the agency of the Commonwealth charged with the duty and authority of administering and enforcing SWMA, 35 P.S. §6018.101 et seq., and section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-1, at §510-17, and the rules and regulations promulgated thereunder.

3. Mr. Zorger and his wife own five acres of property located in a rural area in Penn Township, Clearfield County. (T. 70-72). His son lives on a

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[1]"T. ___" is a reference to a page in the transcript of the hearing on this matter. "Ex. ___" is a reference to an exhibit admitted at hearing. All exhibits at the hearing were introduced by DER.

portion of the property. (T. 71). The nearest residence is located approximately one-quarter of a mile away. (T. 71-72)

4. The Borough of Curwensville contacted Mr. Zorger about demolishing a building known as the Park Hotel located in Curwensville. (T. 73-74)

5. Mr. Zorger had done no work demolishing a commercial building prior to being contacted by the Borough of Curwensville. (T. 73)

6. Mr. Zorger contacted the Williamsport Regional Office of DER to inquire whether he could burn the waste from the demolition. The record does not clearly demonstrate what Mr. Zorger was told by the Williamsport office. (T. 74-75)

7. Mr. Zorger began demolishing the Park Hotel in the beginning of December 1989. (T. 76)

8. On December 20, 1989, James D. Greene, a solid waste specialist with DER's Bureau of Waste Management, visited the site of the Park Hotel due to reports that demolition waste was going to be burned. He discussed with Mr. Zorger DER's regulations prohibiting the burning of solid waste, except according to statute. (T. 6-7, 11, 76-77)

9. Mr. Greene visited Mr. Zorger's property in Penn Township on December 22, 1989 in response to a telephone call that burning was taking place. Mr. Greene witnessed a pile of demolition waste burning on the property. (T. 12; Ex. C-2,3)[2]

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[2]Exhibits C-1 through C-6 were admitted for the limited purpose of showing a prior violation for use in calculating the civil penalty assessment, and not for the purpose of proving the April 30, 1990 violation which is the subject of this appeal.

10. Mr. Greene again visited the Penn Township property on December 23, 1989. He again witnessed a burning pile of demolition waste with Mr. Zorger standing next to it. (T. 14)

11. On December 26, 1989, Mr. Greene witnessed a tractor trailer being loaded with demolition waste at the site of the Park Hotel. He followed the tractor trailer to Mr. Zorger's property in Penn Township, where it was unloaded. (T. 14; Ex. C-4,5)

12. On December 29, 1989, a notice of violation was issued to Mr. Zorger based on Mr. Greene's inspections at the site of the Park Hotel in Curwensville and Mr. Zorger's property in Penn Township. (T. 11, Ex. C-1) Mr. Zorger entered into a consent assessment for the December 29, 1989 notice of violation in the amount of $500. (T. 53)

13. Sometime after receiving the notice of violation, Mr. Zorger set up a meeting with DER officials at the Williamsport Regional Office regarding the demolition waste. He was advised that he was not allowed to bury the waste or to burn it outdoors, but that he could burn it in a furnace. (T. 77, 78-79)

14. During the week of April 18, 1990, Mr. Greene passed the Zorger property several times and each time saw a pile of demolition waste on the property. (T. 16)

15. Mr. Zorger's explanation for the pile of demolition waste which Mr. Greene observed during the week of April 18, 1990 was that it consisted of stones and bricks remaining from demolition of the Park Hotel, which had been pushed over a bank on his property. (T. 83)

16. On April 30, 1990, Mr. Greene visited the Zorger property and observed Mr. Zorger standing next to a pile of burning demolition waste located on his property and the adjacent property. (T. 17-18; Ex. C-7,8)

17. The pile of burning waste which Mr. Greene observed consisted of timbers, boards, and lattice materials. (T. 18)

18. Mr. Zorger's explanation for the pile that Mr. Greene observed burning on April 30, 1990 was that he was burning brush, trees that had blown down, and part of a shed that had blown down during a windstorm. (T. 81-82)

19. Mr. Greene could not identify the material burning on April 30, 1990 as being from the Park Hotel, but did identify it as being demolition waste. (T. 30, 32-33)

20. DER issued Mr. Zorger a second notice of violation on May 31, 1990 based on Mr. Greene's observations on April 30, 1990. (Ex. C-9)

21. Mr. Greene again visited the Zorger property on June 11, 1990. He observed that demolition material had been burning in a pit located in the same place where Mr. Greene had observed the April 30, 1990 fire. The material consisted of partially burned pieces of board, lattice, and plaster. (T. 19)

22. "Demolition waste" is waste generated from the demolition of a building and usually consists of boards and plaster. (T. 33-34)

23. DER does not as a practical matter take enforcement action against someone burning "a few boards" where the smoke does not cross the property line. What constitutes "a few boards" is left to the judgment and experience of the individual inspector, but generally is no more than one-fourth of a ton of material. (T. 35). On April 30, 1990, Mr. Greene witnessed Mr. Zorger burning approximately one ton of material on his property. (T. 34-35; Ex. C-8, C-9)

24. On June 28, 1990, Mr. Zorger was assessed a civil penalty for the April 30, 1990 violation. (T. 55, 57). The penalty was calculated by R.

Curtis White, an Environmental Protection and Compliance Specialist at DER's Williamsport Regional Office. (T. 39)

25. In assessing a civil penalty under SWMA, DER considers the following factors: seriousness of the violation as it relates to threatened harm to the environment or public; whether the violation was accidental, negligent, or willful; and the savings to the violator. (T. 41)

26. Other factors are also considered on a case-by-case basis, such as compliance history and cooperation of the violator. (T. 44-45)

27. DER uses a worksheet containing guidelines to assist in calculating civil penalties. (T. 42)

28. The guidelines for assessing a penalty for environmental harm are as follows: Severe harm -- $12,500 to $25,000; Moderate harm -- $5000 to $12,500; and Low impact -- $1000 to $5000. (T. 43; Ex. C-10)

29. Mr. White calculated the minimum penalty of $1000 for environmental harm because Mr. Zorger did not harm the environment, but simply had committed a violation of SWMA and the regulations. (T. 56)

30. The guidelines for assessing a penalty for intent of the violator are as follows: Willful -- $12,500 to $25,000; Reckless behavior -- $5000 to $12,500; Negligent behavior -- $500 to $5000; and Accidental -- no penalty. (T. 43-44; Ex. C-10)

31. Mr. White assessed Mr. Zorger for willful intent because he had prior knowledge of the regulations. He calculated a penalty of $12,500, at the lowest end of the willful range. (T. 56-57)

32. Mr. White also factored in an additional $675 because this was Mr. Zorger's second violation. (T. 57). This provided a total calculation of $14,175. (T. 57, 59)

33. DER did not assess Mr. Zorger in the amount of its initial calculation of $14,175. Rather, it reduced the amount of the actual assessment to $5000 because it considered that amount to be a "reasonable penalty that fit the violation..." (T. 59)

34. DER arrived at the figure of $5000 based upon its review of the scale of penalties which had been issued for similar violations in that region. (T. 59-61)

35. A civil penalty assessment in the amount of $5000 was issued to Mr. Zorger on June 28, 1990. (Notice of Appeal)

35. Mr. Zorger appealed the civil penalty assessment on July 30, 1990. (Notice of Appeal)

DISCUSSION

In this appeal of the civil penalty assessed by DER on June 28, 1990 under SWMA, Mr. Zorger is challenging the amount of the penalty as well as the fact of the underlying violation for which the penalty was assessed. The burden of proof rests with DER to show by a preponderance of the evidence that Mr. Zorger committed a violation of SWMA and, if so, that the penalty assessed is reasonable and authorized by law. 25 Pa. Code §21.101(b)(1) and (3). Gerald E. Booher v. DER, EHB Docket No. 89-204-MJ (Adjudication issued June 20, 1991).

Mr. Zorger is charged with burning demolition waste without a permit on April 30, 1990 in violation of §610(3) of SWMA, 35 P.S. §6018.610(3). This section reads in pertinent part as follows:

> **§6018.610 Unlawful conduct**
> It shall be unlawful for any person or municipality to:
> ...
> (3) Burn solid wastes without a permit from the department...

The municipal waste regulations define "demolition waste" as the following:

> Solid waste resulting from the construction or demolition of buildings and other structures, including, but not limited to, wood, plaster, metals, asphaltic substances, bricks, block and unsegregated concrete.

25 Pa. Code §271.1.

We find that DER met its burden of showing that Mr. Zorger violated §610(3) of SWMA, 35 P.S. §6018.610(3), by burning demolition waste without a permit. On April 30, 1990, the date of the violation that formed the basis of the May 31, 1990 notice of violation, DER solid waste specialist James Greene observed Mr. Zorger standing next to a pile of burning waste which consisted of timbers, boards, and lattice materials. (F.F. 16, 17).[3] Prior to that, during the week of April 18, 1990, Mr. Greene had passed the Zorger property several times and each time saw a pile of demolition waste on the property. (F.F. 14). Although Mr. Greene could not identify the material he saw burning on April 30, 1990 as being from the Park Hotel, he was able to identify it as demolition waste. (F.F. 19). When Mr. Greene visited the property on June 11, 1990, he again observed that demolition material had been burning in a pit located in the same place as the burning on April 30, 1990. The pit contained partially burned pieces of board, lattice, and plaster. (F.F. 21)

Mr. Zorger's explanation for the April 30, 1990 incident was that he was burning brush, trees, and parts of a shed which had blown down during a windstorm. (F.F. 18). However, Mr. Greene identified the burning material as demolition waste consisting of boards and lattice material. (F.F. 16, 17).

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[3] "F.F. ___" refers to a finding of fact set forth herein.

When he next visited the site on June 11, 1990, he observed that the same type of material had again been burning. (F.F. 21). We find Mr. Greene's testimony and observations to be accurate and credible, and determine that the evidence supports the finding that Mr. Zorger was indeed burning demolition waste on April 30, 1990.

A violation of §610(3) of SWMA occurs when one burns solid waste without a permit. There is no mention in the record directly stating that Mr. Zorger did not possess a permit to burn waste. However, Mr. Zorger did not raise the issue of possessing a permit in his appeal. Rather, one of the arguments made by Mr. Zorger in his appeal was that he was advised by DER that no permit was required for his activities. Therefore, we find that Mr. Zorger did not, in fact, possess a permit for the burning of solid waste at the time of the incident in question.

As noted above, Mr. Zorger stated that he was advised by DER that no permit was needed for his activities. Mr. Zorger testified that he called DER prior to demolishing the hotel to determine whether he could burn the waste and that he was referred to DER's Williamsport Regional Office. (F.F. 6). Mr. Zorger testified that an unidentified individual at the Williamsport office advised him that as long as the Township had no ordinance prohibiting the burning of waste and no smoke crossed onto other properties, "it was all right with them." (T. 75). Even if Mr. Zorger is correct in his assertion that he initially misunderstood or was misinformed by the Williamsport office, he was apprised of DER's regulations with respect to the burning of waste when Mr. Greene visited the site of the Park Hotel on December 20, 1989. (F.F. 8). In addition, he met with DER officials in Williamsport following receipt of the December 29, 1989 notice of violation, and was again advised that he was not permitted to burn the demolition waste. (F.F. 13). Finally, the

December 29, 1989 notice of violation provided additional notice to Mr. Zorger that the burning of demolition waste without a permit was a violation of DER's regulations. Therefore, even if Mr. Zorger were misinformed in his first contact with DER's Williamsport office, he was fully informed of the prohibition against burning at the time of the April 30, 1990 violation.

Along a similar line, Mr. Zorger argues that there is conflict within the regulations as to whether open burning of waste is or is not allowed, although he cites us to no particular provision in support of his argument. DER concedes that the Bureau of Air Quality may allow some open burning of household waste on one's property without a permit so long as certain criteria are met. However, Mr. Zorger points to nothing in the air quality regulations which would allow him to burn demolition waste on his property without a permit. Moreover, as stated in the previous paragraph, prior to the April 30, 1990 incident, Mr. Zorger had been fully informed of the applicable statutory and regulatory provisions and the prohibition against burning demolition waste without a permit.

In summary, we find that DER has met its burden of proving the violation in question, that is, that Mr. Zorger burned demolition waste without a permit in violation of §610(3) of SWMA, 35 P.S. §6018.610(3).

We now turn to the question of the reasonableness of the civil penalty assessed by DER for the aforesaid violation. Our task in this review is not to determine what penalty we would impose, but to determine whether DER abused its discretion in setting the amount of the assessment. Chrin Brothers v. DER, 1989 EHB 875. However, where we find that DER has abused its discretion, we may substitute our discretion and modify a penalty assessment. Id. Under the authority of §605 of SWMA, DER may assess a civil penalty up to a maximum of $25,000 per day for any violation of the

act or the regulations promulgated thereunder. 35 P.S. §6018.605. In setting the amount of the penalty, DER is to consider the following factors: the willfulness of the violation, damage to natural resources, cost of restoration and abatement, savings resulting to the violator, and any other relevant factors.

DER arrived at an initial calculation of $14,175 by assessing the following amounts: $675 for poor compliance history; $1000 for environmental harm; and $12,500 for willful intent. (F.F. 29, 31, 32). As to the first factor, compliance history, the evidence indicates that Mr. Zorger committed the same violation in December 1989 and was warned at that time against burning without a permit. The prior incident indicates a failure on the part of Mr. Zorger to attempt to comply with the applicable environmental statutes and regulations. Therefore, we find that DER did not abuse its discretion in assessing Mr. Zorger a penalty based on his history of non-compliance. Moreover, we find $675 to be a reasonable assessment on this basis.

With respect to the second factor, environmental harm, DER presented no evidence as to potential harm to the environment resulting from Mr. Zorger's actions. DER indicated that it did not intend to prove that Mr. Zorger was harming the environment, but simply that he had committed a violation of SWMA, and it therefore assessed Mr. Zorger at the minimum end of the range for environmental harm. (F.F. 28). However, we find that DER was required to present at least some evidence of potential environmental harm in order to assess a penalty therefor, albeit a penalty at the minimum end of the range. Because DER presented no evidence on this, we cannot find that it acted reasonably in setting this penalty amount. Therefore, this factor should be deducted from the total penalty calculation.

As to the final factor, intent, DER determined Mr. Zorger's behavior to have been willful because at the time of the April 30, 1990 violation he had knowledge of the regulations with respect to burning waste. We find that DER did not abuse its discretion in finding Mr. Zorger's violation to have been willful because at the time of the April 30, 1990 incident, Mr. Zorger had knowledge of the prohibition against burning without a permit, yet proceeded to act in contravention of the law.

In arriving at the final penalty amount, DER settled on an initial figure of $14,175 but felt this to be high given the nature of the violation. It then reviewed the scale of penalties which had been issued in that region for violations of a similar nature and arrived at a figure of $5000 as a proper and fair assessment.

We agree that the initial calculation of $14,175 was excessive given the relatively low degree of severity of the violation, coupled with the lack of showing of environmental harm.

We find that DER properly took into consideration the factors listed in §605 of SWMA in calculating the civil penalty against Mr. Zorger. Considering the evidence before us and §605 of SWMA, we find $5000 to be a fair and reasonable assessment based on the violation in question. Therefore, we find that DER met its burden of proof with respect to the civil penalty assessment issued to Mr. Zorger on June 28, 1990.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proving that Mr. Zorger violated §610(3) of SWMA, 35 P.S. §6018.610(3), and that DER did not abuse its discretion in

issuing the June 28, 1990 civil penalty assessment. 25 Pa.Code §21.101(b)(1) and (3); Booher, supra.

3. Mr. Zorger bears the burden of proving any affirmative defenses. 25 Pa.Code §21.101(a); Booher, supra.

4. Section 610(3) of SWMA prohibits any person from burning solid waste without a permit from DER. 35 P.S. §6018.610(3).

5. Solid waste includes waste from the demolition of buildings and other structures, including but not limited to wood, plaster, metals, and bricks. 25 Pa.Code §271.1.

6. Mr. Zorger violated §610(3) of SWMA by burning demolition waste without first obtaining a permit from DER.

7. DER met its burden of proving that Mr. Zorger committed the violation cited in the May 31, 1990 notice of violation.

8. DER may assess a penalty of up to $25,000 per day per violation of any provision of SWMA or the rules and regulations promulgated thereunder. In assessing the penalty, DER is to consider the willfulness of the violation, damage to the environment, cost of restoration and abatement, savings resulting to the person as a result of the violation, and any other relevant factors. 35 P.S. §6018.605.

9. DER has met its burden of proving the reasonableness of the $5000 civil penalty assessed against Mr. Zorger for the April 30, 1990 violation.

O R D E R

AND NOW, this 20th day of February , 1992, it is ordered that Donald Zorger's appeal from the Department of Environmental Resources' June 28, 1990 Civil Penalty Assessment in the amount of $5000 is dismissed. The entire civil penalty is due and payable immediately to the Solid Waste Abatement Fund.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann is filing a dissenting opinion.

DATED: February 20, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Robert Abdullah, Esq.
Central Region
For Appellant:
Anthony S. Guido, Esq.
DuBois, PA

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DONALD ZORGER	:	
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v.	:	**EHB Docket No. 90-321-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

DISSENTING OPINION OF BOARD MEMBER RICHARD S. EHMANN

Having reviewed this adjudication on several occasions I find I must dissent.

As the majority points out on page 9 of their Adjudication one element which DER must prove as part of its case-in-chief, since it has the burden of proof, is that Zorger had no permit for his burning of the demolition wastes. As the majority also observes, the record is devoid of any evidence as to whether or not Zorger had a permit for this burning.

Rather than finding that DER had failed to prove its case because it had failed to introduce any evidence on this issue and thus that we are reluctantly compelled to sustain this appeal, the majority attempts to manufacture an admission of the lack of a permit by Mr. Zorger. Unfortunately for the majority's approach, Mr. Zorger did not make such an admission. In one of the arguments in his appeal he says someone at DER told him no permit was required for this burning activity. It is from this argument alone that the majority concludes he had no permit. A statement that

a person was told that he did not need to secure a permit to conduct an activity is not and cannot be stretched to be the admission that, having been told this, he did not secure one. DER may prove its case by admissions from Mr. Zorger, but we may not manufacture admissions which are not made. The statement that DER told Zorger he did not need a permit is as consistent with the unstated concept of "but I got one anyway to be safe" as it is with a non-existent admission of "so I did not get one". We cannot select the admission against interest by Zorger from these two possibilities and use it to hold him liable, especially where DER has the burden of proof on this point.

Accordingly, I dissent.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATE: February 20, 1992

cc: **Bureau of Litigation:**
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For the Commonwealth, DER:
Robert Abdullah, Esq.
Central Region
For Appellant:
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DARMAC COAL, INC. :
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v. : EHB Docket No. 91-305-MJ
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: February 20. 1992

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

In this appeal of a compliance order issued to the appellant for alleged degradation of a stream, the appellant's motion for summary judgment must be denied where material issues of fact remain with respect to the source of the alleged degradation.

OPINION

This matter originated with the filing of a notice of appeal by Darmac Coal, Inc. ("Darmac") on July 25, 1991 challenging compliance order 91G193 issued by the Department of Environmental Resources ("DER") on July 3, 1991. The compliance order charges Darmac with degrading an unnamed tributary to Glade Run in violation of sections 301 and 315 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., at §§691.301 and 691.315. The order requires Darmac to upgrade collection and treatment of all seeps.

On or about October 28, 1991, Darmac filed a motion for summary judgment and supporting memorandum asserting that there were no genuine issues

of material fact and that it was entitled to judgment as a matter of law. In support of its motion, Darmac provided the affidavit of its chief engineer, Charles T. Lee, and DER's responses to Darmac's First Set of Interrogatories and First Request for Admissions.

DER filed a response in opposition to Darmac's motion on or about November 19, 1991, contending that several material facts remain in dispute. Included with its response are, inter alia, the affidavit of hydrogeologist Michael Gardner of DER's Bureau of Mining and Reclamation, and Darmac's responses to DER's First Request for Admissions and Interrogatory.

Summary judgment may be granted when the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, 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(b); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). For the reasons outlined below, we find that summary judgment may not be granted to Darmac because genuine issues of material fact remain.

The facts established thus far are as follows. Surface Mining Permit No. 03840112, as revised, ("permit") was issued to Darmac for the operation of a bituminous strip auger mine known as "Darmac No. 14 Mine" in East Franklin Township, Armstrong County. The permit authorized Darmac to discharge from eight outfalls into Glade Run and its unnamed tributary subject to the effluent limitations set forth in Part A of the permit. (Exhibit 1 to Darmac's Motion; Exhibit A to DER's Response) Operation of the mine ended in May 1991. (Exhibit 2 to Darmac's Motion; Exhibit B to DER's Response)

Subsequently, on July 3, 1991, DER issued the compliance order which is the subject of this appeal and charged Darmac with degradation of the unnamed

tributary to Glade Run as evidenced by sample number 4105487 which was collected on June 4, 1991 at monitoring point C-2. (Exhibit 4 to Darmac's Motion; Exhibit F to DER's Response) No further information is provided regarding the results of the sampling, except that in Michael Gardner's affidavit and in DER's response to number 10 of Darmac's request for admissions, it is stated that sample number 4105487 showed a manganese concentration of 3.090 mg/l. (Exhibit 3 to Darmac's Motion; Exhibit B to DER's Response)

Chapter 93 of 25 Pa. Code establishes water quality standards for the waters of Pennsylvania, based upon water uses which are to be protected. Mathies Coal Co. v. Commonwealth, DER, 522 Pa. 7, 559 A.2d 506 (1989). Glade Run is classified in 25 Pa.Code §93.9 as a "cold water fishery" subject to special water quality criteria contained in §93.7. The limit established in §93.7 for manganese is 1.0 mg/l.

The discharge limits set forth in Darmac's permit for manganese are as follows: 4.0 mg/l (instantaneous maximum) and 2.0 mg/l. (average monthly). (Exhibit 1 to Darmac's Motion; Exhibit A to DER's Response.) Darmac argues that since the water sample cited in the compliance order contained manganese in a concentration of less than 4.0 mg/l., it was within the parameters of Darmac's permit and, therefore, could not have been a violation of §§301 and 315 of the Clean Streams Law, 35 P.S. §§691.301 and 691.315, which prohibit a surface mine operator from discharging mine drainage which is not authorized by permit or the regulations. In addition, Darmac argues, it was fully in compliance with 25 Pa.Code §87.102, which contains discharge limitations for surface mines.

It is Darmac's contention that DER has premised its compliance order on the water quality criteria contained in 25 Pa.Code §93.7 and that DER erred in doing so because the criteria contained in §93.7 do not apply independently

of the effluent limits established by permit. Rather, Darmac contends, the water quality criteria of §93.7 are simply one of the major factors to be considered in developing discharge limits for a permittee. Because the sample in question contained a manganese concentration within the limits of its permit, Darmac asserts, there was no basis for issuance of the compliance order.

In response, DER points out that the compliance order being appealed did not cite Darmac with violation of the discharge limits set by its permit. Rather, it cites Darmac for an unauthorized discharge which allegedly caused degradation of the tributary. DER asserts that a stream can be degraded in ways other than a violation of the effluent limits of one's permit. DER contends that seeps and non-point discharges are entering the unnamed tributary from the mine site causing the elevated levels of manganese detected in the sample collected at monitoring point C-2. Therefore, DER asserts, a material issue in dispute is whether there exist discharges from the mine site entering the unnamed tributary other than from the outfalls listed in the permit.

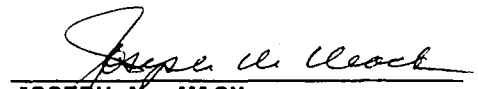
At this point we do not reach Darmac's argument regarding the applicability of the water quality criteria contained in 25 Pa.Code §93.7 because we find that material questions of fact exist which would prevent us from granting summary judgment in this matter. A review of the memoranda submitted by the parties and the supporting exhibits shows that Darmac was cited for degradation of the unnamed tributary to Glade Run in violation of §§301 and 315 of the Clean Streams Law, 35 P.S. §§691.301 and 691.315, and 25 Pa.Code §93.7. Little more is provided to us as to the basis for DER's order. While Darmac asserts that DER based the compliance order on a water sample which allegedly violated the manganese limit of 25 Pa.Code §93.7, this is not obvious from the party's affidavits nor the sketchy facts provided by DER's responses

to Darmac's discovery requests. Because we cannot clearly determine the basis for DER's issuance of the compliance order and because motions for summary judgment must be viewed in the light most favorable to the non-moving party, in this case DER, we are unable to grant Darmac's motion. Therefore, we enter the following order:

O R D E R

AND NOW, this 20th day of February , 1992, upon consideration of Darmac's motion for summary judgment, the motion is denied because issues of material fact remain in question.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 20, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

KEPHART TRUCKING COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-514-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 21, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

Where it appears that an appeal has been filed from a notice of violation which neither changes the status quo nor imposes, by its terms, obligations upon the appellant, the appeal is not from a Department of Environmental Resources' ("DER") action and jurisdiction of the Board will not lie. Therefore, DER's motion for dismissal of the appeal is granted for lack of jurisdiction.

OPINION

This matter was initiated with the filing of a notice of appeal by Kephart Trucking Company ("Kephart") on November 25, 1991, challenging a notice of violation issued by DER on November 7, 1991. The notice of violation details a pair of inspections by DER at Kephart's trucking facility in Bradford Township, Clearfield County, and recites that Kephart stored several trailer loads of municipal waste in excess of twenty-four hours in violation of §610

of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., at §6018.610, and 25 Pa.Code §285.212(d)

Kephart's appeal is directed at what it characterizes as DER's misconstruction of certain sections of the SWMA and the regulations promulgated thereunder. The appeal also questions the regulatory structure of DER.

Kephart asks the Board to dismiss the notice of violation, to issue a ruling that tractor trailer combinations as operated by Kephart are not "collection vehicles" within the meaning of 25 Pa.Code §§285.212 and 285.213, to rule that the actions of DER are unlawful in failing to comply with its own rules and regulations for promulgating or amending regulations, to grant a hearing to develop a record on all of the issues, and to grant such other general relief to which it may be entitled.

On December 12, 1991, DER filed a motion to dismiss Kephart's appeal for lack of jurisdiction. The motion argues that the notice of violation issued to Kephart is not an appealable action subject to this Board's jurisdicti

In its reply to the motion, filed on January 6, 1992, Kephart argues that the notice of violation involved in this case is an "action" within the meaning of 25 Pa.Code §21.2(a) in that it constitutes a determination or ruling by DER that Kephart's flatbed tractor trailer trucks are collection vehicles, and places Kephart in violation of the SWMA. The reply details that Kephart is engaged in the trucking industry and that it transports a number of commoditi including solid waste. It utilizes flatbed tractor trailer units for this purpose. Often, the tractor trailer units are left at the trucking facility, fully loaded, over the weekend for delivery to the final destination on the following Monday. Kephart contends that the regulation upon which DER is relying applies to vehicles used for the collection of waste, as opposed to

the transportation thereof, and, therefore, that DER's determination interferes with Kephart's right to continue effectively operating its trucking business.

Kephart disputes the contention that the notice of violation was merely advisory in nature. In support of this, Kephart alleges that when it contacted Curt White, the individual whom the notice indicated should be contacted, Mr. White said that it was for the purpose of agreeing upon the amount of the fine which would be assessed as a result of the notice of violation.

Finally, Kephart argues that under the language of §4(c) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 Pa. C.S.A. 7511 et seq., at §7514(c), an appeal must be filed in this instance in order to preserve its rights. That provision reads as follows:

> (c) Departmental action.-The department may take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulation of the Board, the department's action shall be final as to the person.

35 P.S. §7514(c) (Emphasis added in Kephart's reply)

Kephart interprets that provision to mean that if it did not appeal the notice of violation, it would be left with the determination that its flatbed trailers are collection vehicles subject to the 24 hour limitation of 25 Pa.Code §285.212(d).[1]

---

[1] 25 Pa.Code §285.212(d) reads as follows:

> (d) A person or municipality may not store municipal waste in collection vehicles for more than 24 hours.

DER replied on January 8, 1992, again arguing that the notice of violation under consideration does not constitute an appealable action of DER because it merely informs Kephart of a violation and recommends corrective action. DER argues that Kephart will have the right to bring a challenge if and when DER takes any action based on the contested determination. Kephart filed a supplemental memorandum in support of its opposition to DER's motion on January 4, 1992.

Section 4 of the Environmental Hearing Board Act, 35 Pa.C.S.A. §7514, limits this Board's jurisdiction to reviewing "actions" of DER. Louis Costanza t/d/b/a Elephant Septic Tank Service v. DER, EHB Docket No. 91-140-E (Opinion and Order Sur Question of Jurisdiction issued July 3, 1991.) An "action" is defined at 25 Pa.Code §21.2(a) as follows:

> Action-Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering the waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

Generally, notices of violation have been found not to constitute actions subject to review. See Fiore v. Commonwealth, DER, 98 Pa.Cmwlth. 35, 510 A.2d 880 (1986); Costanza, supra; Ed Peterson and James Clinger v. DER, 1990 EHB 1224; Adams County Sanitation Co. and Kenneth Noel v. DER, 1989 EHB 258.

However, simply because a document issued by DER carries the label "notice of violation", that does not necessarily prevent it from being an appealable action. Robert H. Glessner, Jr. v. DER, 1988 EHB 773; M. C. Arnoni Co. v. DER, 1989 EHB 27. It is the content of the document, and not merely its caption, which determines whether it constitutes an "action" within the meaning of 25 Pa.Code §21.2(a).

In Glessner, supra, the Board held that a letter which noted violations and directed the appellant to take specific corrective action was an appealable action despite its being characterized as a notice of violation. Likewise, in Arnoni, supra, the Board found that a notice of violation was, in reality, an order because it imposed a clear and immediate obligation on the appellant to begin corrective work and, thereby, affected the appellant's duties and obligations. The operative language in both letters included the word "shall" in directing the appellants to take specific action.

In the case at hand, Kephart argues that the notice of violation in question is not merely advisory in nature, but that it is an enforcement action because it requires Kephart to accede to DER's determination of what constitutes a "collection vehicle" under §285.212(d) of the regulations.

For the reasons discussed below, we find that the notice of violation issued to Kephart does not constitute an action of DER which is reviewable by this Board. The notice of violation recites that inspections of Kephart's trucking facility on November 2 and 3, 1991 revealed eight trailer loads of baled garbage. It then states that Kephart is in violation of §610 of the SWMA, 35 P.S. §6018.610, and 25 Pa.Code §285.212(d) for storing municipal waste in excess of twenty-four hours. The letter then reads:

> To come into compliance with Act 97 [SWMA] and the Department's Rules and Regulations, you should discontinue storage of municipal waste longer than 24 hours.
>
> You should contact Curt White on or before November 22, 1991...

Although Kephart is correct in asserting that the notice of violation contains a determination by DER that Kephart is in violation of the SWMA and §285.212(d) of the regulations, it does not constitute an order to Kephart to take corrective action. It is exactly what the title implies, a notice to Kephart that DER has determined its actions to be in violation of the SWMA

and the regulations. It does not direct Kephart to take any specific action; it merely advises Kephart as to what it should do to be in compliance with the SWMA and regulations. As stated previously, such notices do not amount to appealable actions.

As to Kephart's assertion that the notice of violation may form the basis for a civil penalty assessment, if and when such an assessment is made Kephart may at that time challenge not only the amount of the penalty but the underlying violation. See Gerald E. Booher v. DER, 1990 EHB 285.

Secondly, Kephart asserts that §4(c) of the Environmental Hearing Board Act, 35 Pa. C.S.A. §7514(c), mandates that an appeal be taken in order to preserve its rights. Under that provision if an appeal is not taken from an action of DER, that action becomes final. Because a notice of violation does not constitute an action of DER, within the meaning of 25 Pa.Code §21.2, any determination made therein is not final and need not be appealed on that basis.

Kephart asserts that the notice of violation does require that it take action in accordance with DER's determination therein because if it does not, DER will find it to be operating in violation of the SWMA and regulations. Again, we point out that if and when DER takes enforcement action against Kephart based on the alleged violation contained in the notice of violation, Kephart may challenge DER's determination at that time.

Therefore, for the reasons stated hereinabove, we cannot entertain Kephart's request to dismiss the notice of violation since it does not constitute an action which is reviewable by this Board.

Likewise, we cannot consider Kephart's request that we rule DER's determination in this matter to be unlawful for failing to comply with its own rules for promulgating or amending regulations. As stated above, DER's

determination regarding Kephart's tractor trailer combinations as collection vehicles does not at this point constitute an action which is reviewable by the Board. If and when DER takes enforcement action against Kephart or assesses a civil penalty based on the alleged violation, then at that point we may consider Kephart's argument that DER has acted contrary to its own rules and regulations.

In conclusion, we find that the notice of violation issued to Kephart is not appealable action. Therefore, this appeal will be dismissed for lack of jurisdiction.

ORDER

AND NOW, this 21st day of February, 1992, it is ordered that DER's Motion to Dismiss is granted and the appeal of Kephart Trucking Company at Docket No. 91-514-MJ is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

EHB Docket No. 91-514-MJ

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 21, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
v.	:	EHB Docket No. 91-250-MJ
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and DAUPHIN COUNTY INTERMUNICIPAL	:	
SOLID WASTE AUTHORITY, Permittee	:	
DAUPHIN MEADOWS, INC., Intervenor	:	Issued: February 27, 1992

OPINION AND ORDER
SUR
MOTION TO COMPEL

By Joseph N. Mack, Member

Synopsis

A motion to compel discovery directed to the appellant City is granted in part and denied in part. Discovery regarding the City's cost to dispose of waste, negotiations to retrofit its incinerator, and a study of the feasibility of retrofitting the incinerator is found to be relevant since these issues were raised by the City's appeal. However, the City will not be required to answer interrogatories calling for mere speculation as to how it would have fulfilled the terms of another county's waste disposal contract which it was not awarded. Nor will it be required to provide information on matters which are not relevant to the subject of this appeal.

OPINION

This matter was initiated with the filing of an appeal by the City of Harrisburg ("the City") on June 24, 1991, challenging the Department of

Environmental Resources' ("DER's") approval of the Dauphin County Municipal Waste Management Plan ("the Plan") on May 6, 1991. Notice of the Plan approval was published in the Pennsylvania Bulletin on May 25, 1991. The permittee in this matter is the Dauphin County Intermunicipal Solid Waste Authority ("the Authority").

On January 16, 1992, the Authority filed a motion to compel directed to the City. The motion stated that the City had failed to fully answer and respond to numbers 47 and 53 of the Authority's first set of interrogatories; numbers 57(c), 69, 71(c), 83, 84 and 85 of its second set of interrogatories; the Authority's request for production of documents; and certain deposition questions propounded to City witnesses. The City filed a response in opposition to the motion on or about February 7, 1992, asserting that the information requested was either not relevant or was confidential or burdensome. The Authority replied on February 14, 1992, disputing the City's objections.

Discovery before the Board is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa.Code §21.111. Pursuant to Pa. R.C.P. 4003.1, parties may obtain discovery of any matter which is not privileged and which is relevant to the subject matter of the pending action. Relevancy is to be broadly construed for the purpose of discovery. Centre Lime and Stone Co. v. DER and Bellefonte Lime Co., EHB Docket No. 88-271-F (Opinion and Order Sur Motion to Strike and Compel, July 11, 1991) However, requests for discovery must be reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1 .

The Authority's motion to compel seeks discovery regarding the following matters: (1) the City's cost to dispose of waste, (2) the City's contract with O'Hara Sanitation, (3) the City's proposals submitted to other counties, (4) negotiations with Katy-Seghers, Inc., and (5) retrofit feasibility study. Each of these is addressed separately below.

Discovery regarding City's cost of waste disposal

Information regarding the cost to the City to dispose of waste was requested by Interrogatory No. 47 (first set) and in the deposition of the City's witness, John Lukens. The City objected to providing information on how it arrived at the cost estimates for future years contained in its proposal to the Authority. The City objected on the basis that this information was not relevant and that the bids received by the City were confidential. The Authority asserts this information is relevant to the City's claim that the Authority's Plan will cause higher costs to Dauphin County residents than the City's proposal would have.

A review of the notice of appeal indicates that one of the City's objections to the Plan approval is that it increases the cost of waste disposal for Dauphin County residents. (Paragraph 7 of the appeal) Because the City's appeal raises the issue of the cost of waste disposal, this matter is within the scope of discovery. Therefore, we grant the Authority's motion as to Interrogatory No. 47 (first set) and the Authority's request for information pertaining to the City's cost of waste disposal.

Contract with O'Hara Sanitation

Interrogatory No. 84 (second set) requests information regarding a disposal agreement between the City and O'Hara Sanitation Company, Inc. ("O'Hara Sanitation"). The City objected on the basis that the question called for legal conclusions and interpretations of the contract which is currently the subject of litigation between the City and O'Hara Sanitation's successor-in-interest. The Authority asserts this matter is relevant to the City's claim that the Authority's Plan interferes with City contracts.

Paragraph 36 of the City's appeal alleges that the Plan "directly interferes with [the City's] contracts, operations, designs and financing."

In its response to the Authority's motion, the City contends that paragraph 36 of its appeal referred to its impaired ability to contract with municipaliti within Dauphin County for waste disposal. It further goes on to say, "The City has never contended that the O'Hara contract was harmed by the Plan." Based on this representation by the City, we find that information related to its contract with O'Hara Sanitation is not relevant to this appeal and, thus, deny the Authority's motion to compel with respect to this matter. However, on this basis, we also caution the City that it shall be precluded from introdu at hearing any testimony or evidence which attempts to show that the Authority' Plan interferred in any way with the City's contract with O'Hara Sanitation.

Proposals submitted to other counties

Interrogatories No. 69 and 85 (second set) request information pertaining to proposals submitted by the City to other counties. The City objected on the grounds that since it was not awarded disposal contracts by these counties, the information requested is purely speculative. The Authority on the other hand, argues that rejection of the City's proposals by other counties is relevant to the City's claim that the Authority was arbitrary and capricious in rejecting the City's proposal.

Interrogatory No. 69 asks the City how its incinerator would have disposed of both Cumberland County's and Dauphin County's waste had both countie agreed to its proposal. Interrogatory No. 85 asks whether the City contends that requests for proposals ("RFP's") issued by Cumberland County, Montgomery County, and Philadelphia County were more favorable than that of Dauphin County and, if so, in what respects they were more favorable.

Although for the purpose of discovery, relevance is to be broadly construed, the City's opinion as to other counties' RFPs does not appear to be relevant to the City's challenge to Dauphin County's Plan. Nor will we

require the City to speculate as to how it might have carried out the terms of another County's municipal waste management plan had it been awarded disposal contracts by both the Authority and the other county. See Centre Lime and Stone, supra, at p. 6.

Therefore, we deny the Authority's motion to compel with respect to Interrogatories No. 69 and 85 (second set).

Negotiations with Katy-Seghers, Inc.

In Interrogatories No. 53 (first set) and 71(c) and 83 (second set) and in the deposition of City witness, John Lukens, the Authority requested information regarding the City's negotiations with Katy-Seghers, Inc. ("Katy-Seghers") in or about 1989 concerning a proposal for retrofitting the City's incinerator. The City objected on the basis that the requested information was irrelevant since the City's proposal to the Authority did not involve Katy-Seghers. The Authority argues that this information is relevant to what it perceives to be the City's claim that the Plan threatens the viability of the incinerator by precluding a retrofit.

In paragraph 16 of the City's appeal, it states that the terms of the Authority's Plan directly and substantially impair the City's ability to continue to operate, maintain, and improve its facility. Moreover, it appears from the City's response to the Authority's motion that part of its proposal to the Authority was based upon a retrofit of the incinerator. Thus, the City's negotiations with Katy-Seghers regarding a proposal to retrofit its facility appear to be within the proper scope of discovery. Therefore, we grant the Authority's motion with respect to requests for discovery regarding the City's negotiations with Katy-Seghers, and particularly Interrogatories No. 53 (first set) and 71(c) and 83 (second set).

Feasibility study

In Interrogatory No. 57(c) (second set), the deposition of John

Lukens, and its request for production of documents, the Authority requested information regarding a study which had been done regarding the feasibility of retrofitting the City's incinerator. The City again objects to the relevancy and breadth of the requested information. The Authority makes the same claim for relevancy as regarding the Katy-Seghers negotiations.

For the reasons discussed hereinabove with respect to the Katy-Seghers negotiations, we also find that the information regarding the feasibility study is relevant, and we shall permit discovery thereof. Therefore, we grant the Authority's motion with respect to Interrogatory No. 57(c) (second set) and the discovery of information pertaining to the retrofit feasibility study.

Confidentiality

The City's response requests that, should the Board allow any or all of the requested discovery, a confidentiality order be entered. All discovery materials filed with the Board are retained as confidential.

O R D E R

AND NOW, this 27th day of February , 1992, the Authority's motion to compel directed to the City is granted in part and denied in part. The City is directed to answer in full the Authority's discovery requests pertaining to the following matters: (1) cost of waste disposal, including the basis for future estimates; (2) negotiations with Katy-Seghers regarding the proposed retrofitting of the City's incinerator; (3) the feasibility study of retrofitting the City's incinerator. The Authority's motion is denied with respect to the following matters: (1) RFPs issued by other counties and the proposals submitted thereto by the City; (2) the disposal contract with O'Hara Sanitation.

ENVIRONMENTAL HEARING BOARD

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 27, 1992

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JOHN J. BAGNATO :
:
v. : EHB Docket No. 90-358-MJ
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and MARQUISE MINING CORPORATION, Permittee: Issued: March 2, 1992

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

In issuing a mining permit to the permittee, DER properly conducted a hydrologic impact assessment as required by §315(c) of the Clean Streams Law, 35 P.S. §691.315(c). A Program Guidance Manual, developed by DER and containing guidelines for conducting a cumulative hydrologic impact assessment, is meant to provide guidance for conducting such an assessment but does not carry the weight of a statute or regulation.

Procedural History

This appeal was filed by John J. Bagnato (the appellant) on August 22, 1990 to obtain review of the issuance by the Department of Environmental Resources (Department or DER) of Surface Mining Permit (S.M.P.) No. 11890103 to Marquise Mining Corporation (Marquise or permittee), for a surface mine

site in Lower Yoder Township, Cambria County. The appeal asserts that the Department issued the permit in violation of section 315(c) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., 35 P.S. §691.315(c), by allegedly failing "to conduct an assessment of the probable cumulative impacts of the permitted activity, prior and present mining activity, and all anticipated mining in the area and upon the hydrology of the area[a], and particularly upon water availability." A hearing was held in Pittsburgh before Administrative Law Judge Joseph N. Mack on March 28, 1991, at which the appellant, a member of the Bar of Cambria County and the Commonwealth of Pennsylvania, appeared pro se. DER was represented by counsel, as was the permittee, Marquise. All parties presented evidence. Post-hearing briefs were filed as follows: by the appellant on July 1, 1991; by the permittee on July 10, 1991; and by the Department on July 10, 1991. The appellant filed a reply brief on July 29, 1991. No other reply briefs were filed. The record consists of the pleadings, a joint stipulation of facts (Jt. Stip.), a transcript of 56 pages, and 2 exhibits. After a full and complete review of the record we make the following:

FINDINGS OF FACT

1. The appellant herein is John J. Bagnato, Esq., an individual and member of the law firm of Spence, Custer, Saylor, Wolfe and Rose of Johnstown, Pennsylvania, who resides adjacent to the subject permit area. (NA, NT-5).[1]

2. The appellee herein is the Commonwealth of Pennsylvania, Department of Environmental Resources, charged with the enforcement of, inter alia, the

[1]Where used, NA means Notice of Appeal and NT means notes of testimony or transcript of the hearing followed by a page number.

Clean Streams Law, 35 P.S. §691.1 et seq., and particularly here with 35 P.S. §691.315(c), and the regulations promulgated thereunder.

3. The permittee herein is Marquise Mining Corporation, with a mailing address of 206 Greene Street, Johnstown, Pennsylvania 15905. (Exhibit B)

4. On July 25, 1990, DER's Bureau of Mining & Reclamation issued S.M.P. No. 11890103 to Marquise to conduct surface mining at the "St. Clair Strip" i Lower Yoder Township, Cambria County. (NA)

5. On August 22, 1990, the appellant appealed the Department's issuance of the S.M.P. to Marquise. (NA)

6. Pennsylvania obtained primacy in surface mining in 1982. (NT-11).

7. "CHIA" is an acronym for "cumulative hydrologic impact assessment." (NT-10). It consists of an assessment of the cumulative impact of a proposed mining operation on a receiving stream. (NT-32)

8. The CHIA program was developed as part of Pennsylvania achieving primacy in the regulation of surface mining. (NT-32)

9. DER's Program Guidance Manual contains guidelines for conducting a CHIA. (NT-37; Exhibit A). The CHIA guidelines went into effect on March 1, 1988. (NT-12)

10. The Program Guidance Manual guidelines for conducting a CHIA involve a Phase I review, a Phase II review, and a Mine Site Assessment. (NT-37)

11. The Phase I review consists of an evaluation of watershed conditions at a certain point in time. (NT-13, 37; Exhibit A)

12. The Phase II review consists of a detailed mining history and hydrologic analyses. (Exhibit A)

13. The Mine Site Assessment consists of a summary of the anticipated hydrologic impact of the proposed mining operation and the steps to mitigate the impact. (NT-25; Exhibit A)

14. When the Program Guidance Manual guidelines were developed there was no requirement that a Phase I study be performed in the watersheds of all bituminous mining regions. Rather, the DER District Office in each of the regions submitted a list of the ten watersheds considered to be the most sensitive; Phase I studies were conducted based on this priority listing. (NT-38)

15. The information that goes into a Phase I report is obtained from permit applications and is available to a permit reviewer. (NT-38) No field work is required since all the necessary information is in the permit file. (NT-39)

16. The Program Guidance Manual does not require that a Phase I study be done as a condition precedent to issuance of a mining permit. (NT-18, 38)

17. In 1989, the Program Guidance Manual for the CHIA program was reviewed by the Department (NT-27)

18. The review revealed that the Phase I and II analyses had proven to be of little value to the Department and an inefficient use of resources because they provided information corresponding to only one static point in time, whereas the Department needed a program which was more dynamic. (NT-19, 20)

19. In or about the latter part of 1989, as a result of the above-stated determination, the Department discontinued the Phase I and II reviews as part of the CHIA program. (NT-19, 20, 21, 23)

20. The Mine Site Assessment still remains a part of the Department's CHIA program. (NT-23)

21. Marquise's permit application was filed with the Department in August of 1989 (NT-44) and assigned to Thomas P. Pongrac of the Department's Bureau of Mining and Reclamation as lead reviewer with respect to hydrology and geology. (NT-42, 44)

22. In August 1989, Mr. Pongrac set up a field meeting on site with a DER inspector. They conducted an overall field review wherein they looked for: any discharges, seeps, or springs; drill hole locations; and water qualit on adjacent operations. (NT-44)

23. Subsequently, Mr. Pongrac conducted an office review in which he reviewed the following:

a) Modules accompanying the permit application, particularly Module 6 (environmental resources map), Module 7 (geology), Module 8 (hydrogeology), and Module 10 (mining plan). (NT-44)

b) Potential impacts of the operation on the environment. (NT-44)

c) Water quality of the receiving streams above and below the proposed mine site. (NT-45)

d) Mining discharges or any effects on public or private water supplies. (NT-45)

e) The overburden and its potential impact on the in-stream water quality of a nearby stream, St. Clair Run. (NT-45)

24. Neither a "Phase I review" nor a "Phase II review," as outlined in the Program Guidance Manual, was done prior to issuance of Marquise's permit. (NT-39, 53)

25. A Mine Site Assessment was conducted as part of the review of Marquise's permit application. (Exhibit B)

26. Reports and comments were solicited from the Pennsylvania Game Commission, the Pennsylvania Fish Commission, DER's Bureau of Water Quality Management, the Pennsylvania Historical and Museum Commission, and the Soil Conservation Service. Field reports were also obtained from the mine site inspector and the geologist and hydrogeologist involved in the review process. (NT-47; Exhibit B)

27. Mr. Pongrac prepared a written report incorporating the findings of the aforesaid reviews. (NT-48, 49; Exhibit B)

28. The review prompted the decision that the Lower Kittanning seam and the Lower Kittanning Rider (Rider) seam be removed from the permit because of the potential for the production of acid mine drainage (AMD). (NT-45, 54-55)

29. There is a history of AMD being produced out of the Lower Kittanning and Rider seams. (NT-50, 54)

30. The following conditions were inserted into the permit based on Mr. Pongrac's review:

a) Binder, bony and pit cleanings should be special handled because of the potential for AMD. (NT-46, 51)

b) The pit floor should be limed at 20 tons per acre to neutralize any cleanings not collected. (NT-46, 51)

c) No mining should be conducted on slopes exceeding 20 degrees to prevent soil erosion to the road and St. Clair Run. (NT-47)

d) Erosion and sedimentation ponds should be of sufficient capacity to hold the run-off from rain, storm or snow melt in order to reduce chances of flooding. (NT-47)

31. There are no federal guidelines for the preparation of a CHIA. (NT-32)

DISCUSSION

The appellant has the burden of proof in this case, i.e., the burden of convincing the Board by a preponderance of the evidence that the Department abused its discretion or acted in violation of the statute or regulations in the issuance of this permit. 25 Pa.Code §21.101(a) and (c)(3).

In his notice of appeal, the appellant asserts that the permit in question was issued in violation of section 315(c) of the Clean Streams Law, 35 P.S. §691.315(c), because the Department, in issuing the permit, allegedly failed to consider the cumulative impact of all mining in the area, the probable impact of this particular mining operation, and its effect on hydrology and water availability. Section 315(c) reads as follows:

> The application for a permit to operate a mine shall include a determination of the probable hydrologic consequences of the operation, both on and off the site of the operation, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the site of the operations and surrounding areas so that an assessment can be made by the department of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability: Provided, however, That this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency: And provided further, That the permit shall not be approved until such information is available and is incorporated into the application.
>
> 35 P.S. §691.315(c)

The 1980 amendments to the Clean Streams Law were enacted to procure primacy for the State with respect to the regulation of surface mining and to

permit the delegation of enforcement authority to the Department. The language of section 315(c) is almost identical to that of the corresponding federal statute, the Federal Surface Mining Control and Reclamation Act ("Federal Surface Mining Act"), Act of August 3, 1977, P.L. 95-87, as amended, 30 U.S.C. §1201, et seq., at §1257(b)(11),[2] and imposes the same burden on the applicant for a mining permit and upon the issuing authority.

The applicable regulation at 25 Pa.Code §86.37(a)(4) reads as follows:

> (a) No permit or revised permit application will be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following exist:
>
> * * * * *

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[2] 30 U.S.C. §1257(b)(11) specifies that an application for a surface coal mining permit shall contain, among other things--

> (11) a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability: *Provided, however*, That this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency: *Provided further*, That the permit shall not be approved until such information is available and is incorporated into the application;

> (4) The assessment of the probable cumulative impacts of anticipated coal mining in the general area of the hydrologic balance as described in §87.69, §88.49, §89.36 or §90.35 has been made by the Department, and the activities proposed under the application have been designed to prevent damage to the hydrologic balance within and outside the proposed permit area.

In addition to the statute and regulation, the Department developed a Program Guidance Manual which became effective March 1, 1988. (FF 9)[3] This Guidance Manual proposed the creation of a Cumulative Hydrologic Impact Assessment (CHIA) to determine the cumulative hydrologic impacts of proposed mining activities on a designated watershed. (FF 9) This was to be done in two phases and was to provide baseline information for the Department and the industry to evaluate potential problems of mining, past and future, on the water quality of the particular watershed. The first phase was to contain basic information about the watershed to give guidance in permit application reviews. (FF 11) Phase II was to incorporate all of the information known about the watershed from all prior permit applications together with geology, stratigraphy, soil and land use of the area. (FF 12) A third aspect of the Guidance Manual was the Mine Site Assessment (MSA) which was to be completed by the District Office of DER for each proposed mining area, and placed in the data base for the CHIA of the particular area as well as the CHIA central files. This summary was to include an evaluation of the anticipated cumulative impacts of the mining operation on the quality and quantity of the water within the hydrologic unit. This MSA also required the compilation of a hydrologic impact assessment for each mine permit area as well as the potential hydrologic impacts of the proposed mining activities, a summary of

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[3]"FF", where used, means "Finding of Fact" as set out earlier in this adjudication.

the measures proposed to mitigate the potential impacts, and any special conditions or restrictions imposed. (FF 13)

Upon re-examination of the CHIA program in 1989, the Department determined that the Phase I and II reviews were of little or no value because they provided information pertinent to only one given point in time and were not helpful to the Department overall. (FF 18) In addition, all of the information in a Phase I report can be found in the permit application files. (FF 15) Because it was determined that the Phase I and II reviews were an inefficient use of resources, the Department, in late 1989, discontinued conducting them as part of the CHIA program, although they still remain in the Program Guidance Manual. (FF 19) The MSA, on the other hand, remained and still remains an active part of the CHIA program. (FF 20)

Prior to the issuance of Marquise's permit, an MSA was conducted. (FF 25) For the reasons detailed above, no Phase I or II reviews were conducted as part of the permit application review process. (FF 24)

The appellant focuses primarily on the last two phrases of section 315(c) of the Clean Streams Law, 35 P.S. §691.315(c), and makes the assertion that the two phrases or "provisos" have not been complied with.

These read as follows:

> "Provided, however, that this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or state Agency: and provided further, that the permit shall not be approved until such information is available and is incorporated into the application."

In his reply brief, the appellant states, "There is no question but that Phase I and Phase II of the CHIA [guidelines in the Program Guidance Manual]

were developed to comply with the two provisos." The appellant asserts that since the Phase I and Phase II analyses were not conducted for the watershed in question, the permit was granted in violation of the statute.

There are two problems with this approach: the appellant's reading of what is required by the statute, and the raising of a program guidance manual, an inside Agency document, to the stature of a statute or regulation. We will deal with the second by pointing out that a guidance manual is exactly that and no more; it is to provide guidance to the rank and file employees of the Department and as such is essentially an internal departmental document. It is not intended as a measuring stick or guide with which to evaluate departmental action. It is not a statute or a regulation and is not entitled to the weight of either of these. Pennsylvania Human Relations Commission v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671 (1977); Western Pennsylvania Water Co. v. DER, EHB Docket No. 88-325-E (Adjudication issued February 22, 1991).

In Western Pennsylvania Water, supra, the Board reviewed DER's "General Policy and Procedure for the Review of Water Allocation Permit Applications" (General Policy). In finding the General Policy to be a statement of policy rather than a regulation, the Board held, "Turning to DER's General Policy itself, we see it as a narrative of how DER goes about conducting a permit review. It is not a binding obligation of general applicability and future effect...We do not see this General Policy as establishing a standard of conduct having the force of law..." Id. at p. 42. Likewise, in the present case, the Program Guidance Manual provides guidance in conducting a CHIA. As such, DER is free to discontinue any practices or procedures contained therein as long as the discontinuance thereof is not

contradictory to what is required by statute or regulation. Thus, DER was under no obligation to conduct a "Phase I" or "Phase II" review simply because these procedures are contained in the manual's guidelines as being part of a CHIA.

The important question involves an interpretation of what is required under section 315(c) of the Clean Streams Law by way of a hydrologic assessment and whether DER fulfilled that requirement in granting Marquise's permit application. The issue becomes whether the Department considered all of the parameters of the law, without reference to the Program Guidance Manual which we have already determined is a non-binding guide.

Section 315(c) requires that DER make a determination of the probable hydrologic consequences of the proposed mining operation, both on and off the site. In making this evaluation, DER must review the following: the hydrologic regime of the area; the quantity and quality of surface water and groundwater, including dissolved and suspended solids; and an assessment of the probable cumulative impact of all anticipated mining in the area upon hydrology and water availability. The issue is, then, whether the Department, in reviewing Marquise's application for a mining permit, had before it in the application or its own files sufficient data to make the evaluation required by §315(c) of the Clean Streams Law. In reviewing Marquise's permit application, lead reviewer Thomas Pongrac evaluated the hydrology of the area and water quality of area streams, the effect on public and private water supplies, as well as the potential impact of the mining operation on the streams and surrounding area. (FF 21, 23) Mr. Pongrac's field review looked at the following: any discharges, seeps, or springs in the area; drill hole locations; and water quality on adjacent operations. (FF 22) In

addition, the permit application contained data on the geology and hydrogeology of the area. (FF 23(1)) Finally, as previously noted an MSA was conducted consisting of a summary of the anticipated hydrologic impact of the proposed mining operation and the steps to mitigate it. (FF 13, 25) Thus, DER's review consisted of a study of the hydrologic regime of the area, an evaluation of the quality and quantity of surface water and groundwater, and an assessment of the probable cumulative impact of mining on the area, as required by §315(c). It should also be pointed out that reports and comment were solicited from the Fish Commission and DER's Bureau of Water Quality Management, as well as from the mine site inspector and the geologist and hydrogeologist involved in the review process. (FF 26)

We specifically point out as noted hereinabove that the study conducted by the Department resulted in the elimination from the S.M.P. of any mining on the Lower Kittanning and Lower Kittanning Rider seams of coal based upon the history of AMD from these seams and the potential for further degradation of the waters of the Commonwealth by mining therein. (FF 28, 29) Additionally, by reason of the water quality issue it was ordered in the S.M.P. that binder, boney and pit cleanings were to be specially handled because of the potential for AMD. Further the operator was to lime the pit floor to neutralize the potential for AMD. With reference to the erosion and sedimentation issues of §315(c), the permit prohibited mining on slopes exceedin 20 degrees to prevent soil erosion reaching St. Clair Run. The permit also required that the sizing of the erosion and sedimentation ponds be sufficient so as to hold run-off from rain, storm, and snow melt to further reduce chances of flooding. (FF 30)

These eliminations are the result of a study of the hydrologic consequences of the operation, both on and off the mine site and make certain that the activities proposed under the application have been designed to prevent damage to the hydrologic balance within and outside the proposed permit area.

We find that DER's review properly evaluated the probable hydrologic consequences of Marquise's mining operation on the area and that the review met the requirements of §315(c) of the Clean Streams Law, 35 P.S. §691.315(c).

CONCLUSIONS OF LAW

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

2. The Department issued Surface Mining Permit No. 11890103 to the permittee Marquise Mining Corporation in conformity with 35 P.S. §691.315(c), and the review conducted by the Department met the requirements therein.

3. The Program Guidance Manual is a statement of guidance and is not a regulation or a statute and is non-binding.

O R D E R

AND NOW, this 2nd day of March , 1992, it is ordered that the appeal of John J. Bagnato is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 2, 1992

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

JOSEPH BLOSENSKI, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 85-222-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 3, 1992**

OPINION AND ORDER
SUR
APPLICATION FOR RECONSIDERATION

Robert D. Myers, Member

Synopsis

The Board refuses to reconsider an order admitting certain of Appellant's business records into evidence.

OPINION

Joseph Blosenski, Jr. (Appellant) has asked for reconsideration of the Board's Order of January 16, 1992 dealing, in part, with the admission into evidence of certain documents produced by Appellant in response to a request for business records. Appellant objects to our Order to the extent that it admits the documents into evidence, arguing that Appellant admitted only to the authenticity of the documents.

Since our Order was interlocutory, we could deny reconsideration without comment: *William Ramagosa, Sr. et al. v. DER*, 89-097-M (Opinion and Order issued December 12, 1991). However, because the challenged Order carried no explanation with it, we will provide Appellant with the rationale for our action.

The documents were the subject of repeated controversies prior to the hearing. At the outset of the hearing, the presiding Administrative Law Judge ruled that he was going to permit DER to offer the documents into evidence as Appellant's business records (N.T. 29). DER's legal counsel called Appellant as on cross examination as part of DER's case-in-chief. During this examination an agreement was reached among the litigants and the presiding Administrative Law Judge to avoid lengthy questioning of Appellant on every page of the business records.

The procedure agreed upon (at the suggestion of Appellant's legal counsel (N.T. 346)) required DER to formulate written Requests for Admission as to each record being introduced and required Appellant to provide written responses thereto. Appellant was specifically directed by the Admninistrative Law Judge to "admit or deny. And then with respect to those to which you have objection, also state objection" (N.T. 347).[1] Following a colloquy on the next day of hearings, the Administrative Law Judge ruled that all business records subsequent to May 14, 1985 (the date of the civil penalty assessment) were irrelevant (N.T. 395).

DER served its Requests for Admission by letter dated November 27, 1991. Appellant's responses were served by letter dated December 30, 1991. The responses contained admissions, denials and objections. On January 16, 1992 the Administrative Law Judge sustained all of Appellant's objections and admitted into evidence the remaining records as well as the responses pertaining thereto. Appellant now claims that our action was improper because DER had not formally moved the records into evidence and Appellant had not had an opportunity to object to their admissibility.

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[1] The agreement involved precise deadlines subsequent to the hearing for completion of this process and contemplated the possibility that another day of hearing might have to be scheduled to conclude Appellant's testimony on the records. Each litigant was given the option of requesting such a hearing after the Administrative Law Judge had ruled on any objections.

DER had moved the records into evidence *en masse* (N.T. 343-344), triggering objection from Appellant and resulting in agreement on the process described above. The process was designed to weed out those records which could not be identified and those to which Appellant had valid objections. It was obvious that the remaining records would be accepted into evidence and that some additional testimony might have to be presented with respect to them. The Administrative Law Judge properly assumed that Appellant had included in his responses all of the objections he had to making these documents part of the record in this case. Appellant's failure to do so was inexcusable.

ORDER

AND NOW, this 3rd day of March, 1992, it is ordered that Appellant's Application for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: March 3, 1992

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

READING COMPANY AND CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 90-192-MR (consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 3, 1992**

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

By Robert D. Myers, Member

Synopsis

In a consolidated proceeding challenging DER orders to Reading Company (Reading) and Consolidated Rail Corporation (Conrail) to extinguish an underground fire that has been burning for twenty years or more on a site previously owned by Reading Railroad and now owned in distinct portions by the Appellants, the Board finds that adequate evidence was presented to show the presence of the fire on Reading's portion of the site but not on Conrail's. Nonetheless, the Board rules that DER failed to present sufficient evidence to show that the fire violates the Solid Waste Management Act or the Air Pollution Control Act, or that it constitutes a public nuisance. Both appeals are sustained.

Procedural History

Reading Company (Reading) filed a Notice of Appeal on May 14, 1990, contesting an Administrative Order issued by the Department of Environmental Resources (DER) on April 11, 1990. This appeal was docketed at 90-192-MR. Consolidated Rail Corporation (Conrail) filed a Notice of Appeal on May 11,

1990, contesting another Administrative Order issued by DER on April 11, 1990. This appeal was docketed at 90-196-MR. Both Administrative Orders concerned an underground fire at Klapperthal Junction in Cumru Township, Berks County, and directed Reading and Conrail to extinguish it. On November 28, 1990 the appeals were consolidated at docket number 90-192-MR.

A hearing was convened in Harrisburg on June 4, 1991 by Administrative Law Judge Robert D. Myers, a Member of the Board. The parties, all represented by legal counsel, presented a joint partial stipulation of facts. At the close of DER's case-in-chief, Reading and Conrail each moved for a directed adjudication on the basis that DER had not made out a *prima facie* case. Reminding the parties that granting such a motion required the concurrence of a majority of Board Members, Judge Myers took the motion under advisement and directed the movants to proceed with their cases-in-chief. At this point, Reading and Conrail rested and the record was closed.

DER filed its post-hearing brief on July 26, 1991. Reading and Conrail filed theirs on August 23, 1991. DER filed a Reply Brief on September 19, 1991.[1] The record consists of the pleadings, the joint partial stipulation of facts, a hearing transcript of 100 pages and 2 exhibits.[2] In their post-hearing briefs, DER and Reading confine their arguments to the issue of whether DER made out a *prima facie* case. Conrail goes further and argues that, since the motion for directed adjudication was not granted and Reading and Conrail were directed to proceed with their cases-in-chief, the Board must decide whether DER has carried its burden of proof by a

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[1] Conrail and Reading, in letters docketed on October 9 and October 24, 1991, respectively, also have called the Board's attention to, and have argued the effect of, a recent decision of the U.S. Court of Appeals for the Second Circuit, *In re Chateaugay Corporation.*

[2] Numerous exhibits were filed with the Board prior to the hearing and the parties stipulated to the authenticity and admissibility of most of them (reserving some objections and limitations). However, only 5 exhibits were referred to during the hearing and only 2 were offered into evidence.

preponderance of the evidence. As noted above, Reading and Conrail rested without presenting additional evidence. Accordingly, the evidence to be considered is the same regardless of whether we hold DER to the *prima facie* case standard or preponderance of the evidence standard. We will discuss this later but, in the meantime, make the following.

FINDINGS OF FACT[3]

1. Reading is a corporation that on January 1, 1981 emerged from railroad reorganization under section 7 of the Bankruptcy Act (now repealed) pursuant to Memorandum and Order No. 2004 entered by the U.S. District Court for the Eastern District of Pennsylvania at docket number 71-828 (Stip.)[4] Since the name of the corporation was not changed by the reorganization, we will refer to the pre-bankruptcy corporation as Reading Railroad.

2. Conrail is a freight railroad statutorily created on April 1, 1976 under the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §701 *et seq.* (3R Act) (Stip.).

3. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes.

4. At the inception of the railroad reorganization proceedings Reading Railroad owned real estate (the Site) in Cumru Township, Berks County,

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[3] After a full and complete review of the record.

[4] The joint partial stipulation of facts.

near Klapperthal Junction. On April 1, 1976 Reading Railroad's trustees conveyed to Conrail a portion of the Site consisting, *inter alia*, of a railroad right-of-way approximately 50 feet wide. Reading Railroad retained the portion of the Site bordering the right-of-way on the east and southeast and extending to the Schuylkill River and Reading became the owner at the time of its emergence from the railroad reorganization proceedings (Stip.).

5. Conrail was authorized and directed by the 3R Act to acquire real estate and operate rail service over it. The right-of-way acquired from Reading Railroad is within the contemplation of the 3R Act and is part of Conrail's "Harrisburg Line" running between Harrisburg and Phoenixville, Pennsylvania (Stip.).

6. An underground fire has been burning at the Site for 20 years or more. The precise location of the fire and the nature of the burning materials have not been shown, but the following surface manifestations have been observed:

(a) heat and smoke (or steam) rising from fissures in the ground;

(b) yellow deposits along the fissures;

(c) odor similar to rotten eggs;

(d) craters and unstable surface areas;

(e) ash deposits on the ground; and

(f) absence of vegetation

(N.T. 12-13, 31-32, 37-38, 59-60, 70-71).

7. These surface manifestations are present on several acres of the Site east and southeast of the Conrail tracks. While this indicates that the

underground fire is present on Reading's portion of the Site, there is no competent evidence to establish that the fire extends beneath Conrail's right-of-way (N.T. 17, 31-32, 36, 60-62, 70-71, 78).

8. The area where the surface manifestations are present extends from a point approximately 15 feet east of Conrail's right-of-way to a point approximately 300 feet west of the Schuylkill River (N.T. 32, 78).

9. The area where the surface manifestations are present has been enclosed within a chain link fence, except on the side closest to the Schuylkill River (N.T. 31).

10. The area where the Site is located is uninhabited. Freight trains regularly use the tracks on Conrail's right-of-way with no restrictions on the hauling of hazardous materials (N.T. 14, 30, 41, 65-66).

11. When the underground fire causes surface vegetation to burn, Cumru Township's volunteer firemen are called to extinguish it. These firemen complain of safety hazards at the Site (N.T. 13, 18, 83).

12. On May 30, 1986 DER sent to Conrail a Notice of Violation (NOV) under 25 Pa. Code §129.14(a) and an NOV under the SWMA (Stip.).

13. DER conducted air sampling at the Site in September 1986. The data did not show a violation of any air pollution emission standard, any immediate threat or any significant public health risk caused by the underground fire (Stip.; N.T. 58, 64-65).

14. DER did no additional air sampling after September 1986. DER has taken no soil borings and has conducted no engineering studies involving the Site (N.T. 43).

15. Conrail installed a series of thermistors along its tracks and has monitored the ground temperature since 1988 (Stip.).

16. In accordance with the requirements of the Federal Railroad Administration, Conrail's track engineering personnel inspect the tracks at regular intervals for any defects (Stip.).

17. There is no evidence of any subsidence of Conrail's tracks or of any derailment of trains (N.T. 16, 20-22).

18. Since 1986 meetings have been held among representatives of DER, Reading, Conrail and Cumru Township in an effort to determine responsibility for the underground fire and what can be done about it (N.T. 15, 28-29, 32).

19. After Reading and Conrail failed to file a plan for extinguishing the fire, as requested by DER, DER issued the Administrative Orders which are the subjects of these consolidated appeals (Stip.; N.T. 34-35).

20. DER did not conduct any studies to establish that extinguishment of the fire was the safest remedy (Stip.).

21. Neither Reading nor Conrail submitted a plan within the time period set forth in the Administrative Orders. However, on March 15, 1991 Reading submitted a document entitled *Proposed Program: Extinguishment of a Fire on Reading Company land at Klapperthal Junction, Cumru Township, Pennsylvania, March 1991.* In response to Reading's document, Conrail submitted on April 19, 1991 a document entitled *Coordination Issues Affecting Reading Company's Implementation of Its Proposed Program to Extinguish Fire at Klapperthal Junction, Cumru Township, Pennsylvania* (Stip; N.T. 33, 36, 54, 73, 76).[5]

22. DER has met with officials of Reading, has reviewed Reading's submission but has not made a decision to approve or disapprove it (N.T. 36, 49, 73-74, 77).

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[5] Since the documents were not offered into evidence and since little testimony was presented concerning them, the Board is uninformed about the contents of the documents.

DISCUSSION

Under 25 Pa. Code §21.101(b)(3) DER has the burden of proof when it orders parties to take affirmative action to abate air or water pollution or any other condition or nuisance. The Administrative Orders involved in these consolidated appeals fall within the scope of this provision. In its post-hearing brief, DER calls our attention to an exception to the general rule (25 Pa. Code §21.101(d)) and asserts that Reading and Conrail have the burden of proof. DER's assertion comes too late.

In its pre-hearing memorandum, Reading contended that DER had the burden of proof. DER did not challenge this contention in its pre-hearing memorandum. At the opening of the hearing on June 4, 1991 Judge Myers stated the following (N.T. 6):

> There has been an agreement as to the order of proceedings with [DER] going first since it has the burden of proof, followed by [Reading] and then Conrail.

DER's legal counsel voiced no objection to this statement and proceeded with DER's case-in-chief. After Reading and Conrail moved for a directed adjudication on the basis of DER's alleged failure to prove a *prima facie* case, DER's legal counsel presented countering arguments but never challenged the placement of the burden of proof.

For DER to maintain belatedly that the burden lies with Reading and Conrail is unconscionable. Conrail calls it "mousetrapping" but that is too moderate a term for a practice so inherently prejudicial. The burden of proof remains with DER. To carry the burden DER must prove that the Administrative Orders are lawful and an appropriate exercise of DER's discretion: 25 Pa. Code §21.101(a).

We have no hesitancy in ruling that DER failed to establish either a *prima facie* case or a preponderance of the evidence case against Conrail. There is no competent evidence in the record to show that the underground fire or its surface manifestations are present on Conrail's right-of-way. Nor is there any evidence to suggest that Conrail started the fire or contributed to its continuance. While the fire's assumed proximity to the right-of-way should be a matter of concern for Conrail,[6] that alone does not empower DER under the SWMA, the APCA or section 1917-A of the Administrative Code of 1929, 71 P.S. §510-17, to compel Conrail to extinguish it. Conrail's motion for directed adjudication will be granted.

Reading's involvement is clearer and more substantial - The fire is on Reading's land and was burning prior to institution of the railroad reorganization proceedings. Is this a sufficient nexus to sustain DER's Administrative Order? Reading argues that it is not, for a variety of reasons, including the lack of scientific evidence. This deficiency, coupled with a dearth of other evidence with probative value, has made our task onerous. We do not know, for example, the nature of the burning material, the precise location of the fire or the components present in the emissions.[7] We know little more than that an underground fire is there.[8]

DER contends that the fire violates sections 601 and 610(3) of the SWMA, 35 P.S. §6018.601 and §6018.610(3), prohibiting the burning of solid

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[6] Findings of Fact 15 and 16 reflect steps taken by Conrail to monitor the fire's progress. Finding of Fact 17 suggests that these steps have been adequate, at least for now.

[7] As discussed in Finding of Fact 13, the only air sampling done by DER showed no violations of any emission standards. The details of the sampling data were not presented and we do not know what components were found or in what concentrations.

[8] We disagree with Reading that scientific evidence is necessary to establish the presence of the fire. In our opinion, the surface manifestations are such that even non-professionals can conclude that something is burning beneath the surface on Reading's portion of the Site.

waste without a permit from DER. But DER presented no evidence to show that "solid waste" is burning. While that term is given a broad definition in section 103 of the SWMA, 35 P.S. §6018.103, it does not cover the universe of combustible material. Coal ash and drill cuttings are specifically excluded. To establish a violation of the SWMA, it was incumbent upon DER to present evidence on the nature of the burning material. It did not do so.

DER also contends that the fire violates 25 Pa. Code §129.14(a) which provides that no person "may permit the open burning of material in an air basin." Cumru Township is in the Reading Air Basin, as defined in 25 Pa. Code §121.1, and smoke and odors are "air contaminants" according to section 3(4) of the APCA, 35 P.A. §4003(4). "Open burning", within the contemplation of the regulations (25 Pa. Code §121.1), is "a fire, the air contaminants from which are emitted directly into the outdoor atmosphere and not directed through a flue." "Flue," in turn, is defined as a "duct, pipe, stack, chimney or conduit permitting air contaminants to be emitted into the outdoor atmosphere...." DER argues that flues are man-made and not natural channels like the ground fissures involved here. Therefore, the air contaminants must be deemed to be emitted directly into the outdoor atmosphere.

DER cites no authority for its argument and we are unaware of any prior effort to bring underground fires within the ambit of open burning. In the absence of evidence to show that DER has interpreted this regulation to include underground fires, we believe that open burning (as the words suggest) is a fire in which the air contaminants enter the outdoor atmosphere directly and not by means of some natural or artificial passageway. This would exclude the underground fire on Reading's portion of the Site.

No violation of the SWMA or the APCA has been shown to exist. The only other statutory or regulatory provision cited by DER is §1917-A of the

Administrative Code of 1929, *supra*, 71 P.S. §510-17, which empowers DER to order the abatement of public nuisances. Since the underground fire has not been shown to be a statutory nuisance either under the SWMA or the APCA, DER can order its abatement only if it constitutes a common law public nuisance. In order to rise to that level, the fire must injure the community by producing material annoyance, inconvenience, discomfort or hurt: *Feely v. Borough of Ridley Park*, 112 Pa. Cmwlth. 564, 551 A.2d 373 (1988). Not only is there a total absence of evidence to prove such an injury, the evidence that does exist discredits the idea. The parties stipulated, and a DER witness acknowledged, that the area is uninhabited, that the fire hasn't threatened any nearby properties and that the air contaminants pose no public health risk (N.T. 64-66). Without evidence of public injury, there is no basis for DER's invocation of §1917-A of the Administrative Coe of 1929, *supra*.

We are sympathetic to DER's desire to bring about the extinguishment of this fire but we are unable to uphold its Administrative Orders on a record so deficient in essential evidence. Whether we measure DER's case by a *prima facie* or preponderance of the evidence standard, the result is the same.

CONCLUSIONS OF LAW

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

2. DER has the burden of proof.

3. DER failed to carry its burden of proof against Conrail.

4. Scientific evidence was not necessary to establish that an underground fire is burning on Reading's portion of the Site.

5. No violation of the SWMA has been shown.

6. No violation of the APCA has been shown.

7. No public nuisance has been shown to exist.

ORDER

AND NOW, this 3rd day of March, 1992, it is ordered as follows:

1. Conrail's motion for directed adjudication is granted and its appeal at docket number 90-196-MR is sustained.

2. Reading's motion for directed adjudication is granted and its appeal at docket number 90-192-MR is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

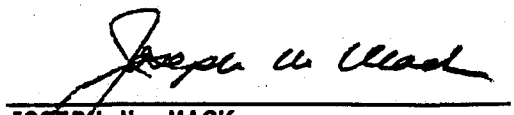
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 3, 1992

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

S.T.O.P., INC.	:	**EHB Docket No. 91-382-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 5, 1992**
and ENVIROTROL, INC., Permittee	:	

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss is denied. A non-profit corporation is a "person" which can seek relief before the Board. Dismissal for lack of standing is inappropriate where facts alleged in the answer to a motion to dismiss establish the potential for direct, immediate, and substantial harm to the appellants. The Board has no authority to award attorneys' fees under §2503(6) of the Judicial Code, 42 Pa.C.S.A. §2503(6).

OPINION

This matter was initiated by the September 12, 1991, filing of a notice of appeal by S.T.O.P, Inc. (STOP), seeking review of the Department of Environmental Resources' (Department) August 15, 1991, issuance of a hazardous waste storage permit to Envirotrol, Inc. (Envirotrol) under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* STOP challenges the issuance of the permit on a number of

grounds, including Envirotrol's alleged incineration and disposal of hazardous wastes without a permit and the Department's failure to apply the proper siting criteria or consider the health impacts on the adjacent community.

On November 14, 1991, Envirotrol moved the Board to dismiss STOP's appeal for lack of standing. According to Envirotrol's motion and supporting memorandum, STOP neither pleaded that it is a legal person with a right to seek judicial relief nor alleged any injury to itself or one of its members. STOP filed its reply to the motion on November 25, 1991, asserting that it is a non-profit corporation with the authority to sue; that Envirotrol knew or had reason to know that STOP was a non-profit corporation concerned with air pollution and other environmental problems in Beaver Falls; that members of STOP believe they have sustained severe and substantial health problems and reduced property values as a result of the operation of the Envirotrol facility; and, that STOP is entitled to attorneys' fees under 42 Pa.C.S.A. §2503(6) should Envirotrol fail to prevail on the motion, since Envirotrol's purpose in filing the motion was simply to harass STOP.

STOP is an entity which can seek relief before the Board. Under §4(c) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(c) *et seq.*, no action of the Department is final until "persons" adversely affected have the opportunity to appeal the action to the Environmental Hearing Board. STOP is a "person" within the language of §4(c) because STOP is a non-profit corporation and, according to the definition of "person" in §21.2 of the Board's rules of practice and procedure, 25 Pa. Code §21.2, any corporation is a "person."

In order to have standing to appeal, one must have a substantial interest directly and immediately affected by the agency action which is the subject of the appeal. William Penn Parking Garage v. City of Pittsburgh, 464

Pa. 168, 346 A.2d 269, 280-284 (1975), and Andrew Saul v. DER and Chester Solid Waste Associates, 1990 EHB 281, 282-283. A "substantial interest" is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 86; 555 A.2d 793, 795 (1989). An interest is "direct" if the matter complained of caused harm to the party's interest. *Id.* at 86-87, 555 A.2d at 795. The "immediacy" of an interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it. *Id.* at 87, 555 A.2d at 795. In other words, the injury cannot be a remote consequence of the action. William Penn, 346 A.2d at 283, and McColgan v. Goode, 133 Pa. Cmwlth. 391, 576 A.2d 104 (1991).

STOP has a substantial interest directly and immediately affected by the agency action which is the subject matter of this appeal. STOP's interest is "substantial." STOP is composed of members of the residential community surrounding the Envirotrol plant (STOP's reply, ¶ 10; notice of appeal, ¶ 46). STOP's notice of appeal asserts, among other things, that Envirotrol's activities have caused health problems in the residents of the community and that the permit issued to Envirotrol fails to adequately protect the health, safety, and welfare of the community (STOP's reply, ¶¶ 8 and 10; notice of appeal, ¶¶ 2 and 46). In light of the foregoing, STOP has established that its interest in the outcome of the litigation surpasses the common interest of all citizens in procuring obedience to the law.

STOP's interest is also "direct" and "immediate." The interest is "direct" because, by claiming that the Department failed to adequately protect the health, safety, and welfare of the community, STOP has asserted that the permit issuance harmed its interest. The interest, finally, is "immediate,"

because, if the assertions in the notice of appeal are true, there is a close causal connection between the action complained of and the injury to STOP. STOP asserts that past handling of hazardous waste at the Envirotrol facility has impaired the health of STOP members (STOP's reply, ¶ 16), and that measures in the permit are not sufficient to safeguard the health, safety, and welfare of the residents of the community (STOP's reply, ¶ 10; notice of appeal, ¶ 46).

As for Envirotrol's assertion that it must be evident on the face of its notice of appeal that STOP had standing, Envirotrol cites no authority which stands for this principle. The Board's rules of practice and procedure do not impose such a requirement. 25 Pa. Code §21.51, which governs the commencement, form, and content of appeals, does not address standing at all; it provides only that "the appeal shall set forth in separate numbered paragraphs the specific objections to the actions of the Department." The Board, moreover, has previously held that dismissal for lack of standing is inappropriate where facts alleged in the answer to a motion to dismiss established the potential for direct, immediate, and substantial harm to the appellants. Throop Property Owners Association v. DER and Keystone Landfill, Inc., 1988 EHB 391.[1]

Turning next to STOP's claim that it merits an award of attorneys' fees pursuant to §2503(6) of the Judicial Code, 42 Pa.C.S.A. §2503(6), we disagree. The Board has no authority to award attorneys' fees under that provision. The Commonwealth Court analyzed the applicability of §2503 to administrative agencies in Pennsylvania Board of Probation and Parole v. Baker, 82 Pa. Cmwlth. 86, 474 A.2d 415 (1984). It was held there that the Judicial Code applies only to the components of the unified judicial system

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[1] While there is no formal requirement to do so, it would behoove appellants to draft notices of appeal which set forth allegations of standing.

unless the term "tribunal" is used in the language of a specific section of the Code. Because tribunals are not specifically mentioned in §2503, that section does not give them the authority to award counsel fees. Duquesne Light Company v. Pennsylvania Public Utility Commission, 117 Pa. Cmwlth. 28, 543 A.2d 196 (1988); Pleasant Valley School District v. Commonwealth Department of Community Affairs, 127 Pa. Cmwlth. 85, 560 A.2d 935 (1989).

O R D E R

AND NOW, this 5th day of March, 1992, it is ordered that:

1) Envirotrol's motion to dismiss is denied; and

2) STOP's request for the award of attorneys' fees is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: March 5, 1992

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

WAYNE MCCLURE	:	
	:	
v.	:	**EHB Docket No. 92-023-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 5, 1992**

OPINION AND ORDER
SUR TIMELINESS OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

For an appeal from an action of the Department of Environmental Resources ("DER") to be timely filed with this Board, the appeal must be received by this Board within thirty days of Appellant's receipt of notice of the DER action, as opposed to merely being postmarked within that period. When the appeal is postmarked within this time period but received by the Board after that period has expired, the appeal is untimely and the Board lacks jurisdiction to hear same.

OPINION

On January 13, 1992, Wayne McClure filed an appeal with this Board. McClure appealed from a Compliance Order issued to him on December 10, 1991 by Rob A. Stermer, a Water Quality Specialist for DER. The Order (attached to Mr. McClure's Notice Of Appeal) says Mr. McClure is constructing a building on Coal Street in Middleport Borough, Schuylkill County, for which an individual or community sewage system is to be installed, without possessing a Sewage Disposal System Permit. The Order says this is a violation of 25 Pa. Code

§72.22 and Section 7(a) of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, (1965), as amended, 35 P.S. §750.7(a), and directs Mr. McClure to cease construction.

25 Pa. Code §21.52(a) provides in relevant part:

> jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action.

This section of our Rules has been held to mean that the untimely filing of an appeal divests this Board of jurisdiction to hear same. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Based on our understanding of this jurisdictional time constraint on appeals to the Board and simple addition, it appeared that this appeal might be untimely. As a result, on January 30, 1992, the Board issued Mr. McClure a Rule To Show Cause why the appeal should not be dismissed because it was untimely filed.[1]

Original counsel for Mr. McClure responded to the Rule To Show Cause by letter, the relevant paragraphs of which state:

> My records reflect that our appeal was mailed via first-class mail on January 8, 1992. The action appealed was served on December 10, 1991. I enclose a file copy of our appeal with certificate of service attached.
>
> I believe our appeal is both timely and perfected in accordance with 25 Pa. Code 21.52(a) and (b), particularly in light of 25 Pa. Code 21.33(a) which states tat [sic] the date of service shall be the date the document served is deposited in the United States mail.

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[1]The January 30, 1992 Rule To Show Cause amended the previously issued Rules To Show Cause issued in this appeal to correct errors in form therein.

Thereafter, on February 13, 1992 McClure's initial counsel withdrew, and new counsel entered his appearance and simultaneously filed a Reply To Rule To Show Cause As Amended on McClure's behalf.

The letter response from McClure's initial counsel confirms the December 10, 1991 date and does not contest the date the Board received the appeal, as reflected in our docket as being January 13, 1992. It thus confirms this appeal was untimely filed.

The letter from Mr. McClure's counsel does not state it is a response in the nature of a Petition For Leave To Appeal *Nunc Pro Tunc* and neither does the Reply. However, this appeal had to have been filed with us by January 10, 1992 to be timely, so absent allowance of an appeal *nunc pro tunc*, we lack jurisdiction over it. American States Insurance Company v. DER, 1990 EHB 338; Rostosky, *supra*.

For an appeal *nunc pro tunc* to be authorized by this Board, the appellant must comply with 25 Pa. Code §21.53(a). This means that good cause to grant leave to appeal must be shown. The courts have made it clear this means fraud or a breakdown in the processes of this Board must be shown by McClure. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986). Negligence or a mistake by an appellant or its counsel does not excuse a failure to file a timely appeal. State Farm Mutual Automobile Insurance Co v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980).

The only basis for allowance of an appeal *nunc pro tunc* offered on behalf of Mr. McClure by his initial counsel is counsel's reading of 25 Pa. Code §21.52(a) and (b) with 25 Pa. Code 21.33(a) and his conclusion therefrom that deposit of this appeal in the mail constitutes a filing with the Board. 25 Pa. Code §21.11(a) addresses this point providing that the date "of receipt

by the Board and not the date of deposit in the mails" is how we determine if an appeal is timely. Further, this issue has been before this Board previously. In Peter Tinsman v. DER, 1986 EHB 1153, we held that an appeal had to be filed with this Board to be timely, not merely mailed within that period. Just as was true there, so it is in this appeal that the form used to file Mr. McClure's appeal states in larger boldfaced type: "THIS FORM AND THE PROOF OF SERVICE MUST BE RECEIVED BY THE ENVIRONMENTAL HEARING BOARD WITHIN 30 DAYS AFTER RECEIPT OF NOTICE OF THE ACTION OF [DER] THAT YOU ARE APPEALING." [Emphasis added] Two sentences later the appeal form says: "You may wish to send your appeal to the [Board] by certified mail return receipt, so that you know your appeal was received by it within the required time." [Emphasis added] This form's language and our rule allow no conclusion other than that timely receipt by the Board is what is required. In accord, see Bradford Coal Company, Inc. v. DER, 1985 EHB 863; Eugene Petricca v. DER, 1984 EHB 519; and Luhrs et al. v. DER, 1983 EHB 251.

In the Reply filed by McClure's new counsel, counsel avers his nearly daily settlement negotiations with DER and the possibility that settlement of the DER/McClure dispute is imminent. The Reply also states that McClure believes DER does not oppose the appeal being considered timely, that there were delays occurring in this appeal from the change in counsel necessitated by a perceived a conflict of interest, that there is a lack of prejudice by the untimeliness of the appeal, that dismissal of this appeal is discretionary with the Board and that dismissal of the appeal is too harsh a sanction.

Neither the allegation of a recent change in attorneys representing McClure nor the occurrence of settlement negotiations involving McClure's present counsel and DER occurred within the time frame which could have any

impact on the timeliness or untimeliness of this appeal. They are subsequent thereto. Thus, they are excludable factors in determining whether grounds exist to grant an appeal *nunc pro tunc* in the instant proceedings, even if they might be argued to constitute grounds in some other proceeding.

It is not clear that DER has consented to this untimely appeal being considered timely as McClure "believes" but even if it did, that would not alter the untimeliness thereof. Jurisdiction is not a waivable issue and timeliness of an appeal to this Board is a jurisdictional issue, Friday v. DER, 1976 EHB 218. Parties cannot vest this Board with jurisdiction to hear a matter by consent when otherwise we have no authority to hear same. Charlestown Arms Corporation v. DER, 1979 EHB 347.

The same is true as to timeliness, and McClure's argument of a lack of prejudice to DER. Rostosky, *supra*.

McClure is also in error as to his allegation that dismissal of this appeal is not mandatory but within the discretion of the judge. Charlestown Arms Corporation, *supra*. Where the Board lacks jurisdiction because the appeal is untimely filed there is no discretion. Eltra Corporation v. DER, 1921 EHB 521. An appeal either is or is not untimely and we either have or do not have jurisdiction based thereon. Lebanon County Sewage Counsel v. Commonwealth, DER, 34 Pa. Cmwlth. 244, 382 A.2d 1310 (1978).

Finally, a question of dismissal as a sanction does not arise here, as should be clear from the above. Dismissal for untimeliness arises from the lack of jurisdiction in the Board to hear untimely appeals; it does not involve any question of impositions of any sanctions on McClure. Rostosky, *supra*; Eltra Corporation, *supra*; Charlestown Arms Corporation, *supra*.

Accordingly, we must make this Rule absolute and enter the following order.

ORDER

AND NOW, this 5th day of March, 1992, it is ordered that this Board's Rule To Show Cause dated January 30, 1992 is made absolute and the appeal of Wayne McClure is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 5, 1992

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M. DIANE SMI
SECRETARY TO THE

EUGENE NICHOLAS, t/d/b/a NICHOLAS PACKING COMPANY	:	
v.	:	EHB Docket No. 92-025-MR (consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 6, 1992

OPINION AND ORDER
SUR
REQUEST FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

A supersedeas is denied in the absence of proof of irreparable harm. Where Appellant seeks to gain additional compliance time in the hope of persuading DER to agree to a less costly solution to an odor problem, he cannot cite the compliance date as producing the irreparable harm associated with a plant shutdown. Any such harm will be viewed as self-inflicted.

OPINION

This appeal contests an Order[1] issued by the Department of Environmental Resources (DER) and requests a supersedeas. A hearing was held in Harrisburg on February 20, 1992 before Administrative Law Judge Robert D.

[1] The Order dated December 12, 1991, was issued to Nicholas Packing Company. In a Notice of Appeal filed on January 16, 1992, Nicholas Packing Company alleged that it was not a legal entity but a business operated by Eugene Nicholas. On January 30, 1992 DER issued an Order to Eugene Nicholas, t/d/b/a Nicholas Packing Company. This Order superseded the December 12, 1991 Order but made no other changes pertinent to our decision. On February 24, 1992 a Notice of Appeal was filed from the January 30, 1992 Order. Both appeals have been consolidated at the above docket number.

Myers, a Member of the Board, at which both parties appeared by legal counsel and presented evidence. The factual narrative that follows is based upon the evidence presented at the hearing.

Appellant has operated a meat packing plant in Green Township, Clinton County, since June 1987. The plant is located in a rural area but in close proximity to several residences. Adjacent to the plant is a wastewater holding tank, a concrete structure 50 feet in diameter and 12 feet deep with a capacity of 176,000 gallons. The top of the tank is open to the atmosphere and extends about 3 feet above ground level. The wastewater that goes into the tank, washdown water from the plant, contains a certain amount of manure, blood, fat and meat. The plant generates about 4,000 gallons of wastewater daily. Currently, the tank is about 2/3 full and is being maintained at that level by daily withdrawals of about 4,000 gallons which are trucked to an off-site sewage treatment facility.

Odor complaints began coming to DER from residents near the plant soon after operations began in June 1987. Although DER inspectors were not able to verify the presence of the odors beyond Appellant's property boundaries, they encouraged Appellant to seek a solution to the problem. During the first half of 1988 Appellant began adding a live bacteria treatment to the wastewater holding tank, on the advice of a chemical company. The odor complaints continued, despite this treatment, and Appellant sought other advice. In 1990, at the suggestion of Penn State University personnel, Appellant permitted a hard crust to form on the top of the wastewater in an effort to seal off the odors. This, also, did not stop the complaints even though the crust has a current thickness of about 12 to 14 inches.

DER inspectors first detected odors beyond Appellant's property boundaries in 1990, and a Notice of Violation (NOV) was sent to him on August

17, 1990. Appellant responded to this NOV by seeking advice from Penn State University and implementing their recommendations, as mentioned above. Odors beyond the property boundaries were detected by DER inspectors again during the spring of 1991, and another NOV was sent to Appellant on July 10, 1991. The odors continued, despite the NOV, and were detected by DER inspectors as recently as October 1, 1991.

On December 12, 1991 DER issued the Order from which the first appeal was taken. After reciting the alleged violations of the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*, and of Chapters 121 and 123 of the regulations at 25 Pa. Code, the Order presented Appellant with two options: (1) discontinue using the wastewater holding tank or (2) cover the tank and vent the emissions to an air pollution control device. Appellant was given 30 days to present a plan implementing one of these options with a mandatory completion date of March 1, 1992.[2]

At or about the time the first Order was issued, Appellant began using a different bacteria additive. While Appellant has been assured by the manufacturer that the additive will solve the odor problem, the effectiveness of the product will not be known for 9 to 12 months, the time necessary to dissolve the crust on top of the wastewater. This crust cannot be removed *en masse*, according to Appellant, because he needs DER approval to dispose of it by land application. DER claims that a land disposal permit was issued to Appellant on May 8, 1990 and there are no current impediments to using it.

The odors, as described by DER witnesses and nearby residents, are strong "dead animal" odors of rotting flesh, much more obnoxious than manure

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[2] As already noted, the December 12, 1991 Order was superseded by the January 30, 1992 Order. The second Order contains provisions essentially identical to those of the first Order.

and sewage odors. These residents, some of whom live as close as 100 yards from the wastewater holding tank and all of whom lived in their residences before Appellant began operations, have been forced to curtail or eliminate outdoor activities. This has been especially true in summer when the stench is worse and houses must be kept tightly closed. The nearest residents put their house up for sale about 3 years ago but have been unable to sell it. They began constructing a cabin on another piece of property and were planning to move into it when DER started taking enforcement action in 1991.

Appellant claims that, if he discontinued using the wastewater holding tank, he would have to cease operating the plant and lay off the 19 employees working there. To cover the tank in the manner directed by DER would cost about $40,000. Installing a venting system would add another $50,000 to $70,000 to the expense. Appellant is convinced that a diffused aeration system (estimated to cost $38,750) or a bioreactor or a centrifuge would eliminate the odors at a much lower cost.

He claims, however, that even a modest expense is more than the business can bear at this point. He owes $450,000 to a local bank and has been experiencing cash flow problems. The only financial documents presented were cash flow statements for undefined periods ended December 31, 1990 and June 30, 1991, respectively. These statements give little insight into the financial strength of the business but do indicate that it produces annual net incomes in excess of $100,000.[3]

Appellant also claims that the compliance date set by DER's Order (March 1, 1992) is impossible to meet. His inquiries have satisfied him that a cover cannot be manufactured and installed before May or June 1992 and that

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[3] Since the length of the periods is undefined, we cannot determine whether the net income figures represent quarterly, semi-annual or annual operations. Since the net incomes are $162,733.96 and $107,920.45, respectively, we can conclude that the annual amounts exceed $100,000 at the least and may amount to 4 times that amount.

one of the alternative systems he prefers cannot be installed any sooner. DER concedes that the March 1, 1992 date cannot now be met but maintains that compliance could have been achieved by that date if Appellant had begun immediately upon receipt of the first Order in mid-December 1991.

To be entitled to a supersedeas, Appellant must show by a preponderance of the evidence (1) that he will suffer irreparable harm, (2) that he is likely to prevail on the merits, and (3) that there is no likelihood of injury to the public or other parties. Where pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas cannot be granted: section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78. At the hearing, Appellant did not challenge the presence of the odor or the effect it has on the neighbors. His evidence, instead, focused on the corrective action mandated by DER and the limited time allowed to accomplish it. We conclude, therefore, that Appellant has conceded (for purposes of a supersedeas) that his operation is causing air pollution in violation of the APCA and, specifically, malodors in violation of 25 Pa. Code §123.31(b). He challenges only DER's exercise of discretion in choosing the type of corrective action required and in setting the date by which the action is to be taken.

Appellant's evidence on irreparable harm concentrates on these two aspects of the Order. He testified that discontinuing the use of the wastewater treatment tank will force a shutdown of the business - an event that has been treated in the past as producing irreparable harm: *Elmer R. Baumgardner et al. v. DER*, 1988 EHB 786. DER made no attempt to dispute this portion of Appellant's testimony. Accordingly, we will agree with Appellant that he will suffer irreparable harm if he is forced to discontinue using the wastewater holding tank.

Of course, DER's Order does not dictate discontinuance but gives Appellant an option either to discontinue using the tank or to equip it with air pollution control devices. Appellant argues that the second option also produces irreparable harm because his business cannot afford the cost of purchasing and installing the necessary equipment. Unfortunately for this argument, Appellant has not produced sufficient evidence to back it up. No financial statements or tax returns were presented to show the condition of the business. The cash flow statements that were presented (if they shed any probative light on Appellant's fiscal affairs) reflect a business that appears prosperous enough to bear the estimated cost of compliance.

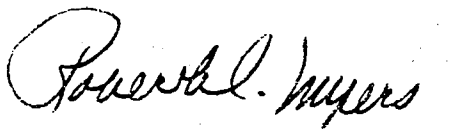
Appellant maintains nonetheless that, since it is physically impossible to purchase and install air pollution control equipment by March 1, 1992 (the compliance date), he has no choice but to shutdown operations on that date and to suffer the irreparable harm that entails. This contention would carry greater weight if it were supported by evidence of diligent efforts to correct the odor problem. We are aware of Appellant's attempts since 1988 to ameliorate the condition, but we are of the opinion that the NOV received by Appellant in July 1991 should have convinced him that more aggressive action was needed. The only action taken, however, was a switch to a different bacteria additive some four months later. While more decisive action was taken after receipt of the first Order, we have the strong impression that Appellant's goal is to gain additional compliance time in the hope of persuading DER to agree to some less costly solution to the odor problem. We do not criticize such endeavors (they are a common aspect of the regulatory process), but we must view any claim of irreparable harm produced by such temporizing as self-inflicted.

Appellant having failed to prove irreparable harm, he is not entitled to a supersedeas. It is unnecessary for us to discuss the other elements.

ORDER

AND NOW, this 6th day of March, 1992, it is ordered that Appellant's Request for a Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: March 6, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

DOREEN V. SMITH and EVELYN FEHLBERG	:	**EHB Docket No. 86-523-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
HERBERT KILMER and JOSEPH BENDICK, Permittees:	:	**Issued:** March 11, 1992

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of the Department of Environmental Resources' (Department) reinstatement of a suspended noncoal mining permit is dismissed. Where an appellant had notice of the Department's issuance of a noncoal mining permit and failed to appeal the permit to the Board, the appellant cannot collaterally attack the terms and conditions of the permit in her appeal of the Department's reinstatement of the permit. An adjacent landowner lacked standing to challenge the Department's reinstatement of the suspended permit where the only reason for the suspension was a dispute over whether the appropriate landowner consent for use of a private access road had been obtained.

The appeal of the Department's issuance of a noncoal mining permit is sustained. The Department's action was an abuse of discretion where the permit application did not meet the requirements of the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.* (Noncoal SMCRA) with regard to maps, reclamation plans, and landowner consent.

INTRODUCTION

This matter was initiated by the September 11, 1986, filing of a notice of appeal by Doreen V. Smith and Evelyn Fehlberg (collectively, Appellants) seeking review of the Department's August 7, 1986, issuance of Mining Permit (MP) 400393-58860801-01-0 to Herbert Kilmer (Kilmer MP). The notice of appeal also challenged what Appellants characterized as the Department's August 16, 1986, reissuance of MP 400905-58842501-01-0 to Joseph Bendick (Bendick MP).[1] Appellants alleged numerous legal deficiencies in the Department's actions, the majority of which focused on the Department's failure to implement and enforce the provisions of the Noncoal SMCRA.

By letter dated November 24, 1986, the Department advised the Board that, consistent with its policy regarding third party appeals, it would not defend its actions. On February 25, 1987, Permittee Kilmer was precluded from presenting his case-in-chief as a sanction for failure to comply with Board orders to file his pre-hearing memorandum.

A hearing on the merits was conducted on November 2, 1987, before Board Chairman Maxine Woelfling. Appellants acted as their own counsel at the hearing. Permittees made a motion on the record to dismiss the appeal as

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[1] The only mention of the date of the Department's reissuance of the Bendick MP is in Appellants' post-hearing brief. The date - August 16, 1986 - is the date by which the Department required Bendick to supply a corrected landowner consent form (commonly referred to as a Supplemental C form) or face further enforcement action (See Appellants' Exhibit (Ex.A) N). We will take this date to be accurate for purposes of this adjudication, since neither the Department nor the Permittees disputed it.

untimely; a ruling on the motion was deferred, as it could not be granted by a single Board Member.

Appellants raise a number of arguments in their March 18, 1988, post-hearing brief. They contend that the Department violated Noncoal SMCRA in issuing permits where: 1) the applicants failed to submit survey maps prepared by registered professional land surveyors or engineers; 2) the reclamation plans were inadequate; 3) adequate public notice was not given of the filing of the permit applications; 4) the Permittees' violations of Noncoal SMCRA were evidence of their lack of intent to comply with the law; and 5) proper landowner consent forms were not obtained. Appellants also claimed that their appeal was timely and that the Department erred in not placing distance limitations in the two MPs.

Permittees filed their post-hearing brief on April 15, 1988, contending that they had supplied the Department with the necessary information for issuance of the MPs and that the requisite landowner consent had been obtained and submitted to the Department. They also argued that the dispute regarding use of the Appellants' private roads was not properly before the Board and that there was no evidence of damage on Appellants' property from illegal blasting.

The Department did not file a post-hearing brief, and Appellants filed a reply brief on May 2, 1988.[2]

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellants are Doreen V. Smith and Evelyn Fehlberg, property owners in Franklin Township, Susquehanna County. (Notice of Appeal)

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[2] We will not summarize their arguments here, as they are essentially the same as those advanced in their post-hearing brief.

2. Appellee is the Department, the agency empowered to administer and enforce the Clean Streams Law, the Noncoal SMCRA, the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (Surface Mining Act), and the rules and regulations adopted thereunder.

3. Permittee Joseph Bendick is authorized by MP No. 400905-58842501-01-0 to conduct surface noncoal mining at a site in Franklin Township, Susquehanna County. (Ex. A-J)[3]

4. Permittee Herbert Kilmer is authorized by MP No. 400393-58860801-01-0 to conduct surface noncoal mining at a site in Franklin Township, Susquehanna County. (Ex. A-K)

5. Both the Bendick and Kilmer MPs are on property in which Joseph Bendick and his wife Susan have a life estate with the right to operate a quarry. (N.T. 80; Ex. A-I, B-B, and K-B)

6. The life estate was conveyed to Mr. and Mrs. Bendick by their son John Joseph Bendick and his wife Ida in June, 1973. (N.T. 80; Ex. A-I, B-B, and K-B)

7. Mrs. Smith's property, which is adjacent to the stone quarry on the southwestern portion of the Bendick property operated by Joseph Bendick, was purchased in March, 1984. (N.T. 12)

8. Joseph Bendick has operated a quarry on the site since 1966. (N.T. 80)

9. Mrs. Smith's home is approximately 550 feet from the quarry operated by Bendick. (N.T. 33)

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[3] References to the transcript will be denoted as "N.T.___," while references to the parties' exhibits will be "Ex. A-___" for the Appellants, "Ex. K-___" for Permittee Kilmer, and "Ex. B-___" for Permittee Bendick. The parties used both numerical and alphabetical designations for each exhibit; we will ignore those designations and employ those in the official transcript of the hearing.

10. Ms. Fehlberg's property, which is adjacent to the stone quarry on the eastern portion of the Bendick property operated by Kilmer, was purchased in spring, 1983. (N.T. 38, 53, 58)

11. A campground and a three-acre lake used for fishing and swimming are on the Fehlberg property. (N.T. 38-39)

12. There is a private road between the Smith and Fehlberg properties which runs north from Township Road 683 to the Bendick property. (Ex. A-G)

13. There is a dispute between Ms. Smith and the Bendicks concerning whether her property line is the eastern side of this private road. (N.T. 75-78)

14. When the Bendick MP was issued by the Department on August 15, 1984, it was issued pursuant to the Clean Streams Law, the Surface Mining Act, and the regulations adopted thereunder at 25 Pa. Code, Subchapter E of Chapter 77.[4] (N.T. 16; Ex. A-J)

15. Ms. Smith was aware in October, 1985, that Mr. Bendick had been issued a mining permit because, after receiving a copy of the Bendick MP, she complained to the Department that Mr. Bendick did not own the property on which his surface mining operation was located, as he had represented in his permit application. (N.T. 17-18, 46)

16. Mr. Bendick indicated in his July 17, 1984, application for his mining permit that he was the owner of the land for which the surface mining operation was proposed, and he signed the landowner consent form in the permit application. (Ex. B-C)

17. The Department advised Mr. Bendick in a November 21, 1985, letter from Walter A. Dieterle, Inspector Supervisor, that it had received a

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[4] These regulations were subsequently superseded by regulations promulgated pursuant to the Noncoal SMCRA. See 20 Pa.B. 1643 (March 17, 1990).

complaint that the landowner consent form in his mining permit application had not been properly executed and requested him to respond to the allegation that he was not the property owner. (Ex. A-M)

18. After he had requested Department attorneys to review the documentation supplied by Ms. Smith in support of her claim that Mr. Bendick was not the owner of the property on which the Bendick MP was located and was advised that her documentation was insufficient, Mr. Dieterle, in a letter dated July 24, 1986, requested Bendick to provide proof of ownership. (N.T. 104-105; Ex. A-N)

19. Dieterle's July 24, 1986, letter also suspended mining activities under the Bendick MP until Bendick submitted new landowner consent forms and advised Bendick that no action would be taken on any pending applications to mine the John Bendick property. (N.T. 104-106; Ex. A-N)

20. John Bendick signed a landowner consent form for the Bendick MP and it was received by the Department on or about August 16, 1986. (N.T. 108-109)

21. On Memorial Day weekend, 1986, blasting occurred on the portion of the Bendick property mined by Kilmer (Kilmer quarry). (N.T. 33-34)

22. Joseph Bendick told Evelyn Fehlberg's father of the impending blast on the Kilmer quarry in 1986. (N.T. 86)

23. The blast on the Kilmer quarry occurred approximately 600 feet from the Fehlberg residence and 250-300 feet from the Fehlberg property line. (N.T. 91)

24. Harold Burdick, a Department inspector, visited the Kilmer quarry in response to a complaint about blasting. (N.T. 61)

25. Kilmer was quarrying without a permit and was issued a compliance order requiring him to obtain a permit and reclaim the area. (N.T. 61-62)

26. Kilmer's permit application was dated June 17, 1986, and contained a landowner consent form executed by Joseph Bendick on that same date. (N.T. 70; Ex. A-K, K-C)

27. The permit application, which is incorporated by reference into the Kilmer MP, consisted of two pages: a face sheet identifying the operator, the type of operation, estimated production, erosion control measures, reclamation plan and type of reclamation; and the landowner consent form. (Ex. A-K, K-C)

28. The reclamation plan portion of the permit application was comprised of two boxes: the box titled "Reclamation Plan" where the operator was to fill in blanks after lines titled "Previous Land Use," "Proposed Land Use," and "Vegetation Plan;" and the box titled "Type of Reclamation" where the operator was to check either "Approximate Original Contour," "35^{o} Terrace (Max)," "Water Impoundment," or "Other (Specify)." (Ex. A-K, K-C)

29. The two boxes occupy a space of approximately 1 1/4 by 8 1/2 inches on the permit application. (Ex. A-K, K-C)

30. A Supplemental C form executed by John Bendick on August 29, 1986, and notarized on October 9, 1986, is part of the Kilmer MP file; the Kilmer MP was issued on August 7, 1986.

31. Permit applications for small noncoal operations such as Kilmer's are assigned low priority by the Department; little time is spent reviewing them and the permits are issued as soon as possible. (N.T. 111)

32. There is a dispute between Ms. Smith and the Bendicks concerning ownership of the road between their properties. (N.T. 75-78)

33. The number of trucks using the road to access the quarry varies; during the summer, when townships are taking shale out of the quarry, approximately 20 trucks per day traverse the road. (N.T. 35)

34. There is erosion occurring on the road, and no erosion control measures are in place. (N.T. 36-37)

35. The noise of the trucks is aggravated by the deteriorated condition of the road. (N.T. 37)

36. In March, 1985, blasting occurred on the Bendick MP approximately 350 feet from the Smith residence; Joseph Bendick attempted to notify Ms. Smith of the impending blast by knocking on her door. (N.T. 20, 33-34, 85)

DISCUSSION

In this third party appeal of the Department's issuance and purported reissuance of surface mining permits for the operation of two stone quarries, the Appellants have the burden of proving by a preponderance of the evidence that the Department's action constituted an abuse of discretion or an arbitrary exercise of power. 25 Pa. Code §21.101(b)(3); J. C. Brush v. DER and Rampside Colleries, 1990 EHB 1521. Our task in reaching this adjudication has been made difficult, however, by the Appellants' proceeding *pro se*[5] and the Department's maintaining its traditional posture with regard to third party appeals.

The Board has previously addressed the problems associated with prosecuting an appeal without benefit of legal counsel. More specifically, we have noted that we cannot impair the rights of the other parties to an appeal in attempting to provide guidance to *pro se* appellants and that a *pro se* appellant must assume the risk that its lack of legal knowledge may lead to an adverse ruling. Michael and Karen Welteroth v. DER and Clinton Township Board of Supervisors, 1989 EHB 1017, 1022-1023. Such an adverse ruling may be the result of the *pro se* appellant's inability to identify relevant issues,

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[5] What the Appellants were seeking review of by the Board was ascertained only after several exchanges of correspondence and the issuance of a rule to show cause why their appeal should not be dismissed for lack of perfection.

unfamiliarity with how to question witnesses, failure to obtain the admission of probative evidence, or ignorance of legal writing techniques. All of these deficiencies are present to some extent here.

Just as with *pro se* appellants, we also are not blind to the Department's plight in stretching its legal resources to participate in the numerous legal proceedings in which it is a party. Deferring to a permittee to defend the Department's actions in a challenge by a third party poses a risk to the Department that its policies and interpretations of statutes and regulations may be mischaracterized by the permittee, thereby leading to an adverse ruling. While the Department may discount such a risk in most situations, it would seem that where the administration and interpretation of a newly-enacted statute is at issue, as is the case here, the Department could exert more than a cursory effort to explain its action or position.

We will first address Permittees' motion to dismiss the appeal of the Bendick MP as untimely.

Bendick MP

Appellants challenge the Department's "reissuance" of the Bendick MP. However, we cannot agree with their characterization of what the Department did with respect to the Bendick MP.

The July 24, 1986, letter to Bendick contained the following passage:

> Therefore, I am enclosing copies of Supplemental C forms which must be completed and signed by the landowner. These forms must be returned by 8:00 A.M., August 16, 1986. Failure to comply will result in the revocation of your permit and an order will be issued to immediately reclaim any lands affected. Until this matter is resolved you are hereby ordered to cease any mining activities, and be advised that no permits presently pending will be issued on this property.
>
> (Ex. A-N, emphasis added)

The Department either ceased Bendick's mining activities or suspended his MP pending submission of proper landowner consent forms.[6] What the Department did on or about August 16, 1986, was reinstate Bendick's MP or reauthorize mining activities.[7]

The nature of the Department action being reviewed determines the scope of the Board's review. Here, the Board is limited to reviewing whether the Department's August 16, 1986, reinstatement/reauthorization as a result of Bendick's submission of what the Department found to be a proper landowner consent form was an abuse of discretion. However, the scope of the Board's review is further circumscribed as a result of an issue raised by Permittees.

Permittees have moved to dismiss this appeal as untimely filed. But, their motion is more appropriately treated as a motion to dismiss the appeal of the reinstatement of the Bendick MP as a prohibited collateral attack on the issuance of the underlying MP. In any event, disposition of the motion necessitates an examination of certain facts related to the issuance of the Bendick MP.

Where a third party appeals from a Department action, the 30-day appeal period does not begin to run until publication of notice of the Department's action in the Pennsylvania Bulletin. Lower Allen Citizens Action Group v. Department of Environmental Resources, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988). If the Department has not published notice of its action in the Pennsylvania Bulletin, the appeal period begins to run from the date the third party receives actual notice of the Department's action. New Hanover Township and Paradise Watch Dogs v. DER and New Hanover Corporation, EHB Docket No. 88-119-W (Opinion issued July 30, 1991).

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[6] In terms of practical effect here, there is no difference.

[7] Again, the practical effect is the same.

Here, we take official notice pursuant to 25 Pa. Code §21.109 that no notice of the Department's issuance of the Bendick MP was published in the Pennsylvania Bulletin during the period between the Department's issuance of the MP and the filing of the notice of appeal in this matter (August 15, 1984, to September 11, 1986). It is clear from the record that Ms. Smith received notice of the Bendick MP in October, 1985, nearly a year after its issuance, through obtaining a copy of the Bendick MP (N.T. 17-18, 46). Thus, she had the opportunity to appeal the permit to the Board at that time and raise the landowner consent issue. Because she did not do so, she may not collaterally attack the underlying permit through her appeal of its reinstatement. James E. Martin v. Department of Environmental Resources, 120 Pa. Cmwlth 263, 548 A.2d 672 (1985); Kennametal, Inc. v. DER, EHB Docket No. 87-227-W (Adjudication issued November 27, 1991).

As for Ms. Fehlberg, there is no evidence in the record of when she received actual notice of the issuance of the Bendick MP. But, a different jurisdictional defect arises in the case of Ms. Fehlberg's appeal of the reinstatement of the Bendick MP. Standing is a jurisdictional issue which may be raised at any time. Del-Aware Unlimited, Inc. v. DER *et al.*, 1990 EHB 759, 785. Given the underlying reason for the Department's suspension and subsequent reinstatement of the Bendick MP, we hold that Ms. Fehlberg does not have standing to contest the reinstatement of the Bendick MP.

As we have recently noted in Borough of Glendon v. DER and Glendon Energy Company, 1990 EHB 1501, where a party has standing to bring an appeal, it does not necessarily follow that it may have standing to raise certain individual objections to the Department's action. Rather, it can only raise

those factual or legal objections which are relevant to the allegations which conferred standing to appeal, Robert A. and Florence Porter v. DER, 1985 EHB 741.

Whether the landowner consent issue is characterized as a matter strictly between the Bendicks (i.e., involving only the land on which the quarry is situate) or one between the Bendicks and Ms. Smith (i.e., involving the access road from TR 683 to the Bendick quarry),[8] it is clear that Ms. Fehlberg does not have standing to raise it. The case of Mario L. Marcon v. DER and Valley Sanitation, 1988 EHB 1246, is on point. There, an adjoining landowner appealed a civil penalty assessment issued by the Department to the permittee, and the Board dismissed Marcon's appeal for lack of standing because he had no interest in the penalty assessment. The Board also noted that Marcon was not authorized by the Noncoal Act to act as a private attorney general, thereby raising any and all alleged violations of the Noncoal Act. Here, Ms. Fehlberg has no interest in the reoslution of the ownership dispute over either the access road or the quarry site. Therefore, we must dismiss her appeal of the reinstatement of the Bendick MP.

Kilmer MP

Before the passage of the Noncoal Act, which became effective on February 17, 1985, the surface mining of both coal and noncoal minerals was regulated by the Surface Mining Act. Permits for noncoal mining operations, as well as regulations governing noncoal surface mining operations adopted pursuant to the Surface Mining Act, were preserved by §24 of Noncoal SMCRA until "modified, repealed, suspended, superseded, or otherwise changed..."

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[8] See, *infra*, for a discussion of this issue.

under the terms of Noncoal SMCRA or regulations promulgated thereunder. Portions of the statute, such as the permit application requirements in §7 were quite detailed and required no implementing regulations to carry out.[9]

Appellants claim that the Department abused its discretion in not requiring Kilmer to submit an accurately surveyed map or plan certified by a registered professional engineer or land surveyor, as is required by §7(b) of the Noncoal Act. That section provides that:

> **(b) Map or plan required.** - As a part of each application for a permit, the operator shall furnish an accurately surveyed map or plan, in quadruplicate, on a scale satisfactory to the department, but in no event less than 1:25,000, showing the location of the tract or tracts of land to be affected by the operation contemplated and cross sections at intervals as the department may prescribe. The surveyed map or plans and cross sections shall be certified by a registered professional engineer or a registered professional land surveyor with assistance from experts in related fields and shall include the following:
>
> (1) The boundaries of the proposed land affected, together with the drainage area above and below the area.
>
> (2) The location and names of all streams, roads, railroads and utility lines on or immediately adjacent to the area.
>
> (3) The location of all buildings within 1,000 feet of the outer perimeter of the area affected and the names and addresses of the owners and present occupants.
>
> (4) The purpose for which each building is used.
>
> (5) The name of the owner of the affected area and the names of adjacent landowners, the municipality and the county.
>
> * * * * *

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[9] Even if we were to hold that §7 of Noncoal SMCRA were not self-executing and Subchapter E of Chapter 77 was applicable to the Kilmer permit application, the Department still abused its discretion in issuing Kilmer's MP, for Kilmer's permit application did not satisfy the requirements of 25 Pa. Code §77.102(f).

Kilmer's permit application (Ex. A-K, K-C) does not contain such a survey, much less any map. Furthermore, it is apparent from the interchange between Ms. Smith and Inspector Burdick that the Department consciously disregarded this requirement and, instead, substituted its own policy with respect to what it characterized as small operators:[10]

> BY MS. SMITH:
>
> Q I just want to get it clear that the policy of the Bureau of Mining is not to require the professional survey that, in other words, that's required by the Act?
>
> A On small non-coal operations.
>
> Q On small non-coal. Define small for me please?
>
> A That's all I can say.
>
> Q Depends upon perception?
>
> A Yes. It's on the small ones they don't.
>
> Q As far as they don't have to be bonded. That's part of the application that is written down?
>
> A Right.
>
> Q But it's just rule of thumb for the Bureau then?
>
> A We tell them they are to submit these -- the maps, you know, according to the application form, and that -- and then we have to see that they have the permit area staked out -- marked out showing where they are going -- where the mining permit is.
>
> Q All right.

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[10] This colloquy relates to the Bendick MP, which did contain a photocopy of what appeared to be a portion of a United States Geologic Survey topographic quadrangle map. However, it is equally relevant to the Kilmer permit application.

A It does not -- on a large operation, they have to go through registered surveyors and engineers, and everything, and bonded, and there's a lot more complications -- more to it, but they have never -- on the small permits.

Q It's never been required is what you are telling me? It's never been required?

A (The witness indicated in the affirmative.)

(N.T. 56-57, emphasis added)

Such a survey is essential to determining whether mining is to be conducted in areas prohibited by §11(c) of the Noncoal Act (*e.g.* within 300 feet of an occupied dwelling) or whether the operator is authorized by the landowner to conduct mineral extraction and reclamation on the site. Thus, it was an abuse of discretion to issue the Kilmer MP without submission of this information.

Similarly, Appellants assert that the Department abused its discretion in issuing the Kilmer MP where the permit application did not contain a reclamation plan, as is required by §7(c) of Noncoal SMCRA.[11] This portion of the Kilmer permit application contains what purports to be the reclamation plan:

Reclamation Plan: [Woodland-Brush]	**Type of Reclamation:**
Previous Land Use: [Woodland-Brush]	☒ **Approximate Original Contour**
Proposed Land Use: [Grasses & Trees]	☐ **35° Terrace (Max)**
Revegetation Plan:	☐ **Water Impoundment**
☐ **Grasses/Legumes**	☐ **Other (Specify)**_____
☐ **Trees/Shrubs**	
☐ **Other (Specify**	

This "reclamation plan" does not even remotely address the requirements of §7(c), and the Department's issuance of the Kilmer MP was an abuse of discretion.

---

[11] Section 7(c) contains a lengthy, detailed recitation of the requirements for reclamation plans.

Appellants claim that the issuance of the Kilmer MP was an abuse of discretion because the landowner consent form for the property on which the Kilmer MP was situate had been falsified and/or obtained after the issuance of the permit. There is no evidence from which we can conclude that the consent form was falsified and there is no relief we can grant now, since the form was submitted to the Department, albeit after the fact. However, there is another problem with the landowner consent furnished by Kilmer.

Here, the Department believed that the essence of the landowner consent problem was that John Joseph Bendick, rather than Joseph Bendick, the permittee, was the property owner. Thus, it felt the problem was resolved with the submission of the landowner consent form executed by Joseph John Bendick. But, this did not cure another significant landowner consent problem, namely that relating to the private road which runs north from Township Road 683 between the Smith and Fehlberg pro perties to the Bendick property and which is used as an access road for the Kilmer quarry.

Section 7(c)(7) of the Noncoal Act provides that:

> If the permit application is based upon leases not in existence on January 1, 1972, the application shall include, upon a form prepared by the department, the written consent of the landowner to entry upon any land to be affected by the operation and by the Commonwealth and any of its authorized agents, prior to the initiation of surface mining operations, during surface mining operations and for a period of five years after the operation is completed or abandoned for the purpose of reclamation, planting, and inspection or for the construction of any pollution abatement facilities as may be deemed necessary by the department for the purpose of this act. If the permit application is based upon leases in existence on or before January 1, 1972, the application for permit shall include upon a form prescribed and furnished by the department, a notice of the existence of the lease and a description of the chain of title:
>
> * * * * *

Obviously, the key phrase here is "lands to be affected by the operation." While the term "operation" is defined narrowly as "The pit located upon a single tract of land or a continuous pit embracing or extending upon two or more contiguous tracts of land," it must be viewed in the context of the Noncoal Act's definition of "surface mining" which incorporates "...all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto...." An operator must, logically, have access to the mine site to conduct reclamation, as well as mining.

There is an outstanding dispute between Ms. Smith and the Bendicks regarding ownership of the private road used for access to the quarries, and, as a result, there is no landowner consent form relating to the access road. Since the applicant must demonstrate compliance with the requirements of §7 of the Noncoal Act and it has been established here that §7(c)(7) has not been satisfied, the issuance of the Kilmer MP was an abuse of discretion.

Appellants claim that Permittee Kilmer did not give public notice of his permit application as required by §10(a) of the Noncoal Act.[12] There is no testimony or evidence otherwise to substantiate this claim, so we must hold that Appellants did not satisfy their burden of proof as to this issue.

There are several issues raised by Appellants which are not within the scope of this appeal because, as best as we can determine, they relate to Kilmer's compliance with the Noncoal Act and the terms and conditions of his MP. If Kilmer is not complying with the distance limitations of §11(c) of the

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[12] Notice of the permit application must be published in a newspaper of general circulation in the locality of the proposed operation for four consecutive weeks.

Noncoal Act or the requirement to file progress report in §12, that is an appropriate subject for enforcement action by the Department; these instances of non-compliance with the terms and conditions of the permit have no relevance to determining whether the Department abused its discretion in issuing the permit.

Finally, Appellants contend that the Department should not have issued Kilmer's MP because of the allegedly illegal blasting he performed on the site. While the blasting occurred before Kilmer had obtained a MP, we cannot hold that the Department was obligated to deny the permit application submitted by Kilmer to cure his violation, especially where we have evidence of only one blast. Furthermore, if the Department intends to deny a permit on the basis of the applicant's lack of ability or intention to comply with the law, it must follow the procedure prescribed in §8(b) of the Noncoal Act.

For the foregoing reasons, the Department's issuance of the Kilmer MP is reversed.[13]

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to this appeal.

2. Appellant Smith is precluded from raising the issue of proper landowner consent in her appeal of the Department's reinstatement of the Bendick MP because of her failure to appeal the issuance of the permit.

3. Appellant Fehlberg has no standing to contest the Department's reinstatement of the Bendick MP.

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[13] We are cognizant that the Environmental Quality Board is empowered by §26(a) of the Noncoal Act to, through the promulgation of regulations, "waive the permit requirements for any category of surface mining operation which it determines has an insignificant effect upon the safety and protection of life, health, property and the environment." The Quality Board may also authorize the issuance of general permits for operations which, because of their similarity, may be regulated by standardized conditions. A regulation authorizing a general permit for small (less than 2000 tons per year mined) noncoal operations was promulgated at 25 Pa. Code §77.108. The MP application submitted by Kilmer does not even meet these relaxed application requirements (*e.g.* 25 Pa. Code §77.108(a)(2), (3), (5), (8), and (9)).

4. Appellants have the burden of proving by a preponderance of the evidence that the Department abused its discretion in issuing the Kilmer MP. 25 Pa. Code §21.101(c)(3).

5. The Department's issuance of the Kilmer MP was an abuse of discretion where the applicant failed to submit an accurately surveyed map or plan in accordance with §7(b) of the Noncoal Act.

6. The Department's issuance of the Kilmer MP was an abuse of discretion where the permit application did not contain a reclamation plan meeting the requirements of §7(c) of Noncoal SMCRA.

7. Landowner consent is required under §7(a) of Noncoal SMCRA for a private road used for access to a noncoal operation.

8. The Department's issuance of the Kilmer MP was an abuse of discretion where there was an unresolved property dispute relating to the private road used for access to the proposed operation.

9. Appellants did not sustain their burden of proving that Kilmer did not publish notice of his application for a permit in accordance with §10(a) of Noncoal SMCRA.

10. Issues relating to a permittee's compliance with the terms and conditions of his permit are not properly raised in a challenge to the issuance of the permit.

11. If a noncoal MP is to be denied on the basis of an applicant's lack of ability or intention to comply with the law, the procedure in §8(b) of Noncoal SMCRA must be followed.

EHB Docket No. 86-523-W

cc: **Bureau of Litigation**
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Southeastern Region
For Appellant:
Doreen V. Smith
Evelyn Fehlberg
Montrose, PA
For Permittees:
Robert G. Dean, Esq.
Montrose, PA
bl

O R D E R

AND NOW, this 11th day of March, 1992, it is ordered that:

1) The appeal of Doreen Smith and Evelyn Fehlberg of the reinstatement of the Bendick MP is dismissed; and

3) The appeal of Doreen Smith and Evelyn Fehlberg of the issuance of the Kilmer MP is sustained and the issuance of the permit is reversed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 11, 1992

cc: See following page.

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M. DIANE SMITH
SECRETARY TO THE BOAI

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 90-540-CP-E
MONESSEN, INC.	:	Issued: March 11, 1992

OPINION AND ORDER SUR MOTION FOR PARTIAL SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

In this civil penalties matter, the Board grants the Department of Environmental Resources' (DER) motion for partial summary judgment as to the liability of a National Pollutant Discharge Elimination System (NPDES) permittee for 123 separate violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.301 and 307, based upon 123 exceedances of the permit's effluent limitations reported to DER in the permittee's Discharge Monitoring Reports (DMRs). On the basis of the reasoning found in Connecticut Fund For The Environment, Inc. v. Upjohn Co., 660 F.Supp. 1397 (D. Conn. 1987), the permittee-defendant's claim that its DMRs overstated the amount of oil and grease in its discharges does not present a genuine issue of material fact precluding our entry of summary judgment on the issue of liability. Nor does the permittee-defendant's assertion that it has "defenses" and "mitigating factors" to meet DER's claims

that its discharges were willful preclude our entry of partial summary judgment, as willfulness is examined in relation to the amount of the civil penalty to be assessed and not the defendant's liability.

OPINION

This matter was commenced on December 12, 1990, by DER filing with the Board a Complaint For Civil Penalties against Monessen, Inc. (Monessen) pursuant to §605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 (Clean Streams Law). The first three counts of DER's complaint alleged Monessen had discharged industrial waste from its waste treatment facility at its coke and coke by-products manufacturing plant (coke plant) in the City of Monessen, Westmoreland County, into the Monongahela River in willful violation of its amended National Pollutant Discharge Elimination System (NPDES) Permit (No. PA 0001554) and various provisions of the Clean Streams Law.

Presently before the Board is DER's Motion For Partial Summary Judgment, seeking judgment in DER's favor on the issue of Monessen's liability for the effluent limitation violations set forth in DER's complaint. DER's motion is supported by an affidavit and memorandum of law, as is Monessen's Reply in Opposition.

We have authority to grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law. Snyder v. Commonwealth, DER, ___ Pa. Cmwlth. ___, 588 A.2d 1001 (1991). Additionally, we must view the motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

It is undisputed that Monessen owns and operates the coke plant located in the City of Monessen, Westmoreland County. It is also undisputed that on October 26, 1988, DER amended NPDES Permit No. PA 0001554 (Amendment 1) in order to transfer the permit, which had authorized Wheeling-Pittsburgh Steel Corporation to discharge waste into the Monongahela River, to Monessen, and that on October 18, 1989, DER again amended NPDES Permit No. PA 0001554 (Amendment 2). The parties agree that Amendment 1 established effluent discharge limitations for the coke plant's Outfall 106, imposing monthly averages and daily maximums for ammonia, oil and grease, and phenol, and that Amendment 2 amended these discharge limitation amounts and imposed monthly average and daily maximum amounts for cyanide as well. It is also clearly agreed that Amendment 1 imposed both average monthly and daily maximum amounts for Total Suspended Solids (TSS) at the coke plant's Outfalls 203 and 103; these limitations were not amended by Amendment 2. The parameters imposed by these effluent limitations are set forth in DER's motion and exhibits and are admitted by Monessen's Reply.

Monessen submitted to DER Discharge Monitoring Reports (DMRs) for the period from November 1988 through October 1990 (complaint DMRs), monitoring the levels of the pollutants in its discharges at Outfalls 106, 203, and 103. Such DMRs are required by both state and federal law. See 25 Pa. Code §92.41 and 40 C.F.R. §122.41(l)(4)(i). Further, under 40 C.F.R. §122.22(d), which was promulgated pursuant to the Federal Water Pollution Control Act, Act of June 30, 1948, 33 U.S.C. §1251 *et seq.*, "Federal Act", Monessen was required to attest to the accuracy of its DMRs. DER's regulations at 25 Pa. Code §92.41(f) provide that the monitoring requirements imposed by the section shall be consistent with any national monitoring, recording, and

reporting requirements. Thus, the Pennsylvania regulations impose the attestation requirements of the federal regulations. Monessen's authorized agent, Richard A. Herman, admittedly certified the accuracy of Monessen's DMRs on its behalf.

In our decision in Lower Paxton Township v. DER, 1987 EHB 282, we ruled that an NPDES permittee can be found to be liable for permit violations by comparing the effluent limits set forth in the permit with the sampling results reported in its DMRs. In arriving at this decision, we adopted the reasoning of numerous federal court decisions which granted motions for partial summary judgment based upon exceedances of permit conditions reported in DMRs. See, e.g., Connecticut Fund For The Environment v. Job Plating, Inc., 623 F.Supp. 207 (D. Conn. 1985); Chesapeake Bay Foundation et al. v. Bethlehem Steel Corp., 608 F.Supp. 440 (D. Md. 1985).

Attached to DER's motion (as Exhibit 1) is the affidavit of DER Water Quality Specialist Supervisor Samuel C. Harper. Mr. Harper's affidavit states that he identified 123 violations of Monessen's NPDES permit effluent limitations by comparing the complaint DMRs with the permit's effluent limitations and that he circled each of these violations on copies of the complaint DMRs (attached to DER's motion as Exhibit 2).

Monessen does not contest the fact that it reported 123 exceedances, of its permit. Rather, it contends that two types of errors occurred which caused the reported amounts for oil and grease to be overstated and that it should not be held liable for any of the 57 exceedances of its permit for oil and grease contained in the complaint DMRs. In an affidavit attached as Exhibit 1 to Monessen's Reply, Richard A. Herman states that he prepared and submitted the complaint DMRs, but, after reviewing them, he believes that the

reported numbers did not accurately reflect actual amounts of the effluent in the discharges. This first type of error Mr. Herman describes as being caused by his misunderstanding, prior to October of 1990, of what he was to report as the daily maximum for oil and grease. He says the oil and grease discharge on any day was supposed to be the average of the "grabs" taken on that day, and that the reported daily maximum oil and grease parameter on any monthly complaint DMR was supposed to be the maximum of the average daily grab during the month, not the maximum (without any averaging) of all the individual grabs taken during the month. The exhibit attached to his affidavit (Exhibit A) states that had this method been employed, only 18 exceedances of oil and grease would have been reported in the DMRs. The second type of error is the analytical procedure used to measure the amounts of oil and grease in the discharges at Outfall 106. Mr. Herman believes the freon extraction method which was used to measure the oil and grease, as required by Monessen's permit, falsely interprets sulfur as oil and grease, so the high values for oil and grease reported in the DMRs were probably due to the presence of sulfur in the discharges. Herman states that beginning in May of 1990, he directed that the freon analysis of the samples be supplemented by an alternative "infrared" method, and such infrared analysis results showed the discharge at Outfall 106 to be in compliance with the permit's limitations for oil and grease.[1] Herman continued to report the freon extraction test results in the DMRs because the permit specified use of that method, but,

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[1] Mr. Herman further states that the laboratory test results show the discrepancies between the infrared and freon extraction results are attributable to the presence of sulfur in the discharge.

beginning in May of 1990, he noted on the Complaint DMRs that the infrared method showed lower oil and grease values.

On these bases, Monessen contends none of the 57 violations of the effluent limitations for oil and grease discharges at Outfall 106 it reported in its DMRs ever actually occurred. Moreover, Monessen wishes to assert certain "affirmative defenses" and "mitigating factors" (e.g., it is entitled to permit conditions or exemptions for "upsets" and "start ups" and to credits for intake water pollutants, and that the testing procedures prescribed by its permit are inaccurate) to show the remaining 66 reported exceedances were not willful and that the civil penalty DER seeks to impose is excessive. Monessen's Reply does not describe these matters in any detail, however.

DER points to a number of federal court decisions which have rejected the argument by an NPDES permittee that the numbers reported in its DMRs cannot be held to constitute violations because of possible reporting inaccuracies. Included among these decisions is Connecticut Fund For Environment, Inc. v. Upjohn Co., 660 F.Supp. 1397 (D. Conn. 1987). Monessen, on the other hand, asks us to ignore the Upjohn decision and the cases cited therein and instead directs us to one federal decision in which summary judgment as to an NPDES permittee's liability was refused on the basis of allegations that the testing procedure employed was inaccurate: U.S. v. City of Moore, 24 ERC 1542 (W.D. Okl. 1985)[2]

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[2] The other case cited by Monessen in support of its position is Friends of the Earth v. Facet Enterprises, Inc., 618 F.Supp. 532 (D. N.Y. 1984), which denied summary judgment where a factual question was presented as to the accuracy of the DMRs (e.g., typographical errors). The Upjohn Co. court specifically noted it was making no ruling on the propriety of a claim of inaccurate DMRs where the inaccuracy allegedly resulted from typographical or (footnote continues)

As was noted by the court in Upjohn Co., *supra* at 1416, most courts that have considered the argument that the numbers reported in a permittee's DMRs cannot be held to constitute permit violations because of inaccuracies have rejected it. See, e.g., Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F.Supp. 284, 289 (N.D. N.Y. 1986) (claim of measurement error insufficient to defeat summary judgment for the reason that a defendant could always claim that its reports were inaccurate); Connecticut Fund For the Environment v. Raymark Industries, Inc., 631 F. Supp. 1283 (D. Conn. 1986) (claim of monitoring inaccuracy insufficient to defeat summary judgment); Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge, and Olcott, 579 F.Supp 1528 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985) (claim that permittee may have overzealously documented its own transgressions did not preclude summary judgment). To the contrary, the district court of Oklahoma in City of Moore, *supra*, concluded that the allegation of inaccuracy of the testing procedure used to derive the DMR amounts for biochemical oxygen demand (BOD) was sufficient to preclude a grant of summary judgment on the issue of the permittee's liability for the BOD violations.

This Board follows the district court of Connecticut's decision in Upjohn Co., *supra*, and the cases cited therein. The Clean Streams Law, 35 P.S. §§691.301 and 307, prohibits the discharge of pollutants into Commonwealth waters, without regard to the willfulness of the discharge, other than pursuant to a permit or other prior authorization by DER. Lower Paxton, *supra*. An NPDES permit satisfies this requirement. 25 Pa. Code

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(continued footnote)
clerical errors. Here, we note Monessen has made no allegation that its DMRs are inaccurate because of any typographical or clerical errors.

§§92.3 and 92.5. A discharge of industrial waste contrary to the terms and conditions of a permit also constitutes a public nuisance. 35 P.S. §691.307(c). Monessen was required to monitor its discharges and attest to the accuracy of its reports. Mr. Herman certified Monessen's DMRs on its behalf. Monessen cannot now claim that Mr. Herman overstated the reported exceedances of oil and grease limitations in its permit. Fritzshe, Dodge, and Olcott, *supra*. Nor can Monessen refute its own DMRs by claiming the testing method used to fulfill the obligations imposed by its NPDES permit resulted in overstated oil and grease amounts in its DMRs. Upjohn Co., *supra*. Likewise, Monessen's assertion that it has "affirmative defenses" and "mitigating factors" which it will prove at the hearing to show there have been no willful violations on its part does not show any genuine issue of material fact precluding our entry of summary judgment on the issue of liability, since the willfulness of the violations is irrelevant to the determination of liability.

Each of Monessen's 123 exceedances is a violation of §§301 and 307 of the Clean Streams Law, 35 P.S. §§691.301 and 691.307, for which Monessen is liable. By reaching this determination, we are not precluding the consideration of any other relevant evidence Monessen claims to have relating to the willfulness of the violations in relation to the amount of the penalty.[3] See 35 P.S. §691.605; DER v. Canada-PA, Ltd., 1989 EHB 319.

DER has established through Monessen's DMRs that it violated the Clean Streams Law on a number of occasions. There are no genuine issues as to any material fact, since Monessen's "defenses" have no basis as a matter of

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[3] Since DER's motion seeks a ruling only as to the issue of Monessen's liability, we are not called to rule on whether Monessen is precluded from raising any of its asserted "defenses" and "mitigating factors" with regard to the assessment of the penalty.

law. DER is thus entitled to partial summary judgment as to the 123 violations of Monessen's NPDES permit.

O R D E R

AND NOW, this 11th day of March, 1992, it is ordered that DER's motion for partial summary judgment is granted as to Monessen's liability for 123 violations of the Clean Streams Law, with the amount of civil penalties to be assessed at the hearing before this Board.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 11, 1992

cc: **Bureau of Litigation**
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Western Region
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M. DIANE SMITH
SECRETARY TO THE BC

DEAN A. TAYLOR	:	
	:	
v.	:	EHB Docket No. 91-485-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 11, 1992

OPINION AND ORDER
SUR TIMELINESS OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

Where the recipient of a Department of Environmental Resources ("DER") Order files his appeal therefrom with this Board more than thirty days after receipt of the Order, such an appeal is untimely and must be dismissed for want of jurisdiction.

OPINION

On October 10, 1991, DER issued an administrative order to Dean A. Taylor ("Taylor") to close his restaurant known as the T-Shake Shoppe because DER alleges he was operating it without a valid Eating and Drinking Place license. According to his Notice Of Appeal Taylor received DER's Order on October 11, 1991.

On November 13, 1991, the Board received Taylor's Notice Of Appeal from DER's Order. Because this appeal appeared to be untimely filed and the Board lacks the jurisdiction to hear untimely appeals under Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), the Board issued

Taylor a Rule To Show Cause why the appeal should not be dismissed as untimely.

25 Pa. Code §21.52(a) states that this Board's jurisdiction does not initially attach to appeals filed more than thirty days after the appellant receives written notice of DER's action. Adding thirty days to the October 11, 1991 date on which Taylor received DER's Order produces the date of November 10, 1991. November 10, 1991 was a Sunday and November 11, 1991 was Veteran's Day, a legal holiday, when this Board's Office was closed. Accordingly, to be timely filed, this appeal had to be received by this Board on or before November 12, 1991. It was not received until November 13, 1991 and hence was untimely filed.

In response to the Rule To Show Cause, Taylor wrote to the Board by letter dated February 6, 1992. In this letter he advised that he mailed his appeal on November 7, 1991 and he contends 5 days for postal service should be adequate. While this letter does not explicitly request that it be treated as Taylor's motion for leave to appeal *nunc pro tunc*, we will treat it as such since he appears *pro se*.

For an appeal *nunc pro tunc* to be authorized by this Board, the appellant must comply with 25 Pa. Code §21.53(a). This means that good cause to grant leave to appeal must be shown. The courts have made it clear this means fraud or a breakdown in the processes of this Board must be shown by Taylor. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986). Negligence or a mistake by an appellant does not excuse a failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980).

Taylor's letter states he mailed his appeal to this Board November 7, 1991 and that 5 days for postal service should be adequate. This length of time for delivery of the appeal by the postal service may be longer than the normal mail service from Taylor's town to Harrisburg, as he alleges but that does not show fraud or a breakdown in the processes of this Board. Moreover, this issue has been before this Board previously. In Peter Tinsman v. DER, 1986 EHB 1153, the Board ruled that an appeal had to be received by the Board within thirty days, not merely mailed within that period. 25 Pa. Code §21.11(a) of our rules contains this filing requirement as well. Further, the Notice Of Appeal form used by Taylor contains the boldfaced admonition: "THIS FORM AND THE PROOF OF SERVICE MUST BE RECEIVED BY THE ENVIRONMENTAL HEARING BOARD WITHIN 30 DAYS AFTER YOUR RECEIPT OF NOTICE OF THE ACTION OF [DER] THAT YOU ARE APPEALING." [Emphasis added.] Two sentences later, the appeal form says: "You may wish to send your appeal to the [Board] by certified mail return receipt, so that you know your appeal was received by it within the required time." [Emphasis added] This rule, the language on the Notice of Appeal form and our prior decisions allow no conclusion other than that timely receipt by the Board is what is required. In accord, see Bradford Coal Company, Inc. v. DER, 1985 EHB 863, and Eugene Petricca v. DER, 1984 EHB 519.

Accordingly, we must make this Rule absolute and enter the following Order.

O R D E R

AND NOW, this 11th day of March, 1992, it is ordered that this Board's Rule To Show Cause dated January 28, 1992, is made absolute and the appeal of Dean A. Taylor is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 11, 1992

cc: **Bureau of Litigation**
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Dean A. Taylor
Saxton, PA

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

ELEANOR JEANE THOMAS	:	
	:	
v.	:	EHB Docket No. 91-526-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
RESOURCE CONSERVATION CORP., Permittee	:	Issued: March 19, 1992

OPINION AND ORDER
SUR PERMITTEE'S PETITION TO DISMISS
APPELLANT'S APPEAL AS UNTIMELY

By Richard S. Ehmann, Member

Synopsis

Where an appeal by a third party is filed more than thirty days after DER has issued published notice of issuance of a permit in the Pennsylvania Bulletin, the appeal is untimely filed, and a Petition seeking dismissal based on untimeliness must be granted.

OPINION

On December 5, 1991, this Board received an appeal filed *pro se* by Eleanor Jeane Thomas ("Thomas") from the Department of Environmental Resources ("DER") issuance of Permit No. 101421 to Resource Conservation Corporation ("RCC"). This permit was issued to RCC on August 26, 1991 pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.101 *et seq.*, for operation of a hazardous waste treatment and disposal facility to be located in Shade Township, Somerset County.

On January 15, 1992, RCC filed a Petition To Dismiss Appellant's Appeal As Untimely. The Petition alleges DER issued the Permit on August 26, 1991 and notice of the permit's issuance was published in the Pennsylvania Bulletin dated October 5, 1991. The Petition then asserts that Thomas admits the deadline for filing the appeal has lapsed and that she is correct in this regard, so pursuant to 25 Pa. Code §21.52(a) the appeal is untimely and must be dismissed for want of jurisdiction.

In response, on February 3, 1992, Thomas filed her Petition To Dismiss Permittee's Petition To Dismiss The Appellant's Right For An Appeal On The Grounds The Permittee Did Not Stay Out Of The Appeal Process, But Constantly Interfered With The Appeal Process.[1] DER took no position on this timeliness issue and filed no response to RCC's petition.

Thomas is not a "party" as defined in 25 Pa. Code §21.2, but she is a third party appellant required to file an appeal within thirty days of publication of notice of DER's action in the Pennsylvania Bulletin. Lower Allen Citizens Action Group, Inc. v. Commonwealth, DER, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), affirmed on reconsideration, ___Pa. Cmwlth. ___, 546 A.2d 1330 (1988). Notice of DER's action was published in the October 5, 1991 Pennsylvania Bulletin. See 21 Pa. Bull. 4677. Accordingly, Thomas' appeal had to be filed with us by November 5, 1991 to be timely filed. It was not.

Thomas' responding Petition does not state that it seeks leave to appeal *nunc pro tunc* nor does it mention our rule concerning *nunc pro tunc*

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[1] On March 12, 1992, we also received an unsolicited addendum from Thomas which supplements her Petition's supporting Brief by adding two "arguments" thereto. Neither argument goes to the timeliness issue now before us. One addresses possible "superfund" interest in the Central City Landfill which Thomas contends is the permittee. The other deals with the alleged lack of a contract for a replacement of the source of the local water supply in the event the landfill contaminates the current source.

appeals (25 Pa. Code §21.53). Nevertheless, we will review it as if this is what is sought. For an appeal to be allowed *nunc pro tunc* good cause must be shown. The Courts have made it clear this means fraud or a breakdown in the processes of this Board must be shown by Thomas. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986). Negligence or a mistake by an appellant does not excuse a failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980).

In both her Notice Of Appeal and her Petition Thomas admits her appeal is untimely. In her Petition she says that though the Board's rules do not specify it, one more reason to allow her to appeal should be coercion by the permittee.[2] Thomas then alleges that RCC used its money and power by getting some people in this area to act against their own interest through abandonment of their separate appeal to this Board and by urging other local citizens to work against the continuation of that appeal. Thomas' Petition included a long series of attachments, which contain *inter alia* newspaper clippings, letters and circulars. A review of them with the unverified Petition suggests that rather than filing her own timely appeal, Thomas relied on an appeal filed with us by these other parties who subsequently abandoned it. Thomas says the decision to abandon this other appeal took the right to appeal away from many people including herself because when it was made, the

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2 In her Petition, Thomas raises many other issues relating to the merits or lack of merit in DER's issuance of this permit. These issues range from wetlands concerns through suggestions that RCC was incorrect in its projections as to the beneficial impact on the local economy from operation of the facility to arguments that Pennsylvania's laws on waste importation are too weak. Some of these issues are not of the type we could redress and none of them relate to good cause under 25 Pa. Code §21.53(a); accordingly, we have not addressed them herein.

time for filing a timely appeal had expired.[3] This allegation does not show fraud or a breakdown in the processes of this Board. It fails to show why Thomas could not have initially filed her own individual timely appeal if she wished to do so or how she was personally coerced out of doing so. Even if we assumed the truth of the assertions contained in the unverified petition and attachments, which we will not do, all they suggest as to Thomas and her right to seek leave to appeal *nunc pro tunc* is that Thomas failed to take a timely appeal in reliance on that abandoned appeal. Such allegations do not state cause to allow an appeal *nunc pro tunc*.

Accordingly, the decisions of the Commonwealth Court cited above compel us to enter the following order.

O R D E R

AND NOW, this 19th day of March, 1992, the Petition To Dismiss Appellant's Appeal As Untimely Filed by RCC is granted and this appeal is dismissed because it was untimely filed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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3 Thomas also makes allegations based on rumor. We will not act based on rumors which even the Petitioner refuses to dignify by calling them facts.

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 19, 1992

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

FRANKLIN TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 84-403-W**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
DELTA EXCAVATING & TRUCKING COMPANY, INC.,	:	
DELTA QUARRIES AND DISPOSAL, INC.,	:	
EARTHMOVERS UNLIMITED, INC., and	:	**Issued:** March 20, 1992
JOHN P. NIEBAUER, JR.	:	

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

By Maxine Woelfling, Chairman

Synopsis

The Board dismisses an appeal from the Department of Environmental Resources' (DER) denial of an application for reissuance of a solid waste permit and DER's concurrent revocation of the permit. In conducting a technical review of the application for permit reissuance, DER did not act in an arbitrary or capricious manner. The regulation which governs applications for permit reissuance, found at 25 Pa. Code §75.22(f), does not prohibit DER from conducting a technical review of an application for reissuance of a permit since it sets forth no standards for evaluation of the application. DER did not abuse its discretion in denying an application for permit reissuance where the applicant (the new owner and proposed operator of the disposal sites) failed to demonstrate that the soil and geologic conditions complied with the requirements of 25 Pa. Code §§75.24 and 75.33 and failed to demonstrate that the presence of closed depressions would not result in

contamination of the groundwater. DER properly revoked the underlying solid waste permit where the permittee relinquished all ownership and operating interest years before.

INTRODUCTION

This case involves a consolidated appeal from DER's denial of the application of John P. Niebauer, Delta Excavating and Trucking Company, Inc., Delta Quarries and Disposal, Inc., and Earthmovers Unlimited, Inc. (collectively, Delta) for reissuance of Solid Waste Permit No. 101105 (permit) and its subsequent revocation of the permit. The permit was issued to Landfill Acres, Inc. on May 21, 1980, and provided for the operation of two disposal sites in Franklin Township, Huntingdon County: a 26.5 acre sanitary landfill site (sanitary landfill) and a 60 acre Class III demolition debris site (demolition landfill). In 1982, Delta acquired ownership of the property from Landfill Acres, Inc., and on January 29, 1985, applied for reissuance of the permit as the new owner and the proposed operator of the sites. DER denied the application on August 1, 1985, and, on the same date, in a separate action directed to Landfill Acres, Inc., revoked the permit. DER denied Delta's application for three fundamental reasons. The first reason, based upon §503(d) of the SWMA, focused upon Delta's repeated violations of a consent order and agreement (CO&A), dated November 1, 1984, between DER and Delta and entered as a final adjudication and order by the Board at Docket No. 81-080-M. The second reason, based upon §503(c) of the SWMA, focused upon Delta's unsatisfactory record of compliance with environmental laws and regulations. The final basis rested upon the results of a technical review which indicated that the sanitary and demolition landfill sites were unsuitable for disposal activities. The Landfill Acres, Inc. permit also was revoked by DER based upon the results of this technical review.

Delta filed a timely appeal from the denial of its application with the Board on August 28, 1985, at Docket No. 85-357-M. Landfill Acres, Inc. did not appeal from the revocation of its permit. However, the Board allowed Delta to amend its appeal on November 8, 1985, to include the revocation, based upon Delta's unrefuted claim that it never received notice of DER's action. The Franklin Township Board of Supervisors' (Township) petition to intervene was granted by the Board on September 27, 1985. On September 17, 1985, Delta's appeal at Docket No. 85-357-M was consolidated at Docket No. 84-403-M with four related appeals docketed at Nos. 84-403-M, 85-212-M, 85-289-M and 85-327-M at Docket No. 84-403-M. These earlier appeals relate to the compliance issues cited by DER for rejecting Delta's application. Therefore, a brief review of these cases is in order.

The original appeal docketed at Docket No. 84-403-M was filed on December 4, 1984, by the Township from the entry of the CO&A of November 1, 1984, between Delta and DER. This CO&A related to Delta's operation of another landfill, also located in Franklin Township, Huntingdon County, and known as the Huntingdon site. In an order dated May 15, 1981, DER alleged that between 1978 and 1980 Delta had operated the Huntingdon site in a manner violative of the SWMA by overfilling the Huntingdon site and by accepting, storing, and disposing of unpermitted waste. The CO&A resolved several appeals.[1] As it related to the Huntingdon site, the CO&A required Delta to

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[1] The consent order and agreement was entered at Docket No. 81-080-M (consolidated), and included the following appeals: Docket No. 81-087-M, involved Delta's appeal from DER's order of May 15, 1981, finding that Delta had unlawfully operated the Huntingdon site and requiring remedition; Docket No. 81-080-M, involved Delta's appeal from DER's order of May 15, 1981, denying Delta's application to amend its permit to construct and operate an industrial waste trench at the Huntingdon site; Docket No. 81-102-W, involved Delta's appeal from DER's denial dated June 19, 1981, of Delta's application to construct and operate a second solid waste disposal site in Blair County; and Docket No. No. 82-080-H involved Delta's appeal from DER's order of February 4, 1982, imposing a bar upon approval of any further applications submitted by Delta. Until the bar was lifted in the CO&A of November 1, 1984, Delta was unable to file the application for reissuance of the Landfill Acres, Inc. permit. The Township was not a party to any of these appeals.

undertake specific remediation measures, submit a capping plan for DER's review and approval, provide appropriate bonding, and operate the site in accordance with all environmental laws and regulations. In its December 4, 1984, appeal from the entry of this CO&A, the Township challenged the adequacy of the remediation elements of the CO&A, contending that they were insufficient to correct the hazardous conditions at the Huntingdon site.[2]

The remaining three cases consolidated at Docket No. 84-403-M arose as a result of allegations that Delta had unlawfully disposed of solid waste in an area adjacent to the Huntingdon site. The wastes originated in the vehicle maintenance building owned and operated by Delta at the Huntingdon site. DER alleged that oily wastes exited the maintenance building via a floor drain and collected in a depression near the building. In DER's April 25, 1985, order, Delta was required to cease this disposal activity, pump the wastes from the depression, and analyze the wastes. Delta appealed this order at Docket No. 85-212-M. A civil penalty assessment followed on June 17, 1985, from which Delta appealed at Docket No. 85-289-M, and a second remediation order was issued by DER on July 5, 1985, from which Delta appealed at Docket No. 85-327-M.

These underlying appeals were consolidated on September 17, 1985, at Docket No. 84-403 with the agreement of all parties, since the appeals presented common issues relating to Delta's compliance with environmental laws

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[2] In the appeal docketed at No. 86-266-W, DER had advised Delta by letter that DER would only accept a capping plan for the Huntingdon site which met the requirements of the CO&A of November 1, 1984. The Board dismissed this appeal as moot at 1987 EHB 319 based on DER's issuance of an order on December 19, 1986, finding that Delta's Huntington site capping plan was unacceptable. Delta filed an appeal to the order of December 19, 1986, at Docket No. 86-691-W. In the case docketed at No. 86-614-W Delta filed an appeal from DER's letter of October 3, 1986, requiring Delta to implement a program to collect and treat contaminated groundwater at another disposal site located in Blair County as required by the CO&A of November 1, 1984. By order dated September 16, 1988, the Board stayed all proceedings at Docket Nos. 86-614-W and 86-691-W pending the outcome of Docket No. 84-403-W.

and regulations, as well as the CO&A.[3]

The parties also agreed that in the interests of judicial economy the consolidated appeal would be heard in stages, with the initial stage to deal with the technical reasons cited by DER for its rejection of Delta's application. Evidence regarding the compliance issues and the CO&A was to be deferred to the second stage and would be heard only if the Board found that DER had abused its discretion by conducting the technical review of the application. Therefore, this adjudication is limited to consideration of the technical issues.

Hearings on the merits of the technical issues were held over a period of twelve days from November 15, 1985, through January 22, 1986, before former Board Member Anthony J. Mazullo. Mr. Mazullo resigned from the Board before the parties filed their post-hearing briefs.[4] The matter was then reassigned to Board Chairman Maxine Woelfling on May 19, 1986, and she heard oral argument by the parties on June 30, 1986.

Delta essentially offered two arguments in its post-hearing brief to support its contention that DER had abused its discretion in denying the application and in revoking the Landfill Acres, Inc. permit. Delta contended that DER did not have the legal authority to conduct a technical review and evaluation of an application for permit reissuance under 25 Pa. Code

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[3] The Board was advised during the course of the hearings on the merits that Delta and DER had reached a settlement of Delta's appeal of the civil penalty assessment at Docket No. 85-289-M and was discontinuing that appeal; a formal order to that effect was never issued by the Board.

[4] As a result, this matter is being adjudicated on the basis of a cold record, Lucky Strike Coal Co. and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 547, A.2d 447 (1988).

§75.22(f). In the alternative, Delta argued that the evidence demonstrated that its application and the disposal sites met all of the requirements of the SWMA and applicable regulations, and that as a result, DER was compelled to reissue the permit. In response, both the Township and DER asserted that DER properly reevaluated the application and did not abuse its discretion in denying it. Additionally, they argued that since natural renovation was no longer a viable landfill design theory and would not protect the groundwater from contamination by volatile organic compounds, DER properly denied the application.

The record consists of a transcript of 1,723 pages, 53 exhibits, [5] and the briefs of the parties. After a full and complete review of the record, we make the following findings.

FINDINGS OF FACT

1. The Appellants are John P. Niebauer, Jr., and the three corporations owned and controlled by him: Delta Excavating and Trucking Company Inc., Delta Quarries and Disposal, Inc., and Earthmovers Unlimited, Inc., (collectively "Delta"). (Ex. A-1, A-3 and A-4)

2. The Appellee is DER, the executive agency of the Commonwealth of Pennsylvania with the authority and duty to administer and enforce the SWMA, the Clean Streams Law, the Act of June 22, 1937, P. L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL), §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the rules and regulations adopted under these laws.

3. The Intervenor at Docket No. 85-357-M is the governing body of Franklin Township, Huntingdon County, the location of the disposal sites in question.

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[5] Exhibits from Delta are noted as "Ex. A-___" those from DER as "Ex. C-___" and those from the Township as "Ex. I-." The notes of testimony are referred to as "N.T.__."

4. The Township is also the appellant in the matter originally docketed at No. 84-403-M.

5. Solid Waste Permit No. 101105 (permit), as issued by DER to Landfill Acres, Inc. on May 21, 1980, provided for the construction of a 60 acre Class III demolition debris landfill (demolition landfill) and a 26.5 acre municipal waste landfill (sanitary landfill) in Franklin Township, Huntingdon County. (Ex. A-5)

6. Landfill Acres, Inc. is a corporation registered to do business in the Commonwealth from a mailing address of RD #3, Box 625, Hollidaysburg, PA 16648. (Ex. A-15)

7. Landfill Acres, Inc. is the former owner of the property upon which the sanitary landfill and demolition landfill sites are located. (Ex. A-3, A-4, A-5)

8. Landfill Acres, Inc. sold the property upon which the sanitary landfill and demolition landfill sites are located to Delta in 1982, and since that date Landfill Acres, Inc. has not possessed any ownership interest in the property. (Ex. A-3, A-4)

9. Upon the sale of the property to Delta in 1982, Landfill Acres, Inc. relinquished its interest as operator of the disposal sites. (Ex. A-3, A-4)

10. Although one trench was constructed at the sanitary landfill site, no disposal activities have ever taken place at either disposal site. (N.T. 78-79)

11. On January 29, 1985, pursuant to 25 Pa. Code §75.22(f), Delta, having acquired title to the property upon which the disposal sites are located, filed applications with the Harrisburg Regional Office of DER for reissuance and transfer of the permit from Landfill Acres, Inc. to Delta. (Ex. A-3 and A-4)

12. The reissuance applications were supported by copies of a Module 5A - Phase I for the sanitary landfill, a Phase II Design Report for the sanitary landfill, a set of plans for the sanitary landfill, and plans, reports and modules relating to the demolition landfill. (Ex. A-13, A-16, C-1)

13. Pursuant to §504(d) of the SWMA, the applications were forwarded to the host municipalities, the Township and Huntingdon County, which submitted comments recommending denial based on Delta's compliance history, Delta's choice of a natural renovation design for both disposal sites, and the characteristics of the soil and geology at the sites. (Ex. I-6, I-16, I-17)

14. DER did not have a firm policy as to the extent to which it would conduct a technical review of an application for reissuance of a permit. It depended upon the circumstances of each application. (N.T. 354)

15. Several factors could be considered, including, but not limited to, the date of issuance of the original permit and whether it had been issued prior to the (then) current regulations and statutes; whether there had been any changes in the permitted property that would affect its use; whether there had been any changes in the state of scientific and technical knowledge regarding the permitted activity; the compliance history of the applicant; and the comments received from the host municipalities. (N.T. 349-359)

16. DER considered all of these factors in deciding to conduct a full technical review of Delta's application for permit reissuance. (N.T. 349-354)

17. On August 1, 1985, DER denied Delta's application because of Delta's repeated violations of the CO&A with DER entered at Board Docket No. 81-080-M; Delta's unsatisfactory record of compliance with environmental laws and regulations; and the results of a technical review of Delta's application for the reissuance of the solid waste permit. (Ex. A-1)

18. The technical reasons for denial were that Delta failed to adequately demonstrate that there were sufficient renovating soils to satisfy the requirement of a one-to-one ratio of renovating soil to refuse; that the presence of closed depressions within and adjacent to the boundaries of both the sanitary landfill and demolition landfill, which conflicts with DER's regulations, may result in the contamination of the waters of the Commonwealth; and that the design of the proposed trenches was not level and, therefore, the trenches would not prevent leachate from collecting in and saturating one area. (Ex. A-1, A-2)

19. On August 1, 1985, DER revoked Landfill Acres, Inc.'s permit for essentially the same technical reasons cited in its denial of Delta's application for permit reissuance. (Ex. A-2 at p. 1)

20. The permit does not contain an expiration clause which would operate to extinguish the permit if disposal activities were not commenced by a certain date. (Ex. A-5)

21. Both disposal sites were designed as natural renovation, as opposed to lined, landfills. Lacking an artificial barrier between the refuse and the groundwater, a natural renovation landfill relies upon certain biological, chemical, and physical processes within the soil layer to attenuate and remove harmful materials from leachate before it reaches the groundwater. These processes tend to be grouped as: filtration, absorption, microbiological degradation, ion exchange, dilution, and dispersion. (N.T. 69-70, 641, 1240)

22. Both landfill sites are located over bedrock identified as the Gatesburg formation. The demolition landfill site is also partially located over the Nittany Dolomite formation. (N.T. 266-267, 1047)

23. The Nittany Dolomite and Gatesburg formations are both composed primarily of dolomite carbonate rock with varying amounts of sand and chert. (N.T. 267, 191-192, 822-823)

24. In the area of the proposed landfills, the Gatesburg formation is deformed, folded, and faulted bedrock. In addition, much of the formation in the area of the proposed landfills is tilted or upturned, and, therefore, slopes. (N.T. 220-221, 700-701)

25. The Gatesburg formation is further characterized by alternating layers of dolomitic rock, sandy dolomite, clay dolomite, and shaley dolomite. (N.T. 698-704, 1453-1454, 1470; Ex. I-13, I-14)

26. Carbonate rock of the type found in the Gatesburg formation is composed of calcium carbonate and magnesium carbonate, both of which are relatively soluble rock types. (N.T. 1103-1104)

27. The Gatesburg formation in this area is subject to solution attack because of its fractured nature and carbonate composition. (N.T. 700-704, 1103-1104)

28. Fractures in bedrock, enlarged by solution attack, create passages through which leachate or water contaminated with leachate can flow with little or no attenuation. This can occur not only in unweathered bedrock but in weathered bedrock which retains its structure. (N.T. 965-966, 1255-1256, 1373-1374, 1489-1490)

29. The differential weathering of bedrock (varying weathering rates for various layers) due to solution attack is likely to create bedrock pinnacles (slender, pointed masses of bedrock) and ledges (narrow, horizontal projections of bedrock) at the landfill sites. (N.T. 701-703, 770-772, 1104-1105)

30. There is a substantial likelihood that bedrock pinnacles or ledges exist under the sites. (N.T. 770-772, 925, 949-954, 1104-1105, 1404)

31. The likely presence of bedrock pinnacles is also indicated by dolomite fragments which were reported at shallow depths at the sanitary landfill site, and by fragments of bedrock noted at shallow depths in the logs of the monitoring wells. (N.T. 777-779, 897-900)

32. If leachate reaches a pinnacle, it could travel unattenuated through cracks directly into groundwater. (N.T. 741-748)

33. The topography of the sites is characterized as very hummocky and karstic[6] due to the differential rate at which the bedrock weathers. This means that the surface has a rolling or wavey nature consisting of alternating highs and lows, with anywhere between five to fifteen feet of topographic relief. (N.T. 770-784, 1456)

34. Surface topography is generally a subdued reflection of the bedrock below. (N.T. 936-937, 1105)

35. The Gatesburg formation as a whole is characterized by an irregular bedrock surface with bedrock pinnacles and closed depressions. At the landfill sites, this creates radical differences in soil depth when soil layers drop down or bend (draping) into closed depressions in the top of the bedrock, resulting in the topographic highs having the shallowest soils, and the topographic lows having the deepest soils. (N.T. 697-724, 1466, 770-784)

36. Both landfill sites primarily consist of Morrison soils, which are typical of the Gatesburg formation. (N.T. 191-192, 1580, 1676, 1699)

37. Morrison soils are residual soils developed by the in-place physical and chemical weathering, or decomposition, of the Gatesburg formation. (N.T. 697-699, 907-909, 1676)

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[6] "Karst" is defined as a type of topography that is formed over limestone, dolomite, or gypsum by dissolving or solution, and that is characterized by closed depressions or sinkholes, caves and underground drainage; "hummock" is a rounded or conical knoll, mound, hillock, or other small elevation. Glossary of Geology, American Geological Institute, 1972.

38. Because the layers of the Gatesburg formation weather at different rates, the Morrison soils have varying concentrations of weathered rock, sand, silt, and clay. (N.T. 754-757, 770-784)

39. Morrison soils, in general, and the soils at the sanitary landfill site, in particular, are not uniform. The soils display great variation in texture and depth, which is accentuated by the draping of soil layers into the closed depressions in the bedrock. (N.T. 697-724, 728, 1453, 1459, 1470; Ex. I-4, I-13)

40. The variation in soil texture in Morrison soils results in varying rates of permeability. (N.T. 739-751)

41. Sheets and pockets of sand, which is too permeable to be renovating, and of clay, which is too impermeable to be considered renovating, are present at the sites. (N.T. 697-724)

42. The greater permeability of sandy soil means that there could be greater flow through it. This preferential channeling reduces renovation because of the higher flow and shorter contact time. (N.T. 1255-1256, 1449-1461; Ex. I-21)

43. Further, leachate may flow through more permeable sandy units above less permeable silty or clayey units for great distances. Thus, leachate could be channeled directly into fractured bedrock pinnacles and reach the groundwater with little or no renovation. (N.T. 739-751, 1255-1256, 1452-1461)

44. Four groundwater monitoring wells were located on the periphery of the sanitary landfill site: monitoring well (MW) No. 1 was drilled approximately 250 feet south; MW No. 2 was drilled approximately 50 feet north; MW No. 3 was drilled approximately 125 feet southwest; and MW No. 4 was drilled approximately 150 feet east. (Ex. A-22, Sheet No. 1)

45. The log of MW No. 4 reflects 13 feet of sandy loam to loamy sand, underlain by 12 feet of pure sand. Areas of very sandy soil were also found adjacent to the sanitary landfill site on the southeast and north. (N.T. 1668, 754-755, 875-876, 944-945; Ex. A-21)

46. The entire area in which the sanitary and demolition landfill sites are located is dotted with a series of closed depressions which lie within, as well as adjacent to, both sites. (N.T. 700-704, 1456, 1525; Ex. A-24, A-25)

47. The closed depressions are subdued depressions and range in size, in lateral extent, from 25 feet in diameter to approximately 110 feet in length. They are saucer-like in appearance, with the center a few inches to a couple of feet lower than the edge of the saucer. (N.T. 209-210, 1117)

48. The closed depressions are formed when bedrock dissolves in areas of high groundwater flow. The voids or cavities eventually collapse, causing the closed depression to form. (N.T. 779-791, 946-949, 1076, 1495-1498, 1531)

49. The sanitary landfill site contains at least a half dozen such closed depressions. (N.T. 208)

50. The differing permeability of soils across the sanitary landfill site is also demonstrated by certain other areas of the site that show impeded drainage, even to the point of having ponded water. (N.T. 466, 480-481, 1454-1457)

51. At least a half dozen pockets of clay sheets or clay lenses lie within the sanitary landfill site. (N.T. 184, 930-932, 1548-1549)

52. The clay lenses examined were found to range from several inches to two feet thick. (N.T. 187)

53. Limited layers of clay loam soil were found directly above the clay lenses. (N.T. 184)

54. The clay lenses are related to on-site seeps and could contribute to water or leachate channeling. (N.T. 184-187, 465-467, 731, 740-743)

55. The clay lenses retard downward movement of percolating water and direct it in a lateral direction. Leachate could be similarly directed. (N.T. 187, 731, 740-743)

56. The construction, operation and closing of a landfill can significantly alter the flow patterns of water. The construction and filling of trenches with waste will change permeability and channel water; the flow patterns of water will also be redirected by altering the contours of the site, by implementing a soil erosion and sediment control plan, and by capping the site upon closure. (N.T. 780-790)

57. Altering the flow patterns of both surface and groundwater could concentrate groundwater flow into areas where silty sand units are present; this will accelerate erosion, causing a loss of soil support and possibly resulting in the formation of a sinkhole. (N.T. 780-790)

58. Although no sinkholes have been observed at either site, landfill operations would significantly increase the likelihood of their development due to the geologic conditions present at both the sanitary and demolition landfill sites. (N.T. 779-796, 1076, 1495-1498, 1531)

59. The likelihood of sinkhole development does not appear to be significantly reduced by Delta's proposed erosion and sediment control plan. (N.T. 948-949)

60. Surface drainage at the site is toward the southwest, which is toward the interior of the site. (N.T. 1113, 1132-1133)

61. The development of a sinkhole near or under the disposal sites would almost certainly lead to groundwater pollution. (N.T. 798-799)

62. There is no evidence that excess water runoff collected in the closed depressions at the sanitary landfill site or that the soil in the

closed depressions was saturated. This indicates that permeability is unusually high, at least at the bottom of the closed depressions. (N.T. 1456-1457, 1556-1557)

63. Soil piping occurs when underlying soil moves into a solution cavity. A collapse or movement disturbs the soil, which creates preferential routes by which water and leachate can move directly into and contaminate groundwater. (N.T. 1105-1110)

64. The topography of the sanitary landfill site indicates that there may be soil piping taking place. This is particularly true within the closed depressions. (N.T. 1105-1106)

65. At the sanitary landfill site water seeps downward, rather than outward, by surface drainage through closed depressions to solution cracks and crevices in the bedrock. (N.T. 1104)

66. The disposal sites are located in an upland recharge area and overlie one of the most important aquifers in the Nittany Valley. (N.T. 1049-1051, 1492-1493; Ex. I-6)

67. In the Nittany Valley the amount of precipitation recharged to groundwater may amount to as much as 20 inches per year, or about one half of all precipitation. (N.T. 1049-1050)

68. Precipitation recharging through the surface of the sanitary landfill site moves downward in the subsurface away from the site, flowing to the nearest point of discharge. (N.T. 1045-1050)

69. Delta's soil investigations at the sanitary landfill site consisted primarily of the excavation of 19 test pits and four test borings. (N.T. 85-86, 179-183, 1267; Ex. A-13, A-17, A-22, I-6, I-16)

70. The soil investigation at the 60 acre demolition site consisted of only 12 test pits on the site and one monitoring well located southwest of the site. (N.T. 818-833; Ex. I-4)

71. Soil characteristics such as texture, structure, color, and moisture content were examined. (N.T. 180)

72. The 12 test pits located on the demolition landfill site confirm the presence of variable soils. (N.T. 235-237, 818-833; Ex. I-4)

73. There were only 30 inches of soil in Test Pit No. 1 on the demolition landfill site , rather than the 40 inches required. (N.T. 833-837, 1499; Ex. I-4)

74. The test pit logs from the demolition site also noted the presence of significant amounts of limestone underlying the site, thus establishing the possibility of the presence of an even more soluble bedrock type. (N.T. 818-824; Ex. I-4)

75. For some of the 19 test pits on the sanitary landfill site, soils fell within DER's required classifications. (N.T. 906-907)

76. There were insufficient renovating soils in Test Pit Nos. 1, 4, 5, 17, 18, and 19. (N.T. 424-481; Ex. A-13, A-17, A-22, C-1)

77. The primary means used to classify the types of soils was the "hand texturing" method of soil classification and visual observation. This involves feeling the soils along the test pit wall and rubbing of the soil with the fingers to determine soil texture. (N.T. 1687-1688)

78. Hand texturing is a relatively crude method of soil classification that is commonly used in conjunction with laboratory testing such as hydrometer and/or pipette tests in order to obtain accurate classification data. (N.T. 1404-1429, 1551-1552, 1571, Ex. A-13)

79. Three soil samples from Test Pit No. 1 at the sanitary landfill site were subjected to sieve analyses. (N.T. 180; Ex. A-13)

80. A sieve analysis is a soil test consisting of a series of sieves or wire screens used in an apparatus that shakes a soil sample through

progressively finer mesh screens. The amount of soil retained on each of the screens is then measured. (N.T. 199)

81. The sieve analyses submitted in support of the application went no further than the No. 200 sieve, which divides sand particles from silts and clays. (N.T. 1404-1429, 1686; Ex. A-13)

82. The sieve analysis allows for a determination of the percentage of sand in a sample. (N.T. 1404-1429, 1686; Ex. A-13)

83. The sieve analyses indicate a high possibility of error in the hand classifications. (N.T. 1404-1429; Ex. A-13, I-20)

84. Delta's classification of the first of the three soil samples from the five foot level of Test Pit No.1 at the sanitary landfill site is inconsistent with the sieve analysis. This sample had been classified by Delta as sandy clay loam, which must contain no less than 45% sand. Yet, the sieve analysis indicated a sand content of 21%, well outside of the permissible range. (N.T. 1414, 1423; Ex. A-13, I-20)

85. The sieve analysis of the second sample from Test Pit No. 1 indicated 48% sand. This soil had been hand-classified by Delta as a sandy loam, which usually contains a substantially higher percentage of sand. Therefore, Delta's classification of this sample also has questionable validity. (N.T. 1414, 1425; Ex. A-13, I-20)

86. Sand content in the soils ranges from 21% to as high as 78%. (N.T. 1452-1454)

87. Insufficient data were submitted by Delta to accurately determine soil classification and renovative capacity; additional tests such as the Attenberg limits test, an ion exchange capacity test, and permeability tests should have been performed. (N.T. 1415-1416)

88. Inadequate data were presented to indicate that sufficient depths of renovating soils were present over the entire site. (N.T. 1403-1430, 1466, 1622-1623; Ex. I-6)

89. Because of the differential weathering of the bedrock formations at both sites and soil variability, it is particularly important to know the nature of the soil at depth. (N.T. 1472-1475, 1622-1623)

90. The four test borings at the sanitary landfill site were made using an air rotary drilling rig and a rollercone bit. (N.T. 277, 1947; Ex. A-13, A-21)

91. Air rotary drilling with a rollercone bit is inaccurate and inappropriate for performing soil characterization because air rotary drilling destroys soil structure and mixes soils from different depths. A core method such as split spoon would have been more appropriate. (N.T. 707-708, 752-768, 935-936, 1466-1474)

92. More drilling would be needed to establish the nature and sequence of soils and bedrock over even a short distance at both sites because of the variable nature of soil and bedrock already known to be present. (N.T. 703-705, 721-738, 957-958, 1403, 1464-1465)

93. The sampling performed failed to establish a comprehensive pattern. A grid pattern designed to test all geologic formations of concern would have presented a more useful picture. (N.T. 775-776, 993-994, 1464-1466, 1622-1623)

94. In particular, inadequate sampling of soil depth and texture of the topographic highs at the sanitary landfill site is evident. (N.T. 925-929)

95. Nineteen test pits, four test borings and four monitoring wells on the 26.5 acre sanitary landfill site are inadequate to properly

characterize the full range of variation in geology and soils at the site. (N.T. 706-708, 775-776, 1466-1467, 1529-1530, 1555, 1980-1981, 1622-1623)

96. Twelve test pits at the demolition landfill site are similarly inadequate to properly characterize the full range of variation in geology and soils at the site. (N.T. 818-840, 1266-1267, 1499, 1930; Ex. I-4).

97. The plans submitted with the application indicate that a trench method of fill would be used over a large part of the sanitary landfill site. This would involve the excavation of seven feet of soil and placement of 6.5 feet of refuse in the trench. Over this would be placed an intermediate cover of 12 inches and then a second and, perhaps a third, lift of refuse, depending on the final proposed contour elevation of the site. (N.T. 206, 422-423; Ex. A-22)

98. Most of the test pits in the sanitary landfill site did not exceed 14 feet in depth. (N.T. 183; Ex. A-13, A-17)

99. In attempting to demonstrate a one-to-one ratio of renovating soil to waste, the first seven feet of soil in a trench area is irrelevant, as that soil is removed in excavating the trench. (N.T. 425-429)

100. Because of the limited depths of the test pits at the sanitary landfill site, and considering the minimum amount of waste which could be deposited, six of the pits do not reach the depth to which renovating soils must be present in order to demonstrate a one-to-one ratio of renovating soil to waste. (N.T. 422-481; Ex. A-13, A-17, A-22, C-1)

101. An examination of the plans for the sanitary landfill indicates that the trenches will be dug to a uniform depth of seven feet. The plan indicates the seven feet would be measured from the existing uneven contours and would, thus, result in the floors of the trenches being uneven. (N.T. 476-479, 1256-1264, 1306-1307, 1356-1358, 1503-1504; Ex. A-22, C-1)

102. The trenches would mimic the existing hummocky topography. (N.T. 476-479, 1256-1264; Ex. A-22, C-1)

103. Sloping trenches would cause leachate to concentrate in one area and overload whatever renovative capacity might be present in the soil. (N.T. 787-788, 1256-1262, 1358)

104. The underlying geology and the soils which are present at both disposal sites are unsuitable for natural renovation landfills.

105. Dr. Richard R. Parizek is a professor of hydrogeology at the Pennsylvania State University and is a leading expert on carbonate geology. He has conducted significant research involving the Gatesburg formation and Morrison soils and is widely published. (Ex. I-20). He was qualified as an expert on behalf of the Township in the general fields of soils, geology, hydrogeology, and, specifically with regard to Karst regions, groundwater models and solid waste suitability analysis. (N.T. 636).

106. At the time of the hearing, Dr. Arthur A. Socolow was the Director of the Bureau of Topographic and Geologic Survey within DER and was the State Geologist. He was widely published and had extensive experience in all areas of geology. Dr. Socolow was a Fellow of the Geologic Society of America, a Fellow of Mineralogical Society of America, and a Fellow of the Society of Economic Geologists. He was qualified as an expert on behalf of DER in the fields of geology and hydrogeology. (N.T. 1100)

107. Dr. Marston Todd Giddings is the president and owner of Todd Giddings and Associates, Inc. and holds a Doctorate degree in geology. He has experience in designing sanitary landfills, selecting sites for landfills, and conducting monitoring activities to determine landfill performance. (Ex. A-10). Having collected the data and prepared the application for reissuance of the permit, Dr. Giddings was called to testify on behalf of Delta as an expert in the field of geology and hydrogeology. (N.T. 172)

108. The opinions of Dr. Giddings with regard to the suitability of the proposed sites as natural renovation landfills are based on an incorrect assessment of the geology and soil conditions underlying the sanitary and demolition landfill sites, as well as upon data of questionable validity. As a result, the opinions of Dr. Giddings are not afforded significant weight by the Board.

109. Dr. Parizek's opinions, which are based upon a more thorough understanding of the specific geology, hydrogeology, and soil conditions at the proposed sites, and upon his broader research experience with the Gatesburg formation and Morrison soils, are afforded decisive weight by the Board.

DISCUSSION

DER, the Township, and Delta must carry their respective burdens of proof in this case. DER must sustain its burden of proving that its revocation of the solid waste disposal permit held by Landfill Acres, Inc. was not an abuse of discretion. 25 Pa. Code §21.101(b)(2). The Township, having intervened on the same side as DER, has the same burden of proof. Delta must sustain its burden of proving by a preponderance of evidence that DER's denial of the application for permit reissuance was arbitrary, capricious, contrary to law, or a manifest abuse of discretion. 25 Pa. Code §21.101 (c)(1); Warren Sand and Gravel Co. Inc., v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Consol. Pennsylvania Coal Company v. DER, 1990 EHB 645. Further, Delta must prove clear entitlement to the permit before DER will be ordered to issue it. Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

Delta offers two arguments in support of its contention that DER abused its discretion. Initially, we will consider Delta's contention that DER did not have the legal authority to conduct a technical review and evaluation of an application for reissuance of a permit under 25 Pa. Code §75.22(f).

A. DER's Authority to Conduct a Technical Review

Reissuance of an existing solid waste permit is addressed in 25 Pa. Code §75.22(f):[7]

> (f) Reissuance of permits. Reissuance of permits shall be in accordance with the following:
>
> (1) Permits are not transferable or assignable.
>
> (2) If a change of ownership occurs, the new owner shall submit the following:
>
> (i) An application for a revised permit on a form to be provided by the Department.
>
> (ii) A notarized statement attesting to the following items:
>
> (A) Verification of possession of approved plans, maps, documents, schedules and commitments approved by the Department.
>
> (B) Statement of agreement and intent to comply with the requirements, plans, stipulations and commitments previously approved by the Department.
>
> (iii) A clear and cogent narrative indicating the scheduling and procedure to be utilized in the transfer of ownership and subsequent operational intent.

In this case, the record indicates that the extent of DER's review of an application for reissuance of a permit under §75.22(f) depended on the particular circumstances of each application. James Snyder, Assistant Director of the Bureau of Waste Management, testified that the date upon which the original permit had been issued was an important consideration, especially where the original permit had been issued pursuant to a different statute or version of the regulations. In that instance, a technical review was necessary to ensure compliance with any new regulatory requirements.

Delta contends that the regulation does not provide for a technical review of an application for permit reissuance and argues that DER, bound by the specific language of §75.22(f), cannot insist on the submission of any other data. Delta argues that the reissuance process is not a proper vehicle

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[7] Section 75.22(f), as it related to municipal waste disposal, was superseded by 25 Pa. Code §271.221. See 18 Pa. B. 1681, 1682 (April 9, 1988).

for DER to re-evaluate its previous issuance of a permit and that DER was obligated by §75.22(f) to reissue the permit upon Delta's demonstrating that it satisfied the criteria in §75.22(f). In support of this proposition, Delta cities Newlin Township v. DER, 1979 EHB 33, reversed on other grounds sub. nom., Strasburg Associates v. Newlin Township, 52 Pa. Cmwlth. 514, 415 A.2d 1014 (1980), overruled, Franklin Township v. DER, 500 Pa. 1, 452 A.2d 718 (1982).

Delta's position is based on the following passage in Newlin:

> Although we believe it is extremely important that the proper parties in control of an operation be named as the permittee, we do not regard the reissuance of a permit as an opportunity to challenge a valid permit on environmental grounds, particularly when no appeal was previously taken from the grant of the permit. The reissuance provision simply requires an application for a reissuance, an affidavit verifying possession of the approved plans and a statement of subsequent intent to be bound by the plans and requirements of DER. This is not an occasion to question the adequacy of provisions of the plans already approved by DER. In this case, DER required revisions to the plans and it is the approval of those revisions that the board considers an appealable event, as previously outlined.
>
> 1979 EHB at 68
> (emphasis added)

This passage, taken out of the context of the remainder of the adjudication, does lend support to Delta's argument. But, the issue in Newlin relating to 25 Pa. Code §75.22(f) was whether a change in ownership or control of the landfill had occurred and, therefore, whether a reissuance of the permit under §75.22(f) was required before the commencement of waste disposal activities; the Board did not evaluate the extent of DER's authority under §75.22(f). And, the language prohibiting a challenge to "the adequacy of provisions of the plans already approved by DER" must be related to the DER action which gave rise to Newlin Township's appeal - the approval of modifications to the

plans originally approved by DER in 1975. Newlin Township had not appealed the 1975 permit to the Board and the Board was precluding any such challenge in its 1978 appeal of the permit modifications approved by DER. 1979 EHB at 57.

The language of 25 Pa. Code §75.22 (f) does not articulate any standards which must be applied by DER when considering requests for reissuance of solid waste permits. In fact, it is nothing more than a recitation of the informational requirements for submission of the application. The reissuance of a permit is, we believe, a discretionary act, much like the issuance of a permit. Obviously, there must be some standards against which to measure DER's exercise of its discretion to conduct a technical review of Delta's application; they are found in §§502 and 503 of the SWMA.

The original permit was issued to Landfill Acres pursuant to the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001 *et seq.* (Pennsylvania SWMA) which was repealed in 1980 by the enactment of the SWMA.[8] The passage of the SWMA resulted in numerous and substantial changes to the law regulating the disposal of solid waste in the Commonwealth. In particular, §502 of the SWMA sets forth numerous additional requirements for the submission of a permit application. An applicant must under §502(d), set forth the manner in which it is to comply with, *inter alia*, the CSL. The issuance of a permit is precluded under §502(d) unless the applicant demonstrates that the plans provided for compliance with the CSL. There was no comparable provision in the Pennsylvania SWMA. As a result, when Delta submitted its application for permit reissuance, there had been no previous determination by DER that the landfills would not violate the CSL. Given the change in law between the time

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[8] See §1001 of the SWMA. The repealer was effective on September 5, 1980.

the Landfill Acres permit was issued in 1980 and Delta's submission of an application for reissuance of the permit in 1985, DER was, therefore, justified in exercising its authority under §502(f) of the SWMA to require the submission of information other than that set forth in §75.22(f) in order to make a determination that the reissuance of the permit would be in accordance with the CSL. As a result, the performance of the technical review by DER did not constitute an abuse of discretion or arbitrary or capricious behavior. Mill Service, Inc. v. DER and Concerned Residents of the Yough, Inc., 1987 EHB 73, 80-81.

Furthermore, it is illogical for the Board to conclude that DER can only evaluate the information set forth in 25 Pa. Code §75.22(f) when considering an application for issuance when DER may then, in turn, later modify or revoke that very same permit for the reasons enumerated in §503 of the SWMA. Certainly, a technical review is required to determine whether a solid waste disposal facility is creating a potential hazard to the public health, safety, and welfare (§503(e)(3) of the SWMA) or is adversely affecting the environment (§503(e)(4) of the SWMA).

Having found that DER was justified in conducting a technical review of Delta's application, we turn now to a consideration of Delta's arguments concerning the technical sufficiency of its application.

B. Technical Reasons for Denial

1. Renovating Soils

DER's first technical reason for its denial of Delta's application for permit reissuance was that Delta had not "adequately demonstrated that sufficient renovating soils exist to satisfy the requirement of a one-to-one ratio of renovating soils to refuse." This was based upon the requirements of 25 Pa. Code §75.24(c)(2)(xiv):

> All landfills constructed without liners or leachate collection systems shall have a minimum

> of 8 feet of renovating soil beneath the refuse and above the high groundwater table or bedrock for one 8-foot lift. If more than one lift is proposed an additional ratio of 1 foot renovating soil to each one foot of refuse shall be provided for each additional lift. The renovating soil may be undisturbed soil or emplaced soil and shall have the characteristics for renovating soil as specified in this section.

This section applies only to the sanitary landfill site and it imposes two fundamental requirements: the soils have to be of a specific renovating type throughout the site and the soils have to be of sufficient depth to equal the amount of refuse to be deposited. Renovating soils were defined at 25 Pa. Code §75.24(c)(2)(x) as those which fall within the USDA textural classes of sandy loam, sandy clay loam, silty clay loam and silt loam. Renovating soils of the proper type and sufficient depth are necessary to renovate the constituents of the leachate generated by the waste and, therefore, prevent groundwater contamination.

Delta's argument is based upon the opinions of their only expert witness, Dr. Todd Giddings, who had assembled the data and prepared the application on behalf of Delta. Dr. Giddings asserted that the soils and geologic conditions at both proposed sites were consistent and predictable, and that the quality of the soils extending below the floor of the test pits and between the test pits was uniform and in compliance with §§75.24(c)(2)(x) and 75.24(c)(2)(xiv). But, there are two fundamental flaws in Dr. Giddings' conclusions: they ignore the inherent geology of the Gatesburg formation from which the soils are derived, and the data relied upon is of questionable validity.

Dr. Giddings primarily relied upon the data from 19 test pits as his basis to conclude that the soils at the sanitary landfill site were uniform in depth and renovating texture. Soil texture was determined by visual observation and hand texturing, a method which involves careful visual

examination and rubbing the sample between the fingers. However, a direct comparison of this data with the results of the sieve analyses of the identical soil samples, casts significant doubt upon the reliability of these techniques. The sieve analysis allows for a determination of the percentage of sand in a soil sample. The results of the sieve analyses demonstrate that the sand content of two of the three soil samples evaluated was outside of the permissible range for sandy clay loam and sandy loam. (Ex. A-13, I-20)

Soil depth was also determined with the data collected from the 19 test pits. This data cannot be afforded any significant weight because the test pits were not sufficiently deep. Since most of the test pits did not exceed 14 feet in depth and the first seven feet of soil must be disregarded, because it would be removed as the trenches were dug, the remaining soil would barely provide adequate soil for one lift of refuse, much less the multiple lifts as planned. Six of the 19 test pits (Nos. 1, 4, 5, 17, 18, and 19) did not meet the required one-to-one ratio of renovating soils to waste.

The second flaw in Dr. Giddings' reasoning lies with his incorrect assessment of the geology of both proposed sites. In his view, the soils derived from the formations underlying the proposed sites should be consistent in depth and texture. The evidence does not support this conclusion. Dr. Parizek testified that the sanitary landfill site and most of the demolition landfill site were underlain by the Gatesburg formation; the demolition site was also partially underlain by the Nittany Dolomite formation which has similar characteristics. The Gatesburg formation is predominantly composed of dolomite carbonate rock with varying amounts of sand and chert. One of its characteristics is the alternating layers of dolomite rock, sandy dolomite, clayey dolomite, and shaley dolomite, all of which weather at different rates. Dr. Parizek indicated that while one layer remained rock, another could be weathered into soil. The soils resulting from the in-place weathering or

decomposition of the alternating layers of rock have different concentrations of sand, silt, and clay, which lead to great variability in soil texture throughout the Gatesburg formation. Additional variability in soil texture is introduced when the soil layers are deformed as they fold and drape into bedrock voids.

Limited field observations tended to confirm Dr. Parizek's opinion regarding the variability of the soil texture and served to further undermine Dr. Giddings' view. Soils composed of almost pure sand were observed approximately 150 feet northeast of the boundary of the sanitary landfill site, although still over the Gatesburg formation. And at least six pockets of clay sheets or lenses were observed and documented towards the western end of the sanitary landfill site. Pursuant to §75.24(c)(2)(x), neither sand nor clay is an acceptable renovating soil. Dr. Giddings failed to take into consideration the likelihood that similar unacceptable soil layers could occur frequently and unpredictably throughout the sanitary landfill site, due to the folding and tilting of the bedrock.

Dr. Giddings also relied upon the data from four test borings to support his view that there were proper renovating soils at sufficient depth throughout the proposed sanitary landfill site. Yet, the results were significantly tainted by the testing method employed, and therefore, deserving of little weight. The test borings were performed with an air rotary drilling rig and a rollercone bit. Dr. Parizek testified that air rotary drilling destroys soil structure and mixes soils from different depths. The air rotary drilling done here could allow weathered bedrock to be mistaken for soil. In addition, air rotary drilling is poor for distinguishing between the top of a rock surface and boulders. The rollercone bit may grind rock and obscure its origin as bedrock, especially a pinnacle, which may appear to be a boulder, and weathered bedrock, which may appear to be soil. As a result, it is not an

accurate method to obtain borings for soil classification. Futhermore, in Dr. Parizek's opinion, the same processes of differential weathering and solution attack which cause variability in the soil texture tend to lead to the creation of bedrock pinnacles, ledges, and an often irregular rock surface. This creates wide variabilities in the soil depths, with the topographic highs having the most shallow soils, and the topographic lows, the deepest.

Given the layered and folded nature of the Gatesburg formation and the variable character of soils in terms of depth and texture, 19 test pits and four test borings spread over the 26.5 acre sanitary site were simply inadequate to accurately characterize the soils as renovative as defined in §75.24(c)(2)(xiv) or to comply with the depth requirement imposed at §75.24(c)(2)(x). Because of the soil characteristics and geology present at the sanitary landfill site, Delta was required to dig a sufficient number of test pits or drill sufficient test borings to determine the "valid and conclusive soil, geology and groundwater conditions." 25 Pa. Code §75.24(b)(4)(i). Delta should have placed the test pits and borings using an appropriate grid pattern that would produce data from the major geographic features of the sanitary landfill site. A primary example of Delta's shortcomings in this report was its failure to dig or drill at four of the five topographic highs on the site where the soils could be the shallowest.

With regard to the demolition landfill site, it is evident that proper soil depth is also lacking. A minimum soil depth of 40 inches to bedrock and 20 inches to mottling in the profile is required for a Class III demolition debris disposal site. 25 Pa. Code §75.33(h)(3)(ii). The log of Test Pit No. 1, of the 12 excavated on the 60 acre site, indicated that dolomite was present at a depth of 30 inches. As noted above, dolomite is the primary bedrock classification in this geologic area; the presence of bedrock at this shallow depth evidences that the regulatory requirements have not been

met. Again, due to the significant geologic variability of the Gatesburg formation, Delta was obligated to dig more pits with an appropriate distribution across the demolition landfill site in order to obtain a more accurate sample of the soil conditions.

2. Closed Depressions

DER's second technical reason for denying the application for permit reissuance also rested upon Delta's application materials, which showed a number of closed depressions within and adjacent to both disposal sites. DER concluded that Delta failed to affirmatively demonstrate in light of these features how its activities would not result in contamination of the waters of the Commonwealth.

The record supports DER's conclusions. Dr. Parizek explained that closed depressions were formed by the gradual draping of soil into eroded areas of the bedrock in areas of increased permeability and high groundwater flow. Sinkholes were formed through the same process, except there was a sudden collapse of the soil into the eroded areas, rather than a gradual draping of the soil. The closed depressions, when viewed in the context of the topography and the known variable nature of the soils, also strongly suggests the presence of soil piping. This occurs when soil moves into solution cavities and disturbs the overlying soil, which in turn makes the soil more permeable. Because it has become more permeable than the surrounding soils, a preferential route is established through which leachate can move into the groundwater without the benefits of natural renovation. Dr. Socolow agreed with this opinion and added that fractured bedrock pinnacles, as well as fractures in the bedrock (enlarged by solution attack), will provide similar passages through which leachate can flow to the groundwater with little or no attenuation by natural renovation.

While no active sinkholes were observed at either site, the massive alteration of groundwater flow patterns which accompanies the construction and operation of a landfill could very likely lead to sinkhole development at both the sanitary and demolition landfill sites. Dr. Parizek explained that construction of trenches would channel water; replacing soil with solid waste during operations would change permeability. Altering the contours of the land would redirect surface water, as would capping the site upon closure. Dr. Parizek indicated that these changes could direct water along new pathways, allowing it to flow into crevices in the soluble carbonate. This would increase and concentrate solution attack in an already unstable bedrock environment, leading to the sudden collapse of cavities and the formation of sinkholes. Any sinkhole development on or near the landfill would allow leachate to move almost directly into the groundwater without attenuation by natural renovation. Dr. Giddings disagreed with this assessment and asserted that the Gatesburg formation was not prone to sinkhole development. However, Dr. Parizek's opinion must be afforded greater weight, since he had broader experience with the Gatesburg formation and a more thorough understanding of the specific geology, hydrogeology, and soil conditions at the proposed sites.

With regard to the demolition landfill site, the design criteria set forth in §75.33(h)(3)(vii) specifically prohibit locating a demolition landfill in a bedrock area with sinkholes, unstable rock conditions, and subsidence. As the record indicates, the subsurface conditions underlying both landfill sites contained closed depressions, were prone to sinkhole development and likely included pinnacles, ledges, and soil pipes. Together, these characteristics constitute unstable conditions which make the demolition landfill site unsuitable for disposal operations.

In sum, given the presence of the closed depressions and unsuitable bedrock, Delta failed to demonstrate in its application materials that the

operation of the disposal sites would not cause contamination of the waters of the Commonwealth. In fact, the available evidence strongly demonstrated that the operation of the facilities as planned would likely cause contamination of the groundwater. Accordingly, DER properly denied the application for permit reissuance.

3. Trench Construction

With regard to DER's third technical reason for denying Delta's application, it is apparent from the design plans that the trenches to be used at the sanitary landfill site would have sloping floors. Condition No. 5 of the permit, as issued, requires that all trenches be constructed essentially level in a widthwise, as well as lengthwise, direction. This is required because leachate could otherwise concentrate in one area and overload the renovative capacity of the soil. The sanitary site plans (Ex. A-22, Sheet No. 2) show the trench locations laid out on a topographic map. Most of the trenches cross contour lines. Elevations within any one trench could vary by as much as 10 feet. Sheet No. 5 of the plans indicates the trenches would have a uniform depth of seven feet from existing contours. Thus, it is evident, particularly from the trench cross-sections, that the trench floors would mimic the existing hummocky topography. While the record demonstrates that there may be technically feasible ways of digging the trenches in a level manner, the plans as presented by Delta in its application indicate that they would slope. Consequently, DER was correct in finding that the application materials were deficient.[9]

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[9] The Board's conclusion that DER was justified in denying Delta's application for permit reissuance based solely on the three technical reasons set forth in DER's letter of August 1, 1985, makes it unnecessary to address the extensive and detailed arguments of the Township and DER that natural renovation will not protect the groundwater from contamination by volatile organic compounds.

C. **Revocation of the Permit**

The Board must next evaluate whether DER has sustained its burden of proof in revoking the permit. The solid waste disposal permit at issue is held by Landfill Acres, Inc., which is not related in any manner to Delta. On May 21, 1980, DER issued the permit to Landfill Acres, Inc., which constructed a single trench at the sanitary landfill site but never received any waste. Landfill Acres relinquished both its interest as owner and operator of the site in 1982, when the property was sold to Delta. While DER's August 1, 1985, revocation of Landfill Acres' permit was premised on the same technical deficiencies as the denial of Delta's application for permit reissuance, its action was proper from a different standpoint.

The parties have devoted a great deal of energy to supporting or attacking the revocation on the basis of the overall effectiveness of natural renovation as a solid waste disposal technology and the particular suitability of these sites for natural revocation. The basis for revocation is much more mundane, however. Landfill Acres never disposed of waste at the sites and, as of 1982, it no longer had an ownership or operator's interest in the sites. Consequently, there is no reason for Landfill Acres to possess a permit for the sites. Section 503(e) of the SWMA recites reasons for revocation of a permit which fall into two categories: violation of the SWMA and the rules and regulations adopted thereunder or adversely affecting the environment or the public health, safety, and welfare. These provisions do not prohibit the Department from revoking a permit for the most fundamental of reasons *i.e.* there is no longer any need for it. It is a matter of common sense that if Landfill Acres no longer owns or operates a waste disposal site, it has no need for a permit.

This conclusion is also inherent in the regulatory scheme. The transfer of a permit is not recognized by the regulations; it must be

reissued in the name of the new owner/operator. If DER does not reissue the permit, then there is no reason to maintain it as a viable regulatory approval, especially where the owner/operator's compliance history is such an important part of the regulatory scheme.[10] Therefore, we will sustain DER's revocation of Landfill Acres' permit on this basis.[11]

CONCLUSIONS OF LAW

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

2. The Board may adjudicate a matter on the basis of a cold record. DER v. Lucky Strike Coal Co. and Louis J. Beltrami, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

3. Delta has the burden of proving by a preponderance of the evidence that DER's denial of its application for permit reissuance constituted an abuse of discretion or amounted to arbitrary or capricious action. 25 Pa. Code §21.101(c)(1).

4. DER has the burden of proving that its revocation of the Landfill Acres' permit was not an abuse of discretion. 25 Pa. Code §21.101(b)(2). The Township, having intervened on the same side as DER, has the same burden of proof.

5. Where a permit application covers the construction and operation of two landfills on a single site, the application may be denied if either of the proposed landfills does not meet the applicable standards.

6. The language of 25 Pa. Code §75.22(f) does not prohibit DER from conducting a technical review of an application for permit reissuance.

7. DER did not abuse its discretion in conducting a technical review

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[10] See §503(c) of the SWMA.

[11] In reaching this conclusion we make the observation that DER had ample grounds to revoke the permit pursuant to §503(e)(4) of the SWMA. The absence of sufficient renovating soils, the presence of closed depressions, and the type of trenches proposed, established that groundwater contamination would adversely affect the environment.

of Delta's application for reissuance of the permit where the law had changed in the years between the original issuance of the permit and Delta's application for reissuance.

8. Where an applicant fails to demonstrate that its proposed landfill will not contaminate the groundwater, DER is authorized under the SWMA and the CSL to deny the application.

9. With regard to the sanitary landfill site, Delta failed to demonstrate that there were sufficient renovating soils of either the type or depth required by 25 Pa. Code §§75.24(c)(2)(x) and 75.24(c)(2)(xiv).

10. With regard to the demolition landfill site, Delta failed to demonstrate compliance with 25 Pa. Code §75.33(h)(3)(vii) in that the bedrock conditions presented a risk of sinkhole development and were unsuitable.

11. Delta failed to establish that renovating soils of sufficient depth were present at the demolition landfill site, as required by 25 Pa. Code §75.33(h)(3)(ii).

12. Delta failed to demonstrate how the presence of closed depressions at the sanitary landfill site would not lead to contamination of the groundwater.

13. DER's denial of Delta's application for permit reissuance was not an abuse of discretion.

14. DER did not abuse its discretion in revoking Landfill Acres' permit where Landfill Acres never disposed of waste on the site and relinquished its ownership and operational interest in the site three years before Delta applied for reissuance of the permit.

O R D E R

AND NOW, this 20th day of March, 1992, it is ordered that:

1. Delta's appeal at Docket No. 85-357-M is dismissed;

2. DER's August 1, 1985, denial of Delta's application for reissuance of Solid Waste Permit No. 10115 and its revocation of that permit are sustained;

3. Delta's appeal at Docket No. 85-289-M from the civil penalty assessment of June 17, 1985, is dismissed as moot; and

4. On or before April 27, 1992, the parties in the remaining appeals consolidated at Docket No. 84-403-M (i.e., Docket Nos. 84-403-M, 85-212-M, and 85-327-M) shall advise the Board of status of those matters in light of this adjudication.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Terrance J. Fitzpatrick concurs in the result only.
Board Member Richard S. Ehmann did not participate in this decision.

DATED: March 20, 1992

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WILLOWBROOK MINING COMPANY :
:
v. : EHB Docket No. 90-346-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: March 20, 1992

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses a surface mine operator's appeal from the Department of Environmental Resources' (DER) denial of its Application for a surface mine permit. The appellant has failed to sustain its burden of proving an abuse of DER's discretion in denying its Application on the basis of its failure to provide adequate information to show its sedimentation pond (proposed to be constructed in an area on its mine site which contains three feet of standing water) could achieve the minimum design criteria referenced in 25 Pa. Code §87.112(b). The appellant has also failed to show DER should be estopped from denying its permit Application.

Background

On July 16, 1990, DER's Bureau of Mining and Reclamation (BMR), sent letter to Willowbrook Mining Company (Willowbrook) denying Willowbrook's plication for Surface Mining Permit (SMP) Number 43900101. This Application oposed a surface mine known as the Lean Mine, located in Findley and Wolf eek Townships, Mercer County, in an area which contains several designated tlands. DER gave three reasons for its denial. The first was that llowbrook's SMP Application had not provided adequate information to show llowbrook could achieve the minimum design criteria referenced in 25 Pa. ıde §87.112(b) regarding adequate embankment compaction and temporary storage ıpacity for sedimentation ponds proposed to be constructed in saturated ·eas. The remaining reasons concerned DER's determination that the ɔplication failed to meet the requirements of 25 Pa. Code §105.17(b) and (c), ıich deal with "important wetlands".

On August 16, 1990, Willowbrook filed an appeal of this letter with ıe Board. After engaging in discovery, DER filed a Motion For Summary ıdgment/Motion To Limit Issues, along with a supporting brief, and a Motion ɔr A Site Inspection by the Board. Willowbrook then filed its response to ER's motions and a Cross Motion For Summary Judgment And For A Ruling In imine. We denied each of these motions by separate Opinions dated March 20, 991, March 27, 1991, April 1, 1991, April 3, 1991, and April 11, 1991. A earing was then held in this matter on April 15-19, 1991 before Board member ichard S. Ehmann. On July 29, 1991, Willowbrook filed its Proposed Findings f Fact And Proposed Conclusions Of Law. DER filed its Post-Hearing Brief on

September 10, 1991, to which Willowbrook responded by filing a Reply Brief o September 23, 1991.

While we were preparing our Adjudication in this matter, we noted that the Environmental Quality Board (EQB) promulgated amendments to the regulations at Chapter 105 of the Pa. Code which were effective upon their publication in the Pennsylvania Bulletin on October 12, 1991. See 21 Pennsylvania Bulletin 4911. These amendments included amendment of 25 Pa.Coc §105.17. In anticipation of our ruling on the issues raised in this appeal regarding those regulations, we issued an Order on October 30, 1991, directin both parties to submit a brief addressing the impact of the amendments on the instant proceeding and the appropriateness of remanding the SMP Application t DER. We received both parties' briefs on November 21, 1991, and we later received a Reply Brief filed on behalf of Willowbrook.

In preparing this adjudication, we observe that parties are deemed t have abandoned all arguments not raised in their post-hearing briefs. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). One of the issues Willowbrook has raised is whether DER erred in concluding Willowbrook's Application failed to provide adequate minimum desig criteria required by 25 Pa. Code §87.112(b). Upon our examination of the propriety of DER's denial of the Application on this basis, we determined tha DER's denial was proper. Thus, there is no need for us to consider the other

reasons DER cited in its denial letter and to which Willowbrook objected in this appeal. Empire Coal Mining and Development, Inc., EHB Docket No. 91-115-MR (Opinion issued February 11, 1992).[1]

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

The Parties

1. The appellant Willowbrook is a division of Adobe Mining Company ("Adobe"), a Pennsylvania corporation with offices at R. D. #3, Box 3629, Grove City, PA 16127.(B-1)[2]

2. The appellee DER is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.*; the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*; the Dam Safety and Encroachments Act ("DSEA"), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et*

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[1] Had we ruled in favor of Willowbrook on this issue, we then would have addressed whether remand of the Application to DER in light of the amended regulations was necessary. New Hanover Corp. v. DER, EHB Docket No. 90-294-W (Opinion issued May 29, 1991)

[2] References to pages in the transcript of the hearing held on April 15-19, 1991 will be "N.T.-". References to the parties' Joint Stipulation will be "B-1". References to Willowbrook's Exhibits will be "W-". References to DER's Exhibits will be "C-".

seq.; Section 1917-A of the Administrative Code of 1929 ("Administrative Code"), Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17; and the rules and regulations promulgated thereunder. (B-1)

The Lean Mine Site

3. The proposed Lean Mine is located in Mercer County, slightly to the northeast of the junction of Interstates 79 and 80. (N.T. 119)

4. The rights to the real estate on which the Lean Mine is located are owned by the Leans and the Petsingers, while the mineral rights are leased by Sunbeam Coal, which subleased these rights to Adobe. (N.T. 56-57)

5. The area outlined in orange on Exhibit C-1B (which is an enlargement of the map submitted with Willowbrook's SMP application) represents the boundaries of the Petsinger property, while the Lean property is outlined in red. (C-1B; N.T. 89)

6. The Lean Mine site contains a system of palustrine wetlands, which are wetlands either dominated by vegetation or less than 20 acres in size. (N.T. 208, 294)

7. The wetlands marked by "D" on Exhibit C-1B in the northeast corner of the Lean Mine site below Legislative Route (LR) 43027 are comprised of emergent vegetation with interspersed open water pockets. (N.T. 195-196)

The Permit Process

8. Upon receiving an SMP application, DER normally assigns a hydrogeologist as lead reviewer. (N.T. 512)

9. If DER finds an SMP application to be deficient early during its review, the hydrogeologist prepares a correction letter and notifies the applicant, who is given time to respond. (N.T. 514-515)

10. If DER deems the response to be inadequate, a second letter is sent to the applicant which identifies remaining deficiencies and suggests a pre-denial conference. (N.T. 515)

11. If, after the pre-denial conference, there are issues unresolved, DER denies the application. (N.T. 516)

Willowbrook's Application

12. In January of 1990, Willowbrook submitted, and DER accepted, the SMP application for the Lean Mine. (B-1)

13. The area outlined in pink on Exhibit C-1B represents the area where Willowbrook intended to begin mining at the Lean Mine as Phase I of its operations. (C-1B; N.T. 87-88)

14. Modules 9, 12, and 13 of the SMP application deal with erosion and sedimentation (E&S) controls. (N.T. 367)

15. E&S controls consist of stormwater runoff collection ditches which are installed around the perimeter of affected areas and, in turn, drain into sedimentation ponds (ponds). (N.T. 367)

16. DER assigned Douglas Caylor, a mining engineer, to review Willowbrook's SMP application, particularly Modules 9, 12, and 13 and a portion of Module 10. (N.T. 622, 631)

17. Caylor has been a mining engineer for DER since 1986, and has reviewed about 150 SMP applications and approved around 700 ponds. (N.T. 623,

624) At the time of the hearing, Caylor had been a professional engineer (P.E.) for two years. (N.T. 624)

18. The narrative contained in Module 13 of the Application was a single generic narrative which was supposed to address E&S control ponds A, B C, and D contained in the Application. (C-1; N.T. 414-415)

19. During his review Caylor discovered a defect in Module 9 in that Willowbrook was proposing to construct Pond D in a location where it would be surrounded by and located within an open water wetland. (N.T. 632)

20. As indicated by the green-colored area on Exhibit C-1B, Pond D i to be located in the northeast corner of the Petsinger property, within Phase I of the SMP area. (N.T. 366)

21. At least three feet of standing water exists at the proposed sit of Pond D and the area would have to be dewatered before the pond could be constructed. (N.T. 426-427)

22. Willowbrook's Application did not discuss dewatering the area in connection with construction of Pond D. (N.T. 640)

23. The drawing set forth on page 23 of Module 13 was not specific fo the conditions where proposed Pond D would be located. (N.T. 412)

24. Caylor also noted Module 13 provided a standard narrative for pond construction as if it were being built in a dry upland area which did no take into account the special wetland situation at the site. (N.T. 638)

25. Willowbrook's Application proposed to clear vegetation from and grub the Pond D area, to remove and store topsoil, and to construct a cut off trench by means of bulldozers and backhoes using the cut and fill method (by

which a portion of the excavation creating a normal pond is used as material out of which the pond's embankment is constructed), pushing the excavated material into open water. (C-1; N.T. 414-415, 639-640)

26. Although the Application provided that the embankment would be constructed of impervious material and that all of the ponds would have bottoms lined with impervious material, no description of such an impervious material was given. (C-1; N.T. 414)

27. On behalf of DER, Caylor was concerned that water draining from Collection Ditch 1 (CD-1), which would cross the wetland before reaching Pond D, would constantly be conveying water from the wetland and using the temporary storage space of Pond D. (N.T. 652) In the event of a major storm dropping substantial precipitation, Caylor was not sure that Pond D would have adequate storage capacity. (N.T. 653)

28. On March 16, 1990, Timothy Gillen, a hydrogeologist who was lead reviewer of Willowbrook's Application for DER, sent Willowbrook a correction letter which, *inter alia*, advised Willowbrook that the Module 13 narrative for pond construction must be revised for ponds proposed to be constructed in saturated zones. (B-1; W-36; N.T. 368-369, 525) The letter further stated it seemed unlikely that Willowbrook would be able to construct a pond with adequate embankment compaction or temporary storage volume, since the water table is so near the surface. (B-1; W-36; N.T. 368-369)

29. Copple-Rizzo and Associates (Copple-Rizzo) prepared Willowbrook's SMP Application, and the head of its Mining Division, Mark Phillian prepared Modules 12 and 13 and selected the site of Pond D. (N.T. 46, 361, 365-366)

30. Phillian has been employed by Copple-Rizzo since 1984 and, as of the date of the hearing, he had been a P.E. for less than a year. (N.T. 361, 364-365) He has certified, either as a P.E. or under the supervision of someone licensed as a P.E., between 150 and 200 ponds that Adobe and related companies have constructed. (N.T. 376)

31. None of the other applications with which Phillian had been involved has required him to certify a pond built in a wetland area. (N.T. 408)

32. In his previous experience, Phillian had never seen a letter from DER requesting the type of information in DER's comment letter. (N.T. 454)

33. On behalf of Willowbrook, Phillian responded to DER's March 16, 1990 letter with a letter dated April 11, 1990, stating, among other things, that the pond construction narrative would not be revised because the operator had sufficient past experience with construction of ponds in saturated zones and it would be the operator's responsibility to construct the ponds at the location and to the specifications of the approved permit. (B-1; W-37; N.T. 371)

34. Phillian did not know whether Willowbrook had in fact ever constructed a pond in a wetland area in the past, but knew only that Willowbrook had constructed ponds on sites that contained wetland areas somewhere on them. (N.T. 448)

35. Caylor did not accept Willowbrook's April 11, 1990 letter as an adequate response. (N.T. 650-651)

36. On May 15, 1990, DER's Gillen sent a second letter (pre-denial letter) to Willowbrook which stated that the information DER had received from Copple-Rizzo did not satisfactorily address DER's March 16, 1990 letter. (W-38; N.T. 381) The letter, *inter alia*, requested Willowbrook to revise the typical pond drawing in Module 13 and advised Willowbrook that all outstanding deficiencies had to be addressed to DER's satisfaction within thirty days of the pre-denial conference. (W-38; N.T. 382)

37. A pre-denial conference was held at DER's Knox District Mining Office on June 11, 1990. (B-1; N.T. 657) Phillian and Doug Spicuzza representing Willowbrook, and Caylor, Gillen, and Lorraine Odenthal, representing DER, were present. (N.T. 384-385, 657)

38. Caylor raised the issue of the location of Pond D with Phillian and Spicuzza at the pre-denial conference. (N.T. 657-658)

39. On June 18, 1990, Phillian sent a letter to DER on Willowbrook's behalf which, among other things, stated that in response to DER's May 15, 1990 letter and the pre-denial conference, Willowbrook was submitting revisions to its SMP application; these did not deal with Pond D. (W-39; N.T. 386)

40. In the past, when DER has received applications proposing to construct sediment ponds in wetlands, DER has sent correction letters to the operators citing problems involved with constructing and maintaining such ponds in wetlands, and the operators have either moved the proposed pond out of the wetland area or have decided not to mine to the area. (N.T. 648-649)

41. On July 16, 1990, DER denied Willowbrook's SMP application. (B-1)

Construction of Pond D

42. The cut and fill method would not and could not be used in constructing Pond D because the excavated material would be saturated. (N.T. 392-393, 415-416)

43. Since the material at the bottom of the wetland area is not stable enough to support a bulldozer, if Willowbrook were to build this pond today it would start construction with the bulldozer on high ground outside the open water area. (N.T. 427-428)

44. Glacial till material would be trucked in and dumped in the southeastern edge of the wetland and would be continuously bulldozed over top of the wetland area, giving some stability for the equipment as it progresses toward the open water area. (N.T. 428)

45. A naturally occurring embankment (located about 50 feet east of the proposed Pond D location) would then be extended by Willowbrook in a southwesterly direction toward the wetland to form Pond D's embankment. Willowbrook would construct Pond D's embankment from borrowed glacial till material, which its engineer believes is impervious, existing on the mine site which would be hauled to the site of the proposed pond. (N.T. 375-376, 392-393, 477)

46. In such construction, but prior to extension of this embankment, Willowbrook would install a dewatering or barrel pipe which would transmit out of the area contained within this extended embankment any runoff flow from the wetland. (N.T. 376, 423, 428)

47. After the embankment is constructed, an elbow and a riser pipe would be installed at the upstream end of the barrel pipe so dewatering could subsequently occur. (N.T. 395)

48. Phillian initially designed Pond D to take into account the existing three feet of standing water as sludge storage capacity, so the pond will fill up to at least three feet above its bottom before any water is discharged. (N.T. 461, 468-469)

49. On three not-to-scale drawings he made at the hearing, Phillian indicated how Pond D would be constructed. (C-25, N.T. 421) Figure 1 on Exhibit C-25 is an aerial view of the area around the wetlands; Figure 2 is a side view of the wetland prior to construction of the pond; Figure 3 is a drawing of the riser and outlet pipe after construction of the pond. (C-25; N.T. 424-425)

50. Phillian's testimony at the hearing on Willowbrook's behalf as to how this pond could be constructed was substantially at variance with the design for the pond he submitted to DER, but he sees no need to change his design. (N.T. 432, 469-470, 640)

51. The Application indicates that Drill Hole 2, which was located in glacial till in the proximity of proposed Pond D, collapsed. (C-1; N.T. 644-645)

52. Glacial till is not impermeable, although it is considered to be of low to moderate permeability. (N.T. 551)

53. Because Drill Hole 2 collapsed in the same type of material Willowbrook proposes to use in constructing the embankment, the stability of

an embankment constructed from glacial till is questionable. (C-1; N.T. 432, 439, 596, 644)

54. Material field tests would be needed to show the appropriateness of the glacial till material (e.g., compactibility and moisture content) for constructing the embankment. (N.T. 646)

55. No material field test results were offered into evidence at the hearings.

56. The presence of a static water level which would exist in Pond D could decrease the stability of the embankment if groundwater at the site is flowing upward, causing a failure surface (an interface between where the embankment contacts the ground) to form. (N.T. 647)

57. Results of testing with piezometers are necessary to determine the direction of groundwater flow in this wetland system. (N.T. 554)

58. No results of piezometer testing were offered at the merits hearing.

59. Willowbrook did not explain the effect seasonal freezing and thawing of constant water in the pond will have on the pond's temporary storage capacity. (N.T. 647)

60. It would be atypical and at least unusual to locate a sediment pond in a wetland, as proposed by Willowbrook. (N.T. 408, 606, 626, 666)

Discussion

The first issue we must address is which party bears the burden of proof. As Willowbrook is challenging DER's denial of its SMP application, Willowbrook bears the burden of proof here. William v. Muro v. DER, 1990 EHB 1153; 25 Pa. Code §21.101(c)(1). In order to sustain its burden of proof, Willowbrook must show by a preponderance of the evidence that DER's denial of its SMP application was not in accordance with law or a sound exercise of DER's discretion. Muro, *supra;* 25 Pa. Code §21.101(a).

Both the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, and its predecessor statute, §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, empower the Board to conduct a *de novo* review of DER's actions. Robert L. and Jesse M. Snyder v. DER, 1990 EHB 428, affirmed in part and reversed in part, ___ Pa. Cmwlth.___, 588 A.2d 1001 (1991). In Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), the Commonwealth Court interpreted the nature of our review power and instructed that the Board is under a duty to determine whether DER's action can be sustained or supported by the evidence put before the Board. On the basis of Warren Sand and Gravel, we have stated that we have wide latitude in hearing evidence in a *de novo* proceeding, although that evidence was not previously made available to DER. Snyder, *supra*; Township of Middle Paxton et al. v. DER, 1981 EHB 315. In Township of Salford et al. v. DER and Mignatti Construction Co., 1978 EHB 62, we ruled that in reviewing DER's action, we were not restricted to a review of DER's determination and we permitted expert

testimony which was not developed prior to DER's action. Thus, we will not limit the evidence in this matter to the information contained in the Application itself, as DER seeks, but we will also consider the testimony and documentary evidence (Exhibit C-25) produced at the merits hearing to explain the applicant's proposal for design and construction of Pond D.

In its post-hearing brief Willowbrook asserts that DER erred in concluding Willowbrook did not provide adequate information to show it could achieve the minimum design criteria referenced in §87.112(b) of the regulations. Willowbrook does not support this assertion with any argument, however.[3] DER's post-hearing brief, on the other hand, argues neither Willowbrook's SMP Application nor the explanation its expert provided at the hearing shows Pond D would meet the design standards of §87.112(b) to achieve adequate embankment compaction and temporary storage and, without such a showing, DER urges Willowbrook's application is incomplete under 25 Pa. Code §86.37(a).

Section 87.112(b) of 25 Pa. Code provides that the design, construction and maintenance of dams, ponds, embankments and impoundments must achieve the minimum design criteria contained in the United States Soil

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[3] The Board rarely receives a 134-page Post-Hearing brief such as Willowbrook's containing 561 proposed findings of fact and 119 proposed conclusions of law and no discussion delineating the issues the appellant believes to be before the Board. This post-hearing brief was followed by a 22-page post-hearing reply brief containing further proposed findings of fact and conclusions of law. We note that a post-hearing brief better serves the needs of the Board in preparing our Adjudication if it contains proposed findings of fact, a concise discussion of the issues raised by the appeal (applying the law as appellant believes it to be to these proposed factual findings), and proposed conclusions of law flowing from that discussion.

Conservation Services' Pennsylvania Field Office Technical Guide, Section IV, Standard 350 "Sediment Basin" and 378, "Pond", as amended, (Standards 350 and 378) or United States Soil Conservation Service's Technical Release No. 60, Earth Dams and Reservoirs, whichever is applicable. The section incorporates by reference the standards set forth in these United States Soil Conservation Service publications.[4] Standard 378 contains design criteria for embankment ponds. This standard requires organic and other soft material which would jeopardize the stability of the embankment to be removed from beneath the embankment. (Standard 378-4) Standard 378 also contains design criteria for excavated ponds, requiring that the sideslopes of excavated ponds be stable. (Standard 378-9) Section 87.112(b) of the regulations also requires that the entire embankment be stabilized with respect to erosion by a vegetative cover or other means immediately after it is completed. Standard 378 further sets forth temporary storage requirements for embankment ponds. (Standard 378-4)

Module 13 of Willowbrook's Application contained Pond Certification sheets for four ponds: Ponds A, B, C, and D. The pond construction narrative which was provided in Module 13 and was supposedly intended to cover all four ponds stated that pond construction would be accomplished by the cut and fill method using bulldozers and backhoes. It did not point out that Pond D would be located in an area containing at least three feet of standing water so the

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[4] DER has attached a copy of Standard 378 to its post-hearing brief as Appendix A. Although this document was not offered as an exhibit at the merits hearing, we may take judicial notice of it, since §87.112(b) incorporates by reference the requirements contained therein. See Givnish v. Commonwealth, Board of Funeral Directors, 134 Pa. Cmwlth. 146, 578 A.2d 545 (1990).

cut and fill method would not be practical, and it lacked any description of the actions Willowbrook would take toward dewatering the pond site prior to its construction or toward the installation of permanent dewatering pipes. Moreover, the narrative did not acknowledge that the pond's embankment would be constructed in an area containing soft, saturated materials which would need to be excavated or the need to provide a stable base so heavy equipment could be used in constructing the embankment. As to temporary storage, nothing in the narrative of Module 13 indicated that the three feet of standing water had been taken into account in the pond's design or that standing water which will constantly be contained in the pond will not cause problems, such as seasonal freezing and thawing, which could affect the pond's temporary storage capacity. Moreover, the Application makes no mention of water draining from CD-1 (which runs through the wetland) and the effect it would have on the pond's temporary storage capacity. DER was correct in its determination that the Application was, at best, inadequate to show Pond D would be constructed in conformance with §87.112(b).

Nothing in the testimony of Willowbrook's expert engineer, Phillian, offered at the merits hearing to explain the Application's description of how Pond D would be constructed showed an abuse of DER's discretion, either. Phillian explained that a naturally existing embankment would be extended into the wetland to create the pond's embankment and that borrowed glacial till material existing on the site, which he believes to be impervious, could be used in constructing the embankment. However, DER's expert hydrogeologist, Lorraine Odenthal, testified that glacial till is not impermeable, but is

considered to be of low to moderate permeability. Willowbrook offered no material field test results to show the adequacy of the borrowed glacial till material for embankment construction or other use in constructing the pond, such as for the "impervious pond liner" described in the Application.[5] Without such results, this Board cannot determine whether Willowbrook's proposed embankment will meet the requirements of §87.112(b) for stability. Phillian's belief that glacial till is impervious is not enough to show the suitability of the material in view of Odenthal's testimony. Further, the Application indicates Drill Hole 2, which was located in the proximity of Pond D in glacial till, collapsed. Willowbrook cannot simply rely on Phillian's belief that glacial till is impervious, especially considering the depth of his experience, to show the adequacy of the glacial till material for constructing the embankment where there is evidence suggesting its inadequacy.

Phillian's testimony also did not address DER's concern that static water exists on the site and, if groundwater is flowing upward at the site of the pond, a failure surface might form, decreasing the stability of the embankment. Willowbrook offered no results of testing conducted with piezometers to show the direction of groundwater flow which could reassure DER that a failure surface will not be a problem with the embankment's stability.

Further, Phillian's explanation failed to prove that Pond D will be able to achieve the required temporary storage capacity. The only evidence offered by Willowbrook that Pond D will have sufficient temporary storage

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5 In fact, Phillian did not offer in his testimony any description of how the pond would be lined and what material would be used as a liner.

capacity to meet the requirements of the regulations is Phillian's statement that the pond is designed to take into account the three feet of standing water he observed at the site. DER's expert, Caylor, is not sure that Pond D will have adequate water storage capacity in the event of a major precipitation point, especially since the Application indicates water draining from the wetland via CD-1 will constantly be draining to the pond. Willowbrook's expert did not resolve this concern, nor did he explain to the satisfaction of DER's expert the effect seasonal freezing and thawing of the pond's constant three feet of water will have on its temporary storage capacity. We place greater weight on Caylor's testimony than on Phillian's as to whether temporary storage capacity can be achieved. We do so because Caylor has approved more than 700 ponds, whereas Phillian has certified only around 150 ponds, and, at the time of the hearing, Caylor had been a P.E. for two years, while Phillian for only around eight months. See TRASH, Ltd., et al. v. DER, et al., 1989 EHB 487. Furthermore, Phillian admittedly has no previous experience in certifying ponds in wetland areas, whereas Caylor has previously been involved in reviewing Applications to construct ponds in wetland area.

As the applicant for the SMP, Willowbrook should have taken efforts to see that all of DER's stated concerns regarding Pond D were met. Even though there may be some "give and take" in the permit application review process, as is asserted by Willowbrook's Post-Hearing Reply Brief, the applicant must satisfy DER that its application satisfies each of DER's concerns; it is not up to DER to plead with an applicant to provide DER with

more information so it can approve the permit. The response on Willowbrook's part to DER's concerns about Pond D, even as explained by the information presented by Willowbrook at the hearing, was simply inadequate for Willowbrook to sustain its burden of proving DER abused its discretion or acted contrary to law in denying its SMP application. DER's regulations contain specific requirements for pond design which DER may not ignore. See Mil-Toon Development Group v. DER, EHB Docket No. 90-556-F (Opinion issued February 12, 1991); In re Bentleyville Plaza, Inc., 38 Pa.Cmwlth. 235, 392 A.2d 899 (1978). Unless Willowbrook showed a proper design and construction of its pond, DER could not place trust in Willowbrook's alleged experience in on-site designing, redesigning, and reconfiguring ponds for site specific conditions and on that basis approve Willowbrook's Application. Thus, we find no abuse of DER's discretion and we sustain DER's denial of Willowbrook's SMP Application.

Willowbrook's brief asserts that DER should be estopped from denying its Application on the basis of deficiencies regarding the design of Pond D. In Order for us to find an estoppel to exist against DER, Willowbrook must show that DER induced it to believe DER had accepted its April 11, 1990 letter as an adequate response to concerns raised about Pond D and that it justifiably relied on that inducement to its detriment. Finnegan v. Commonwealth, Public School Employes' Retirement Board, 126 Pa. Cmwlth. 584, 560 A.2d 848 (1989), *affirmed*, ___ Pa. ____, 591 A.2d 1053 (1991); Refiner's Transport and Terminal Corporation v. DER, 1986 EHB 400.

Willowbrook alleges that when it did not receive any response regarding Pond D from DER following its April 11, 1990 letter to DER, it justifiably believed that any deficiencies as to Pond D or concerns DER had regarding the pond had been addressed to DER's satisfaction and that it relied on this belief to its detriment. Willowbrook has not shown any inducement on the part of DER for Willowbrook to believe that no issues were outstanding regarding Pond D. DER's Caylor testified he had clearly indicated to Willowbrook that there was a problem with the location of Pond D and he had specifically raised that problem with Phillian again at the pre-denial conference.[6] Although Willowbrook might have been operating under some misunderstanding of DER's position, it has not shown any justifiable reliance on this understanding of DER's position which worked to its detriment, since additional information regarding Pond D which Willowbrook might have otherwise submitted to DER was presented at the merits hearing and was still inadequate. Further, Willowbrook is attempting to assert an estoppel argument against DER, which was performing its statutory duty in administering and enforcing the SMCRA when it reviewed and denied Willowbrook's Application. Even if DER's agents had misled Willowbrook into believing its Pond D design plans were adequate, where its Application was obviously inadequate, DER cannot be

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6 While Phillian testified that the problem with Pond D had not been raised at the pre-denial meeting, we find Caylor's testimony to be more credible on this point.

estopped from enforcing the law. F.A.W. Associates v. DER, 1990 EHB 1791; Lackawanna Refuse Removal, Inc. v. Commonwealth, DER, 65 Pa. Cmwlth. 372, 442 A.2d 423 (1982). Accordingly, Willowbrook's estoppel argument cannot succeed.

With no abuse of DER's discretion, Willowbrook's appeal must be dismissed.

CONCLUSIONS OF LAW

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

2. Willowbrook bears the burden of proof under 25 Pa. Code §21.101(c)(1), since Willowbrook is appealing DER's denial of its SMP application.

3. In order to prevail, Willowbrook must show by a preponderance of the evidence that DER's denial of its SMP application was arbitrary, capricious, not in accordance with law, or not a sound exercise of DER's discretion. William V. Muro v. DER, 1990 EHB 1153.

4. Willowbrook did not provide adequate information, either in the SMP Application itself or as it was explained at the merits hearing, to show its proposed Pond D could achieve the minimum design criteria referenced in 25 Pa. Code §87.112(b) regarding adequate embankment compaction. It did not provide sufficient information to show that the material it proposes to use in constructing Pond D's embankment will provide the required stability or to show the direction of groundwater flow will not cause a failure surface to form.

5. Willowbrook did not provide adequate information, either in the Application or through its explanation at the merits hearing, to show proposed Pond D could achieve the minimum design criteria referenced in 25 Pa. Code §87.112(b) for temporary storage capacity. It did not provide sufficient information on the seasonal effects of freezing and thawing on the constant volume of three feet of water which will exist in the pond before any water is discharged, nor did it provide sufficient information on the effect water draining from the wetland via CD-1 will have on the pond's temporary storage capacity.

6. Willowbrook failed to sustain its burden of proof.

7. DER is not estopped from denying Willowbrook's SMP application. Willowbrook has not shown DER induced it to believe no issues were outstanding regarding Pond D. Finnegan v. Commonwealth, Public School Employes' Retirement Board, 126 Pa. Cmwlth. 584, 560 A.2d 848, affirmed, __ Pa. ___, 591 A.2d 1053 (1991). Moreover, DER cannot be estopped from enforcing the law. F.A.W. Associates v. DER, 1990 EHB 1791; Lackawanna Refuse Removal, Inc. v. Commonwealth, DER, 65 Pa. Cmwlth. 372, 442 A.2d 423 (1982).

ORDER

AND NOW, this 20th day of March, 1992, it is ordered that the appeal by Willowbrook Mining Company of DER's denial of its SMP Application 43900101, docketed at EHB Docket No. 90-346-E, is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
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TERRANCE J. FITZPATRICK
Administrative Law Judge
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Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 20, 1992

cc: **Bureau of Litigation**
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SECRETARY TO THE B

MANOR MINING & CONTRACTING CORPORATION	:	
	:	
V.	:	EHB Docket No. 86-544-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 23, 1992

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

By Terrance J. Fitzpatrick, Member

Synopsis

The Board dismisses an appeal by Manor Mining & Contracting Corporation (Manor) contesting the effluent limitations for iron and manganese inserted into Manor's National Pollutant Discharge Elimination System (NPDES) permit. The Department of Environmental Resources' (DER) imposition of water quality-based effluent limitations was appropriate because DER was legally bound to apply the more stringent of technology-based or water quality-based effluent limitations. The Board rejects Manor's arguments that a less restrictive use for the receiving stream should have been adopted due to alleged "irretrievable man-induced conditions," that land use rather than water quality criteria should have been the controlling factor in calculating the effluent limitations, and that water quality criteria could not be the controlling factor due to DER's inability to conduct a waste load allocation. The Board also rejects Manor's arguments that DER erred in determining the

background water quality in the receiving stream, in determining the flow rate of the proposed discharge, and in rounding the effluent limitations to the nearest .5.

INTRODUCTION

This is an appeal from DER's granting of an NPDES permit, which was part of a comprehensive Coal Mining Activities Permit, to Manor. Manor operates a deep mine in Clearfield County known as Manor Mine #44. In its appeal, Manor contests DER's imposition of water quality-based effluent limitations[1] on the discharge from Outfall 001 at Mine #44. Manor contends that under the circumstances present here, DER should have applied less stringent technology-based effluent limitations.[2]

DER filed a motion for partial summary judgment on March 31, 1989. On March 9, 1990, the Board granted DER partial summary judgment, holding that under state and federal law DER must apply the more stringent of water quality-based or technology-based effluent limitations. Manor Mining & Contracting Corp. v. DER, 1990 EHB 216. The Board denied DER's motion, however, to the extent that DER argued that the use of a Mass Balance Equation (MBE) to derive water quality-based effluent limitations was appropriate as a matter-of-law. Id.

A hearing on the merits was held on August 23, 1990. Manor presented testimony by Terrance A. Rightnour, an expert in the field of discharge parameters for deep mines. DER presented testimony by L. Richard Adams (Chief of the Permits Section in the Williamsport Regional Office, Bureau of Water

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[1] Water quality-based effluent limitations are designed to protect the designated uses of the receiving stream. (The designated uses of the various streams in Pennsylvania are set out in 25 Pa. Code §93.9.) The stringency of these limitations varies case-by-case depending upon the degree of stringency necessary to protect the designated uses, and the amount of pollutants already in the stream.

[2] Technology-based effluent limitations, as the name implies, are based primarily upon the ability of pollution control technology to remove pollutants from a discharge.

Quality Management), and by Lynn Kyle (an employee in the Permits Section, Bureau of Water Quality Management). After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Appellant is Manor Mining & Contracting Company, a Pennsylvania corporation, with its principal place of business in Bigler, Bradford Township, Clearfield County.

2. The Appellee is the Pennsylvania Department of Environmental Resources, the executive agency of the Commonwealth responsible for administering the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, as amended, 71 P.S. §510-17, and the rules and regulations promulgated thereunder, including 25 Pa. Code Chapters 89 (relating to underground mining of coal), 93 (relating to water quality standards), and 95 (relating to wastewater treatment standards).

3. Manor operates a deep mine in Clearfield County known as Manor Mine #44.

4. On August 20, 1986, DER issued to Manor a permit for Mine #44. The permit contained the following effluent limitations for iron and manganese for Outfall No. 001: 1.5 milligrams per liter (mg/l) (average monthly), 3.0 mg/l (maximum daily), and 4.0 mg/l (instantaneous maximum) (Stipulation - "Stip." - No. 2).

5. The effluent limitations set out in Finding of Fact 4 are water quality-based, rather than technology-based (Stip. No. 3).

6. In calculating the effluent limitations, DER conducted a mass balance equation (MBE). The MBE is designed to determine the amount of a

pollutant which may be discharged into a stream taking into account the existing flow (volume) of the receiving stream, the flow of the proposed discharge, the background concentration of the pollutant in the receiving stream, and the water quality standards applicable to the receiving stream (Stip. 4, Transcript - "T" - 56, 57).

7. The MBE is particularly well-suited for calculating water quality-based effluent limitations for persistent pollutants - such as iron and manganese - because these pollutants do not decay as they flow through the water column. For these pollutants, determining the necessary amount of dilution is a simpler task (T. 57, 58).

8. To determine the existing stream flow to be used in the MBE calculation, DER uses the Q/7-10, which is defined as the lowest seven consecutive day flow which would occur once every ten years (T. 60).[3]

9. The receiving stream here is Bald Hill Run, which is classified as a cold water fishery under the regulations (T. 55, 25 Pa. Code §93.9). The area surrounding Bald Hill Run consists of abandoned, partially reclaimed, mining lands. Bald Hill Run is affected to some extent by acid mine drainage, although there are fish and other aquatic organisms in the stream (T.80, 139, 171).

10. Since there is no gauging station on Bald Hill Run, the Q/7-10 must be derived by using data for a comparable stream which does have a gauging station (T. 107-108).

11. DER considered two streams in the area - Little Clearfield Creek and Little Trout Run - to determine which was more comparable to Bald Hill Run. DER's choice of Little Clearfield Creek to use in determining the Q/7

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[3] See also, 25 Pa. Code §§93.1 (definition of Q/7-10), 93.5(b)(1)

was reasonable because it was representative of a watershed with abandoned mine drainage, the data for it was more recent than that for Little Trout Run, and because the flow data for it showed higher volumes than that for Little Trout Run (T. 107-112).

12. The existing flow of Bald Hill Run at Outfall 001 was reasonably calculated by DER at 0.15 cubic feet per second. This number was derived by determining the square mile drainage area for Little Clearfield Creek (13.2 sq. miles) and dividing that number into the Q/7-10 low flow data for that Creek (one cubic foot per second) to arrive at a yield per square mile (.075) (T. 111). The yield per square mile was then multiplied by the estimated drainage area for Bald Hill Run at Outfall 001 (two square miles). This computation yields a Q/7-10 for Bald Hill Run of 0.15 cubic feet per second (T. 113-114).

13. DER reasonably calculated the flow of the proposed discharge from Outfall 001 at 720,000 gallons per day, which was the number submitted by Manor as the estimated discharge upon completion of mining. This number represents a better long-term flow estimate than the figure representing the present discharge from the mine (Commonwealth Exhibit 3 - "Exh. C-3," T. 124, 178-179).

14. DER reasonably determined the background concentrations in Bald Hill Run as .29 mg/l for iron and 1.62 mg/l for manganese. These numbers were based on a sample taken in Bald Hill Run 10 to 25 feet upstream of Outfall 001 on February 23, 1984 by DER (T. 115-117, Exh. C-8).

15. The sample referred to in Finding of Fact 14 was more appropriate for determining the background concentrations than the samples submitted in

Manor's application, because Manor did not supply information as to how far upstream of Outfall 001 the latter samples were taken (T. 161-162).

16. Even if DER had used the samples submitted by Manor to determine the background concentration of iron in Bald Hill Run, the effluent limitation calculated by DER, after rounding, would not have changed (T. 132).

17. DER's rounding of the effluent limitation for iron from 1.66 mg/l to 1.5 mg/l, and of the effluent limitation for manganese from 1.62 mg/l to 1.5 mg/l, was in accord with DER's Guidance Manual, which called for rounding numbers of this magnitude to the nearest .5 (T. 89, 90, Exh. C-2, p. 3). DER's rounding policy is generally accepted in the field of water quality management as a way of keeping calculations to two or three significant digits to be consistent with the accuracy of analytical tests (T. 88-89, Exh. C-2, p. 2).

18. DER acted reasonably in stating the effluent limitations in terms of a monthly average and a daily average as well as an instantaneous maximum. When calculating water quality-based effluent limitations it is appropriate to examine discharges over a period of time because the water quality criteria in 25 Pa. Code Ch. 93 are designed to protect aquatic life over the long-term (T. 69-70).

19. The instantaneous maximum effluent limitation for manganese in the permit - 4.0 mg/l - is the same as that established in 25 Pa. Code §89.52(c) (T. 32-33).

DISCUSSION

This is an appeal by Manor from the effluent limitations in an NPDES permit issued by DER. Manor bears the burden of proving by a preponderance of

the evidence that DER erred in calculating the effluent limitations. 25 Pa. Code §21.101(a), Chevron U.S.A., Inc. v. DER, EHB Docket No. 85-410-M (Adjudication issued June 24, 1991).

In its post-hearing brief, Manor argues that DER erred in calculating water quality-based effluent limitations; instead, Manor contends that DER should have applied the more permissive technology-based standards for deep mines contained in 25 Pa. Code §89.52(c).[4] Manor's reasoning on this point is two-pronged. First, it contends that, under 25 Pa. Code §93.4(b), DER should have adopted a less restrictive use for Bald Hill Run than the current cold water fishery designation because this use "is not attainable because of irretrievable man-induced conditions." *Id.* Second, Manor argues that, under 25 Pa. Code §93.5(a), "land use" (in the vicinity of Bald Hill Run) rather than water quality criteria should be the controlling factor in setting effluent limitations for this particular discharge. Manor supports this position by arguing that a "waste load allocation"[5] must be conducted whenever water quality criteria are the controlling factor, but that a waste load allocation could not be conducted here because all of the discharges to Bald Hill Run other than Manor's are unregulated non-point source discharges from abandoned mining operations. Thus, since a waste load allocation could not be conducted, water quality criteria could not be the controlling factor.

Manor also makes several subsidiary arguments attacking the particulars of how DER calculated the water quality-based effluent limitations. Manor contends that, in determining the flow from Outfall 001,

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[4] Under this regulation, a deep mine operator may discharge up to 7 mg/l of iron and 4 mg/l of manganese (instantaneous maximums) 25 Pa. Code §89.52(c), T. 31-32.

[5] As discussed below, a waste load allocation is a tool to apportion among dischargers the total allowable amount of a pollutant which may be discharged to a particular stream under the water quality criteria.

DER improperly used the estimated flow upon the completion of mining, rather than the current flow data. Manor also argues that in determining the background concentrations of iron and manganese, DER erred by ignoring the most recent sample data supplied by Manor. Finally, Manor argues that DER erred by rounding the effluent limitations which it calculated to the nearest .5.

DER argues that it properly calculated the water quality-based effluent limitations, and that it was compelled to apply these limitations because, as the Board held in granting DER partial summary judgment, DER must apply the more stringent of water quality-based or technology-based effluent limitations. DER contends that 25 Pa. Code §93.4(b) neither required, nor allowed, it to consider the designated use of Bald Hill Run as anything other than a cold water fishery; DER interprets the language of this section as establishing the standards for amending 25 Pa. Code §93.9 to downgrade a stream, not as allowing DER to alter the classifications on a case-by-case basis without amending the regulations. Finally, DER argues that in calculating the water quality-based effluent limitations, it acted reasonably in determining the flow of Manor's discharge, in determining the background concentrations of iron and manganese already in the stream, and in rounding the effluent limitations to the nearest .5.

For the reasons which follow, we find that the evidence supports DER's calculation of the water quality-based effluent limitations for iron and manganese. Therefore, we will dismiss Manor's appeal.

Manor's argument that DER should have adopted a less restrictive use for Bald Hill Run pursuant to 25 Pa. Code §93.4(b) is unpersuasive. This section provides, in relevant part:

> (b) Less restrictive uses than those currently designated for particular waters listed in §93.9 may be adopted where it is demonstrated that:
>
> * * *
>
> (2) The existing designated use is not attainable because of irretrievable man-induced conditions ... .

25 Pa. Code §93.4(b). DER construes this section as providing the framework for amending the regulations to downgrade a stream, not as authorizing case-by-case departures from the designated uses set out in the regulations. Of course, we are required to defer to DER's interpretation of its regulations unless we believe such interpretation is clearly erroneous. Baumgardner v. DER, 1988 EHB 786, 792, Montgomery County Geriatric and Rehabilitation Center v. Commonwealth, DPW, 75 Pa. Commw. 248, 462 A.2d 325 (1983).

We agree with DER that 25 Pa. Code §93.4(b) contemplates amending the regulations, not adopting a less restrictive use on a case-by-case basis. This conclusion is implicit in the regulatory scheme; if designated uses are established by regulation, then changes in the designated uses must also be accomplished by regulation.[6] If we accepted Manor's argument, then the designated uses established in 25 Pa. Code §93.9 could be overruled by DER without changing the face of the regulation, which would undermine the entire regulatory scheme.

We also disagree with Manor's argument that land use (in the vicinity of Bald Hill Run) rather than water quality criteria should be the controlling factor in setting effluent limitations pursuant to 25 Pa. Code §93.5(a). This section reads:

> (a) *Application of effluent limitations.* The water quality criteria prescribed in this chapter for the various designated uses of the waters of this Commonwealth apply to receiving waters and

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[6] Manor does not challenge the overall approach of establishing the designated uses of particular streams by regulation.

> are not to be necessarily deemed to constitute the effluent limit for a particular discharge, but rather one of the major factors to be considered in developing specific limitations on the discharge of pollutants. Where water quality criteria become the controlling factor in developing specific effluent limitations, the procedures in § 95.3 (relating to waste load allocations) will be employed.

The Supreme Court of Pennsylvania interpreted this language in Mathies Coal Co. v. Commonwealth, DER, 522 Pa. 7, 559 A.2d 506 (1989). There, the Court considered what other "major factors," besides water quality criteria, should be considered in setting effluent limitations under that section. The Court agreed with DER that the other factors are the "numerous scientific and technical decisions which the [DER] makes in deriving a water quality based limit." 559 A.2d at 512. More specifically, the Court agreed with DER that DER could consider the following factors:

> '(1) What is the stream classification; (2) What pollutants are discharged; (3) What is the fate and transport of the pollutants (do they decay or persist, do they chemically or synergistically react with other substances); (4) What other point and non-point sources discharge to this stream segment; (5) Is the discharge to a free flowing stream or to a lake or impoundment; (6) What is the concentration of the pollutant already in the stream; (7) What is the receiving stream volume and (8) What is the volume of the discharge'

559 A.2d at 512 (quoting from DER's brief at pp 28-29).

Turning to the case at hand, we note that the factor Manor alleges is controlling - land use - is not listed among the "other factors" stated in Mathies. Nor do we think that land use can be described as one of the "numerous scientific and technical decisions which DER makes in deriving a water quality based limit." *Id.* In fact, Manor's argument is really an

attempt to have the more permissive technology-based limits applied. Manor's argument cannot be accepted because, as we ruled in granting partial summary judgment to DER, its argument violates the principle that DER must apply the more stringent of technology-based or water quality-based limits.[7]

As an additional argument in favor of establishing land use rather than water quality criteria as the controlling factor here, Manor argues that water quality criteria cannot possibly be the controlling factor because a waste load allocation was not - and could not - be conducted in this case. This argument is based upon the last sentence of 25 Pa. Code §93.5(a), which reads: "Where water quality criteria become the controlling factor in developing specific effluent limitations, the procedures in §95.3 (relating to waste load allocations) will be employed." Manor argues that since a wasteload allocation could not be conducted, then water quality criteria cannot possibly be controlling.

Subsections (a) and (b) of 25 Pa. Code §95.3 read as follows:

> (a) Waste load allocations are specific limitations on the discharge of waste from point sources, as opposed to requirements of minimum waste treatment performance as specified elsewhere in this title.
>
> (b) Waste load allocations are an administrative device to allow the Department to determine effluent limitations necessary to protect water quality and to treat waste dischargers equitably and will normally be implemented by their inclusion as effluent limitations in permits, orders or similar departmental actions concerning point source discharges.

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[7] Manor also cites DER witness Adams' testimony that where a stream is degraded by acid mine drainage to the point that it will not support its designated uses, then under Chapter 95, "minimum treatment standards," similar to the technology-based effluent limitations, would be applied (T. 75-76). This testimony is not entirely correct. Under Section 95.5(a), DER may impose technology-based standards to discharges to streams affected by acid mine drainage, but only when "the applicable water quality criteria are not being met to the extent that aquatic communities are essentially excluded ... ." (emphasis supplied). The evidence here indicated that aquatic communities were not excluded (FOF 9).

(emphasis supplied). We believe the underscored language captures the essence of a waste load allocation - it is designed to protect water quality and to treat waste dischargers equitably. Waste load allocations are used in situations where more than one discharger contributes a particular pollutant to a stream, and application of technology-based limits to each of the dischargers would result in a violation of water quality standards. A waste load allocation can be viewed as a way of dividing the pie among the dischargers - with the size of the pie determined by the water quality standards. See Chevron, USA v. DER, EHB Docket No. 85-410-M (Adjudication issued June 24, 1991, p. 9).

We agree with Manor that a waste load allocation cannot be conducted here because there is only one point-source discharger - Manor. There can be no allocation between Manor and the non-point source discharges; the latter are a given and, collectively, they are responsible for the background concentrations of iron and manganese which were used in the mass balance equation. However, we do not agree with Manor that since a waste load allocation cannot be conducted, that water quality criteria cannot be the controlling factor. The last sentence in Section 93.5(a) of the regulations, quoted above, evinces no such intent. As with Manor's previous arguments, this contention strikes us as an attempted end-run around the principle that DER must apply the more stringent of technology-based or water quality-based effluent limitations. Thus, we conclude that although the last sentence of Section 93.5(a) assumes that a waste load allocation would be conducted when

water quality criteria are controlling - an assumption that does not apply to this case because Manor is the only point source discharger - that DER was still justified in finding that water quality criteria were controlling.[8]

Having concluded that DER was correct in imposing water quality-based limits here, and that water quality criteria, rather than land use, was the controlling factor in setting these limits, we now turn to Manor's arguments that DER committed various errors in conducting its mass balance equation. First, we disagree with Manor's argument that DER erred in determining the flow from Outfall 001 by using the mine closure flow data rather than the current flow data. DER witness Lynn Kyle testified that he thought the closing flow data was a better long-term estimate of the flow over the life of the permit (FOF 13). Manor criticizes this testimony, however, it cites no evidence in support of its argument that the current flow data is more representative. Therefore, Manor has not met its burden of showing that DER erred in deciding which flow data to use.

Second, Manor argues that DER erred in the sample data it used to determine the background concentrations of iron and manganese in Bald Hill Run. This contention suffers from the same infirmity as the previous one - there is no evidence to support it. Lynn Kyle testified for DER that he did not use certain sample data submitted by Manor, even though it was more recent than the data he did rely upon, because he did not know how far upstream of Outfall 001 the samples were taken (T. 162). In addition, Mr. Kyle did not use samples which DER itself took five feet upstream of Outfall 001 because a

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[8] As a practical matter, we cannot imagine a situation where water quality criteria would not be characterized as "controlling" under Mathies. This is so because under Mathies, the "other factors" which DER may consider in setting a water quality-based effluent limitation are merely the technical adjustments which DER must make to assure that the effluent limitations result in compliance with the water quality criteria. If assuring compliance with the water quality criteria is always the goal of DER's formulation of water quality-based effluent limitations, then water quality criteria are always "controlling."

seep entered there and Mr. Kyle did not believe the samples were representative of background water quality (T. 147-148). Again, there is no evidence to contradict this.

Manor's last argument regarding DER's alleged errors in computing water quality-based effluent limitations is that DER erred in rounding the effluent limitations to the nearest .5. DER rounded the effluent limitations in accordance with its Guidance Manual; the effluent limitation for iron was rounded from 1.66 mg/l to 1.5 mg/l, and the limitation for manganese was rounded from 1.62 mg/l to 1.5 mg/l. Since the Guidance Manual is only a policy document, not a regulation, it is not entitled to any weight unless it is supported by independent evidence. See Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 435-436. DER witness Adams testified that the rationale behind the rounding policy is to keep calculations to two or three significant digits to be consistent with the accuracy of analytical tests (T. 89-90).

Manor argues, however, that Mr. Adams stated that he did not know why the rounding was done to the nearest .5 (Manor Brief, p. 8, citing T. 90).[9] While this is an accurate recitation of Mr. Adams' testimony, it does not satisfy Manor's burden of proving that DER erred. It appears to us that Mr. Adams was simply not familiar enough with the accuracy of analytical tests to support, from his own knowledge, the degree of rounding called for by the

[9] Manor's Brief refers to rounding to the nearest ".05." (Manor Brief, pp 8, 27). However, it is obvious from both the numbers involved here and from the Guidance Manual that the rounding was done to the nearest .5. For example, if the effluent limitation for manganese had been rounded to the nearest .05, it would have been rounded from 1.62 mg/l to 1.6 mg/l, not to 1.5 mg/l.

Guidance Manual.[10] This would be fatal to DER's rounding of the numbers if DER had the burden of proof here, but this burden lies with Manor. Manor did not submit any evidence to show that DER's rounding of the effluent limitations was excessive. Moreover, DER did, at least, show that its rounding of the effluent limitations here was consistent with its normal practice. Therefore, we find that Manor did not meet its burden of proving that DER erred in rounding the effluent limitations.[11]

Manor also raises a legal argument against DER's rounding policy - that this policy actually constitutes a regulation which must be promulgated via rulemaking procedures. See, Commonwealth, DER v. Rushton Mining Co., ___ Pa. Commw. ____, 591 A.2d 1168 (1991), allocatur denied, 600 A.2d 541 (1991). We disagree with this argument. In order to constitute a regulation, a DER policy must constitute a "binding norm" of general applicability and future effect. Rushton, 591 A.2d at 1173. Unlike Rushton, where DER inserted the same "standard conditions" in forty-six separate permits, DER's rounding policy does not impose any additional burdens or requirements upon regulated industries. The rounding policy is designed for internal use by DER employees in calculating effluent limitations on a case-by-case basis. The effect of the rounding policy upon the permittee will vary case-by-case; depending upon the numbers, the effluent limitations might be rounded up or down. In fact, in one permit, some limitations may be rounded up while others are rounded down. Finally, the fact that DER attempts to apply its rounding policy consistently does not transform this policy into a regulation.

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[10] There can be no question that the Guidance Manual did, in fact, call for rounding the effluent limitations involved here to the nearest .5. Under the Manual, the degree to which an effluent limitation is rounded depends upon the magnitude of the number. For example, the Manual calls for rounding numbers ranging from .01 to .10 to the nearest .01; .1 to 1.0 to the nearest .1; 1.0 to 10.0 to the nearest .5; etc. (Exh. C-2, p. 3).

[11] It seems logical to assume that DER would also make some allowance for this rounding in determining compliance with the effluent limitations. If DER failed to do so, Manor could raise this issue in a later appeal.

It follows from what we have stated above that Manor has not satisfied its burden of proving that DER erred in calculating the effluent limitations in Manor's permit. Accordingly, Manor's appeal must be dismissed.

CONCLUSIONS OF LAW

1. Manor had the burden of proof in this appeal from the effluent limitations inserted in its permit by DER.

2. In establishing effluent limitations, DER must apply the more stringent of technology-based or water quality-based effluent limitations.

3. Under 25 Pa. Code §93.4(b), the regulations may be amended to downgrade the designated use of a stream where the present designated use is not attainable because of irretrievable man-induced conditions. This section does not authorize DER to depart, on a case-by-case basis, from the designated uses set out in the regulations.

4. In the present case, water quality criteria, not land use, was the controlling factor in setting water quality-based effluent limitations pursuant to 25 Pa. Code §93.5(a).

5. The fact that DER could not conduct a waste load allocation here, because all the discharges to Bald Hill Run other than Manor's were unregulated non-point source discharges, does not preclude a finding that water quality criteria are the controlling factor in setting water quality-based effluent limitations.

6. Manor did not meet its burden of proving that DER erred in determining the background water quality in Bald Hill Run, in determining the flow from the proposed discharge, or in rounding the effluent limitations to the nearest .5.

7. DER's rounding policy does not constitute a binding norm of general applicability and future effect, and, accordingly, the policy need not be published as a regulation.

ORDER

AND NOW, this 23rd day of March, 1992, it is ordered that Manor's appeal at EHB Docket No. 86-544-F is dismissed.

ENVIRONMENTAL HEARING BOARD*

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Member

TERRANCE J. FITZPATRICK
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RICHARD S. EHMANN
Administrative Law Judge
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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 23, 1992

cc: DER, Bureau of Litigation
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jm

***Chairman Maxine Woelfling did not participate in this decision.**

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M. DIANE SMITH
SECRETARY TO THE BC

MCDONALD LAND & MINING COMPANY, INC. :
:
v. : EHB Docket No. 91-173-E
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: March 24, 1992

OPINION AND ORDER
SUR APPLICATION FOR AWARD OF
FEES AND EXPENSES

By: Richard S. Ehmann, Member

Synopsis

The Board awards fees and expenses in the amount of $6,193.24 under the so-called Costs Act to the prevailing party in an adversary adjudication initiated by the Department of Environmental Resources ("DER"). Previously, we had granted the appellant's Petition for Supersedeas of DER's challenged orders. DER then vacated its actions and we granted the parties' joint motion to dismiss this appeal as moot. Where the appellant, the prevailing party, pleads that DER's position was not substantially justified, DER must demonstrate that its position was substantially justified if it contests this assertion. DER has not shown its position, that appellant was absolutely liable under the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* ("Clean Streams Law") for three discharges of mine drainage which were not shown to leave the site or reach any waters of the Commonwealth, was substantially justified. Moreover, no special

circumstances exist which would make the award to appellant unjust, since any "chilling effect" this award might have on DER's pursuit of novel and unique legal theories was envisioned by the legislature in adopting the Costs Act and could be avoided by DER's pursuit of actions where its position is substantially justified. The amount of the award sought for services of appellant's consultant is excessive, however, and so we do not award the entire amount sought, as to do so would be to award punitive damages, something not contemplated by the Costs Act.

OPINION

On April 30, 1991, McDonald Land & Mining Company ("McDonald") filed an appeal from the issuance of Compliance Order No. 914017 by DER. This DER Order directed McDonald to address and correct three discharges of mine drainage at its Schrot Mine in Ferguson Township, Clearfield County. Thereafter, the instant appeal was consolidated with appeals at Docket Nos. 91-287-E, 91-288-E and 91-356-E which dealt with a compliance order reflecting an extension of the deadline for compliance with this order, a second compliance order directing compliance with the first order, and a permit suspension based upon McDonald's failure to comply with DER's Order.

In this appeal (and the others prior to consolidation), McDonald filed a Petition For Supersedeas which was opposed by DER in each appeal.[1] After consolidation, we held a single hearing on the pending Petitions For Supersedeas and, by Opinion and Order dated October 1, 1991, granted supersedeas to McDonald.

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[1] By an Opinion and Order dated July 25, 1991, we had previously denied a DER Motion For Summary Judgment.

Thereafter, the parties filed a Joint Motion To Dismiss As Moot. This motion averred that DER had vacated its Compliance Orders and permit suspension so there was no longer any controversy between the parties and thus the consolidated appeal was moot. In response thereto, on December 23, 1991, we granted the joint motion and dismissed this appeal as moot.

On January 16, 1992, McDonald filed the instant Application For Award Of Fees And Expenses which seeks an award of $10,000 pursuant to the Act of December 13, 1982, P.L. 1127, No. 257, 71 P.S. §2031 *et seq.* ("Costs Act"). On February 5, 1992 we received DER's Response To Application For Award Of Fees And Expenses and supporting Memorandum of law which jointly oppose the award of any fees or expenses to McDonald.

For McDonald to recover any fees or expenses under the Costs Act, it must establish the following prerequisites:

> (1) It is a party;
> (2) It is the prevailing party;
> (3) The compliance orders and permit suspension each constituted an adversary adjudication;
> (4) The adversary adjudication was initiated by DER;
> (5) DER is a Commonwealth agency; and
> (6) McDonald filed its application in a timely manner.

Swistock Associates Coal Corporation v. DER, 1990 EHB 1212.

DER does not contest that the prerequisites set forth in Swistock Associates, *supra*, have been met. Instead, DER concentrates its challenge on the issues which remain after the prerequisites have been met. In order, DER's objections or responses first challenge the amount of fees sought by McDonald for the services of Meiser & Earl, Inc., who are consulting hydrogeologists. DER also avers it is inappropriate for the Board to award

any fees or costs to McDonald because DER's position was legally and factually justified. Finally, DER avers special circumstances make an award of fees and costs unjust in this appeal.

The Substantial Justification Of DER's Position

DER asserts that no monies should be awarded to McDonald in this appeal. It correctly observes that Section 3(a) of the Costs Act, 71 P.S. §2033, allows an award of costs unless the Board finds DER's position in this case was substantially justified, i.e., had a reasonable basis in law and fact. From this assertion, after citing Swistock Associates, *supra*, DER argues its failure to make out a *prima facie* case does not by itself prove its position was not substantially justified. This line of argument makes no sense in this appeal because the only hearing we held was in connection with McDonald's Petition For Supersedeas, on which McDonald had the burden of proof. We granted the parties' Joint Motion To Dismiss before holding a merits hearing; thus, DER never had the burden of making even a *prima facie* case. However, we agree that standing by itself, DER's failure to defeat the supersedeas request does not show a lack of substantial justification for its position.

DER then argues that since McDonald seeks the award of costs and fees, McDonald must show DER's position was not substantially justified. Here, we disagree with DER. Section 3(b)(3) of the Costs Act, 71 P.S. §2033(b)(3), requires McDonald to make an allegation that DER's position was not substantially justified. This section does not establish which party must convince us on this aspect of McDonald's Petition, however. Clearly, McDonald bears the responsibility of pleading each of the prerequisites to qualify for an award of any fees or costs. Our reading of Section 2 of the Costs Act

suggests an award must be made unless we find there was substantial justification for DER's position. In turn, this suggests that as long as McDonald alleges no substantial justification exists, it has fulfilled the requirements for the form of an application, and, if DER contests that allegation, it must show us how it concludes that its position was indeed substantially justified. Further, 25 Pa. Code §21.101(a) of the Board's Rules of Practice and Procedure provide the burden of proof in proceedings before us is generally on the party asserting the affirmative. Thus, as to allegations of substantial justification and that special circumstances exist in this appeal which make an award unjust, DER bears this burden and must meet it using the record as it existed when McDonald's application was filed.

In apparent anticipation that we might place the burden of proof on it, DER also argues at length that its position was reasonable in law and fact. At this point we observe that DER's position can not be sufficiently justified if it is only reasonable in law or only reasonable in fact. DER's position must be reasonable both in law and in fact, and if DER fails to show either, it fails to make its case for substantial justification.

With regard to the reasonableness of DER's legal position, in the initial proceedings in this appeal DER asserted that there were three discharges of mine drainage on the mine site for which McDonald was absolutely liable, even if these discharges were not shown to reach any other waters of the Commonwealth. DER contends this liability exits because the three discharges are themselves waters of the Commonwealth. As noted in our supersedeas Opinion, this is a possible interpretation of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, but that it is a possible interpretation does not equate it with a reasonable

interpretation of the statute. Nevertheless, we need not rule in this Costs Act opinion on whether the statute should be read as DER insists because a review of the record shows that DER failed to establish a reasonable factual basis for its position.

DER's evidence failed to establish any discharge from the pool of water, the alleged discharge from which was identified as X-3 by DER's hydrogeologist. The record shows that a portion of an abandoned dirt road next to X-3 was damp, but there was never a discharge observed.[2] The small volume X-1 and X-2 discharges were initially observed to surface on a portion of the permit area which was actually affected by mining and to flow a short distance across the surface of the reclaimed area before ending again as damp surficial soils. Subsequently, but prior to the supersedeas hearing, the evidence established that X-1 and X-2 dried up and ceased to flow. DER withdrew the Orders (and permit suspension) on these three discharges from which McDonald appealed for the reason that the "discharges" did not reappear. (See the letters from DER attached to the parties' Joint Motion To Dismiss).

In short, there was no evidence offered proving X-1, X-2 or X-3 even discharged to any surface waters of the Commonwealth.[3]

The only evidence as to these discharges reaching any nonsurface "water of the Commonwealth" is testimony by a DER hydrogeologist. He testified that in hydrologic theory there are various zones or layers of subsurface water beneath the land's surface and that water from each of these

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2 X-3 is located within McDonald's permit area but not in an area where it mined coal.

3 DER correctly asserts that in the supersedeas hearing, McDonald did not challenge DER's water quality analysis of X-1, X-2 and X-3.

seeps is infiltrating the ground and reaching at least the upper most of these types of subsurface water. Specifically, he indicated the damp soils, at and immediately beneath the surface of the ground are one of these layers of subsurface water. Other than this hydrogeological theory testimony, there was no evidence offered to support the theory that where soils are damp, the dampness is a water of the Commonwealth or that these discharges infiltrate and reach the underground water. We observe that underground waters, as defined to be part of "waters of the Commonwealth" in the Clean Streams Law's definition thereof, may well include only the "saturated zone" or water table underground waters, as opposed to these damp soils. However, we will not repeat everything stated in Board member Ehmann's supersedeas opinion on this issue or the quality of DER's expert witness evidence offered. It suffices to say that merely because some witness gives an opinion or testifies to a fact does not make a position adopted by DER a factually reasonable one. The weight and sufficiency of the evidence and the credibility of witnesses are also weighed by this Board in reviewing whether DER's position is factually reasonable, just as they should be by DER in deciding what actions to initiate and what evidence to offer in hearings before us.

What has been said above also applies to DER's position that its case had a reasonable factual basis because it offered some evidence that the water discharged at X-1, X-2 and X-3 all flowed on the surface and into surface impoundments (to help fit these discharges into "waters of the Commonwealth"). There was no evidence of same as to X-3. While there was evidence offered that at one point in time the discharges at X-1 and X-2 flowed a short distance on the surface, the only impoundment or channel of conveyance identified in the supersedeas opinion at X-1 is a tire track in the haul road.

The same is true at X-2, although a puddle of water also existed at X-2 during at least one DER site inspection.

Moreover, DER did not offer all of the evidence in support of its position that it might have offered at a merits hearing, but offered us only the evidence it felt it needed to offer to defend against the Petition For Supersedeas. In a supersedeas hearing the evidence is normally truncated and the hearing's focus varies greatly from that of the final merits hearing. At this supersedeas hearing for example, McDonald, as petitioner, had the burden of proof, while at the merits hearing DER would have had this burden because it issued these Orders. Thus, judging the reasonableness of DER's factual position is inherently difficult. McDonald's Petition leaves us no choice in this regard, however.

We make this point because DER also argues that at the hearing, it only offered the evidence required to prove its case based upon the current state of the law and cannot be faulted for that. We disagree. DER offered only the evidence needed to prevail in defense against supersedeas if the Board agreed with what DER contends the law is, i.e., if the discharge arises on a company's mine site but is never shown to leave that site or to reach any other water of the Commonwealth, the miner is nevertheless responsible therefor. We have not agreed that that is what the law on this issue is and DER has failed to cite us to any authority which says this is the law today. Accordingly, when DER elected to present only this evidence, as opposed to this evidence plus any other evidence available to it showing the water from X-1, X-2 or X-3 was leaving the site, entering an impoundment or reaching the "underground water", as that phrase is used in partially defining "waters of the Commonwealth", it elected to accept the risk it might not prevail and

could then be successfully "faulted" through a Costs Act application. Merely because some small amount of testimony supporting a portion of DER's position came before us at the supersedeas hearing, where the burden was on McDonald, does not establish that DER's position had a reasonable basis in fact.[4]

Special Circumstances Bar A Costs Act Award

Next, DER asserts that special circumstances would make a Costs Act award to McDonald unjust. Here, DER asserts awarding costs would chill enforcement by forcing DER to initiate actions only where the law is settled, whereas DER must be able to assert novel and unique legal theories in enforcing the law. DER contends that since its resources are limited, if fees and expenses are awarded, such an award may cause it to curtail its enforcement efforts because it cannot risk incurring these expenses.

We agree with DER that Courts or Boards and the advocates appearing before them often respectfully disagree as to the state of the law. We also agree that if DER's resources are limited, an award under this Act will deplete same, causing DER to rethink how it will spend the remaining resources. As a Board, we disagree with DER as to the assertion that these circumstances would make an award unjust.

The first problem with this argument is that it draws no distinction between unique and novel but sound legal arguments with solid factual footing and hair-brained or off-the-wall arguments based either on a solid factual

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[4] We agree with DER that it acted reasonably in withdrawing these orders and lifting the permit suspension based on the fact that the discharges dried up and that James E. Martin v. DER, 1989 EHB 697, does not apply here. But this does not change the result because the question here is whether DER's position was substantially justified. Clearly, there can be no "automatic" award to McDonald just because DER withdrew its orders and permit suspension, but the lack of such an automatic award does not end our inquiry.

footing or factual quicksand. If we bought DER's argument, all that DER would have to say to defeat a Costs Act petition is that its argument is a novel or unique one so a Costs Act award is inappropriate. DER has the duty to enforce the laws it administers fairly and to take strong enforcement positions, as it asserts. In so doing, it may wish to advance arguments which, if sustained, advance the boundaries of the law in a unique way. We do not wish to dissuade DER from bringing its "test" cases. They may be appropriate. Nevertheless, DER must recognize that there are boundaries as to reasonableness and common sense for it as well and that where it acts unreasonably, not only may it be reversed, but it may also be forced to defend against a Costs Act action. Thus, not every case is a "test case", and DER may even lose some cases which are truly "test cases". DER need only substantially justify its position in cases to eliminate Costs Act actions. This may mean fewer but better "test cases" but that is inherently better than quantity without quality in such matters.

Our final problem with DER's argument is that it ignores the very Act under which McDonald filed its application. The purpose of the Act is to encourage parties to seek review of what they believe to be unreasonable actions by governmental agencies and to diminish the deterrent effect that the cost of seeking review has on persons contemplating same. The Legislature intended to put the brakes on administrative agencies by enacting this statute. It intended to chill enforcement actions which are on the periphery of mainstream enforcement. That being the legislature's intent, the law, if applied properly, will chill all Commonwealth agencies to some unavoidable degree. It is not this Board's responsibility to comment on the rightness of the policy set forth in this Act but to adjudicate the merits of applications

under it. In so doing, we must hold that no special circumstances have been shown to us by DER which would make an award to McDonald unjust.

Amount Of The Fee And Costs Award Sought

Finally, turning to McDonald's application, we see its prayer for relief seeks an award of $10,000, yet the application alleges the expenditure of costs and fees of only $7,187.93. As these are all of the costs and fees which McDonald is alleged to have expended, assuming these figures are accurate, this is the maximum which we may award it under this Act. Nothing in the Costs Act indicates its purpose is to award punitive damages against a Commonwealth agency, and any award over actual allowable fees and expenses would clearly be punitive.

Nothing in McDonald's Application establishes any justification for an award to McDonald in compensation for the services of Meiser & Earl, Inc. at a rate above the highest rate of compensation for expert witnesses paid by DER. This is all that McDonald is allowed as to such expenses by definition in Section 2 of the Costs Act, 71 P.S. §2032. DER has provided us these compensation rates in its Response and objects to the amount sought by McDonald for this consultant's work on this basis. When we apply them to the hours reported as work by this McDonald consultant, instead of costs of $1,242.65 for the work, the maximum amount awardable is $607.27.

The same is true with regard to the fees charged by McDonald's other consultant, EADS Group. Here, too, McDonald seeks hourly compensation levels in excess of that allowed. Though DER's Response never raised this issue, it is our responsibility to award costs, but only in accordance with the Costs Act's requirements, so we must deal with this issue despite DER's omission. According to Exhibit B of DER's Response, it compensates its senior

hydrogeologists at a rate of $34.25. Despite that limit, McDonald seeks compensation for an EADS Group Senior Geologist and Senior Environmental Specialist at the rate of $46.80 and $46.50, respectively. When these EADS Group rates are reduced to $34.25 per person, the amount recoverable by McDonald from DER for this consultant's services drops from $1,404.56 to $1,045.25.

Thus, the reimbursable portion of the consultants' fees are $607.27 and $1,045.25. McDonald also seeks attorneys fees of $4,540.72, about which there is no dispute. The total sum which we can award is the sum of these three figures: $6,193.24.

Accordingly, with findings and conclusions as set forth in the body of this Opinion, we enter the following order.

O R D E R

AND NOW, this 24th day of March, 1992, it is ordered that the Application For Award Of Fees and Expenses filed on behalf of McDonald on January 16, 1992 is granted in part and denied in part. DER shall, within 30 days of this Order, pay $6,193.24 to McDonald.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK*
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

* Board member Terrance J. Fitzpatrick concurrs in the result only.

DATED: March 24, 1992

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

ESTATE OF CHARLES PETERS, JANE P. ALBRECHT, AND LINDA P. PIPHER
v.
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, WESLAND DEVELOPMENT, INC., Permittee, and PIKE COUNTY HOTELS CORPORATION, Intervenor:

EHB Docket No. 90-421-W

Issued: March 25, 1992

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

By Maxine Woelfling, Chairman

Synopsis

A joint motion for summary judgment is granted in part and denied in part, while an alternative joint motion to limit issues is denied. Issues pertaining to the effects of construction of a sewage treatment plant on storm water runoff are waived if not raised in a timely appeal of the Department of Environmental Resources' (Department) approval of a planning module for a new land development pursuant to the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq* (Sewage Facilities Act). Where appellants broadly assert in their notice of appeal that the Department authorized an "unreasonable level of discharge," and they define that term generally in their response to an interrogatory, they will not be precluded from raising the issue of temperature effects in a hearing on the merits because their response to another subpart of the same interrogatory indicates they are contesting temperature limits for the discharge. A motion for summary judgment is moot with respect to those issues

raised in the notice of appeal which have subsequently been withdrawn. Appellants have standing to appeal where they have a substantial interest directly and immediately affected by the agency action which is the subject of the appeal. A motion for summary judgment asserting that certain issues raised in the notice of appeal were waived and another was premature will not be granted where the movants have failed to establish they are entitled to judgment as a matter of law.

OPINION

This matter was initiated by the Estate of Charles Peters, Jane P. Albrecht, and Linda P. Pipher (collectively, Peters) on October 10, 1990, with the filing of a notice of appeal from the Department's September 10, 1990, issuance of a National Pollutant Discharge Elimination System (NPDES) permit to Wesland Development, Inc. (Wesland), under §202 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202 (the Clean Streams Law). The NPDES permit authorizes a discharge of up to 1.15 million gallons per day (mgd) into an unnamed tributary of Little Bushkill Creek.[1]

Peters' notice of appeal contends that issuing the NPDES permit constituted an abuse of discretion, and arbitrary, capricious, and unreasonable action because the Department failed to comply with required notification procedures; authorized an unreasonable level of discharge to the stream; and failed to consider the impact of the discharge on other individuals affected by the Department's action. They also assailed the Department's failure to consider or implement other reasonable alternatives; failure to require mitigation measures to reduce wetland disruption and the

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[1]Peters note in their memorandum of law that the NPDES permit authorized a discharge of 1.15 mgd while the plan approval provided for a discharge of only 1.14 mgd.

adverse consequences of storm-water run-off; and failure to require a revised social and economic justification report for the project upon the closure of Unity House.

Pike County Hotels Corporation (Pike County Hotels), the owner and operator of Unity House, which is jointly financing the treatment plant with Wesland, filed a petition to intervene on November 13, 1990. The Board granted the petition on December 13, 1990.

On April 10, 1991, Wesland and Pike County Hotels filed a joint motion for summary judgment and/or motion to limit issues, accompanied by a memorandum in support. Wesland and Pike County Hotels contend that they are entitled to summary judgment as a matter of law with respect to issues raised in the pre-hearing memorandum which were not raised in Peters' notice of appeal and Paragraphs 14 and 15 of the notice of appeal, which maintain that the Department failed to comply with public notice requirements. They also argue they are entitled to summary judgment regarding the allegations raised in Paragraph 17 of the notice of appeal because Peters does not have standing to maintain an action for injuries to the properties and interests of others not before the Board; the issues in Paragraphs 2, 4, 6, 7, 8, 9, 10, and 11 because they were waived by Peters' failing to file a timely appeal of the plan approval; and an issue in Paragraph 7 because it was prematurely raised.

Peters filed a memorandum in opposition on May 1, 1991.[2] Wesland and Pike County Hotels filed a reply memorandum on May 14, 1991. On August 7,

[2]Peters never filed an answer to the motion for summary judgment. The Board has held previously that motions for summary judgment must set forth, with adequate particularity, the reasons for the motion and that representations in legal memoranda alone are insufficient. See County of Schuylkill et al. v. DER and City of Lebanon Authority, 1990 EHB 1370. We see no reason why the rule for answers to motions for summary judgment should be any different. Even in instances where no response at all is submitted to the motion, summary judgment is not appropriate unless it is apparent that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Nevertheless, where a party opposing summary judgment wishes the Board to consider legal arguments that are raised only in memoranda, and not in an answer to the motion, it does so at its peril. For the purposes of this decision, however, we will treat the memorandum as an answer.

1991, the Board ordered the Department to submit a memorandum providing the Department's interpretation of its regulations and, specifically, identifying which regulations govern Sewage Facilities Act plan revisions involving permits issued under the Clean Streams Law. The Department filed its memorandum on September 16, 1991.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Robert L. Snyder, et al. v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 588 A.2d 1001 (1991). Summary judgment may be entered only in cases that are free from doubt. MacCain v. Montgomery Hospital, 396 Pa. Super. 415, 578 A.2d 970 (1990).

As for the motion to limit issues, this Board recently stated:

> A motion *in limine* is a pre-trial motion designed to exclude evidence which is potentially inflammatory, prejudicial, without probative value, or irrelevant. Ianelli and Ianelli, Trial Handbook for Pennsylvania Lawyers, §2.15 (2d. ed. 1990). The judge has wide discretion to make or refuse to make advance rulings. Cleary, McCormick on Evidence, §52 (3d. ed. 1984).
>
> (County of Schuylkill, et al. v. DER and City of Lebanon Authority, 1990 EHB 1347, at 1348.)

These facts are not controverted. Wesland currently owns and operates a sewage treatment plant with a capacity of 250,000 gallons per day (gpd), which discharges into an unnamed tributary of the Little Bushkill Creek. (Ex. W-28, at ¶¶ 2 and 3; and Ex. W-55, at ¶ 4)[3] The current discharge volume of 250,000 gpd was approved and permitted by an NPDES permit

[3]"Ex. W- " denotes Wesland and Pike County Hotel's exhibits in support of the motion for summary judgment.

issued by the Department on September 22, 1982. (Ex. W-29A) The permit has since been renewed and amended. (Ex. W-30A)

On March 6, 1989, Wesland submitted a planning module for land development for review and approval to the Lehman Township Planning Commission. (Ex. W-33A and Ex. W-33B; Ex. W-28, at ¶ 4) The module, prepared pursuant to 25 Pa. Code §71.52, was submitted together with a social and economic justification report prepared to satisfy the requirements of 25 Pa. Code §95.1(b)(1); the module proposed an expansion of Wesland's original sewage treatment plant, utilizing the existing discharge location on property owned by Unity House. (Ex. W-34)

On April 28, 1989, Unity House also submitted a planning module for new development and a social and economic justification report. (Ex. W-35 and Ex. W-36) The Department and Lehman Township urged Wesland and Unity House to consider a joint treatment system, which would avoid unnecessary duplication of facilities. (Ex. W-28 at ¶ 7) Wesland and Unity House agreed, submitting a revised joint sewage facilities planning module which proposed construction of a joint sewage treatment plant on the site of the existing plant. (Ex. W-28, at ¶ 7; Ex. W-51) The expanded plant would have a capacity of 1.15 million gpd and would discharge from the same location on the Unity House property as Wesland's existing facility. (Ex. W-51)

Lehman Township approved the revised plan, and, on December 13, 1990, the Department informed the Lehman Township Board of Supervisors that the Department approved the revision to the Township's official plan. (Ex. W-37; W-39) Notice of the approval was published at 19 Pa. Bulletin 5533-5534 (December 30, 1990). (Ex. W-19; Ex. W-55, at ¶ 29) Peters did not file an appeal with the Board challenging the Department's action on the plan revision (Wesland and Pike County Hotels' motion, ¶ 26; Ex. W-55, Peters' Pre-Hearing Memorandum, at ¶ 29).

I. Issues not raised in Peters' notice of appeal

Wesland and Pike County Hotels contend that they are entitled to summary judgment or an order limiting issues with regard to those issues in Peters' pre-hearing memorandum which were not previously raised in its notice of appeal. Specifically, they maintain that Peters failed to raise the issue of whether the Department should have imposed temperature limitations on the discharge in the NPDES permit.

In their pre-hearing memorandum, Peters assert:

> 57. The authorized discharge will cause degradation of the receiving stream's water quality as a result of thermal effects on the receiving stream.

Peters maintain that they raised the issue of the thermal effects of the discharge in Paragraph 4 of their notice of appeal. That paragraph provides:

> [The Department] abused its discretion and acted in an arbitrary, capricious, and unreasonable manner by authorizing the unreasonable level of discharge into a stream classified as a High Quality Cold Water Fishery [High Quality Stream], aquatic life, water supply, and recreation [sic].

According to Peters, temperature is an important factor in the classification of a stream as a High Quality Stream and is encompassed by the language "unreasonable level of discharge" used in Paragraph 4 of the notice of appeal. Wesland and Pike County Hotels, for their part, argue that Peters meant to challenge the volume of the discharge rather than specific effluent limitation parameters, noting that Peters included nothing regarding thermal effects in their definition of "unreasonable level of discharge," in response to Pike County Hotels Interrogatory 6(a).

Interrogatory 6(a) and Peters' response were:

> Explain the factual basis for the assertion contained in paragraph 4 of Appellants' Notice of Appeal that "DER abused its discretion and acted in an arbitrary, capricious and unreasonable man-

to complete any additional discovery by March 16th; at that point the instant motion was not decided, let alone pending before us, so DER could not know if it would prevail in regard thereto or not. Accordingly, we believe its counsel properly acted to protect his client's position to the extent he could by conducting discovery to explore the breadth of the contentions Spang might seek to put forth at this hearing. Since discovery can serve both to provide a party information favorable to its position and information concerning the extent of its opponent's position, engaging in discovery cannot act as a waiver of DER's position set forth in its Motion. We also observe in passing that within Spang's waiver argument is the seed of a tacit admission that Spang is indeed trying to broaden the scope of the reopened hearing beyond that directed by the Commonwealth Court, since if there is no broadening occurring there can be no assertion of waiver of objection to any attempt to broaden. Finally, in rejecting this argument after having read Mr. Keister's deposition, we do not see a pattern in the questions asked by DER's counsel suggesting a DER belief that all of the issues which Spang contends are raised by its Petition are indeed raised thereby. Rather, it appears that Mr. Keister's answers to the questions from DER's counsel, at least in some cases, lead counsel for DER to ask further questions to clarify the breadth and meaning of the prior answers.

Having come to the above conclusions, however, we are not done with this Motion because DER's Motion in Limine is two-pronged. It also seeks an Order limiting the testimony of Spang's experts in accordance with Spang's answers to interrogatories and Mr. Keister's deposition which preceded the filing of Spang's interrogatory answers. While we agree that Spang is bound to its answers to DER's interrogatories and further limited in expert opinion

encompass the issue of the thermal effect of the discharge and Peters' responses to Interrogatories 6(f) and 6(g) do raise the issue of the thermal effects, we will not grant the motion on this issue.

II. Moot issues

A number of aspects of the motion are now moot. Wesland and Pike County Hotels moved for summary judgment or to limit issues with regard to Paragraphs 10, 14, and 15, and part of Paragraph 8 of the notice of appeal, in addition to those paragraphs discussed above. Paragraph 10 asserted that the Department should have selected an alternative which would reduce the disruption of wetlands. Paragraphs 14 and 15 contended that the Department failed to comply with certain required notification procedures. Finally, Wesland and Pike County Hotels sought summary judgment relating to that part of Paragraph 8 which alleged that the facilities should discharge into Saw Creek instead of Pond Run Creek. Peters withdrew each of these issues in their memorandum in opposition; the motion, therefore, is moot with regard to those issues. See Cox v. City of Chester, 76 Pa. Cmwlth. 446, 464 A.2d 613 (1983).

III. Standing

Wesland and Pike County Hotels contend that they are entitled to summary judgment with respect to the allegations raised in Paragraph 17 of the notice of appeal because Peters does not have standing to maintain an action for injuries to the properties and interests of others not before the Board. We will treat this portion of the summary judgment motion as a motion to dismiss for lack of standing.

In order to have standing to appeal, one must have a substantial interest directly and immediately affected by the agency action which is the subject of the appeal. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280-284 (1975) and Andrew Saul v. DER and Chester Solid

"substantial" as meaning "some discernible adverse effect other than the abstract interest of all citizens in having others comply with the law." 464 Pa. 168 at ___, 346 A.2d 269 at 282. "Direct," the court wrote, meant that "the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." Id. Finally, the court stated that the term "immediate" related to "the nature of the causal connection between the action complained of and the injury to the person challenging it." In other words, the injury cannot be "a remote consequence of the action." William Penn, 464 Pa. at 195-197, 346 A.2d at 282-83, and McColgan v. Goode, 133 Pa. Cmwlth. 391, 576 A.2d 104 (1990).

This does not end our inquiry into standing for, as we have recently noted in Borough of Glendon v. DER and Glendon Energy Company, 1990 EHB 1501, where a party has standing to bring an appeal, it does not necessarily follow that it may have standing to raise certain individual objections to the Department's action. Rather, it can only raise those factual or legal objections which are relevant to the allegations which conferred standing to appeal, Robert A. and Florence Porter v. DER, 1985 EHB 741.

Paragraph 17 of Peters' notice of appeal asserts:

> [The Department] abused its discretion and acted in an arbitrary, capricious, and unreasonable manner by its failure to consider the discharge's adverse impact on the Christian Herald Camp, Wicks Pond, local groundwater sources, the Bushkill Falls attraction, the Delaware Water Gap recreation areas and no analysis was undertaken of methods to mitigate downstream impacts of the permit.

Wesland and Pike County Hotels concede that Peters have standing to raise the issue of the discharge's effect on Bushkill Falls. Peters own Bushkill Falls, a scenic attraction downstream of the proposed sewage treatment plant, consisting of hiking paths, woodlands, and eight waterfalls (Wesland and Pike County Hotels' motion, ¶¶ 2-4; Ex. W-2, Peters' notice of

appeal, at ¶ 2). Wesland and Pike County Hotels dispute Peters' standing to raise allegations of harm to the Christian Herald Camp, Wicks Pond, local groundwater sources, and the Delaware Water Gap Recreational area. Peters quibble with the procedural vehicle chosen to raise this issue and further contend that they should be able to raise any issue relating to the downstream impacts of the discharge. We do not agree.

Peters have established no interest in downstream properties or uses other than Bushkill Falls, which are sufficient to meet the William Penn standing test. The interests which they have in this respect are no different than the general interest of every citizen in enforcing the law, and, therefore, those objections regarding harm to properties or uses other than Bushkill Falls will be dismissed for lack of standing.

IV. Issues which were waived or are premature

Wesland and Pike County Hotels assert that many of the issues Peters raises in the notice of appeal are being raised at the wrong stage in the approval process.

Three water quality approvals are required before one can build a sewage facility which discharges into surface waters. The first is approval under the Sewage Facilities Act. The second, at issue here, is an NPDES permit under §202 of the Clean Streams Law. And, the third is a water quality management permit, authorizing construction and operation of the facility pursuant to §207 of the Clean Streams Law.

Wesland and Pike County Hotels contend that Peters waived issues in Paragraphs 2, 4, 6, 7, 9 and 11 of its notice of appeal by failing to raise those issues in a timely appeal of the Department's approval of the module for new land development. In addition, Wesland and Pike County Hotels contend that certain issues raised in Paragraph 7 are premature in an NPDES permit appeal.

Paragraph 2 contends that Peters were "adversely affected by the [Department] action that is the subject of the instant appeal." Peters have identified two factual bases in support of this assertion. They contend that public awareness that the waterfalls in Bushkill Falls carry treated sewage will damage Peters' pecuniary interest (Peters' response to No. 6(a) of Wesland's Interrogatories), and that "1.4 (sic) million gallons a day is a substantial amount of water...which could...alter the course of the stream, the...falls, et cetera." (Deposition of James E. Gallagher, Representative of the Peters Estate, at 39-40.) Paragraph 4 of the notice of appeal asserts that the Department, by issuing the NPDES permit, authorized "an unreasonable level of discharge." Paragraph 9 contends that the Department failed to "implement mitigation measures through requiring discharge of effluent first into existing ponds on the applicant's property," and Paragraph 11 asserts that the Department should have "mitigate[d] the adverse consequences of the increased run-off insofar as the project's construction will affect the natural permeability...."

Finally, Wesland and Pike County Hotels assert that certain issues raised in Paragraph 7 were waived and others are premature. Paragraph 7 maintains that the Department failed to "consider and accept proposals that would mitigate the harm caused by the substantial increase in the treatment capacity and discharge of effluent into Pond Run Creek." In Paragraph 7, Peters also assert:

> The permit is too vague on the implementation of spray irrigation measures to treat approximately 460,000 gallons per day, or 43 percent of the total effluent proposed to be discharged.

Peters base their vagueness challenge on language in Condition Six of the NPDES permit, which provides:

> The permittee shall utilize spray irrigation of the treated effluent to the maximum extent

> possible in order to minimize the amount of treated effluent that is discharged to the receiving stream.

Peters contend that Condition Six of the permit is vague and unenforceable on its face because the permit does not set specific discharge limits to be used during spray irrigation.

> The permit does not establish any limits on the discharge and authorizes a full discharge of 1.15 million g.p.d....despite Condition No. Six. Absent specific limits on the discharge upon implementation of spray irrigation, [the Department] abused its discretion in authorizing such a discharge of 1.15 million gallons per day.
>
> Peters' Responses to Pike County Hotels' Interrogatories, No. 8(a).)

Most of the assertions in Paragraphs 2, 4, 6, 7, 9, and 11 of Peters' notice of appeal are phrased in broad language, and there is substantial overlap from one paragraph to another. Essentially, however, Peters only take issue with the effluent limits; the volume of the discharge; the location of the discharge; possibly, certain aspects of the operation of the plant; and, the stormwater drainage plans. The Department evaluates each of these issues at some point in the three-step approval process. The question is which, if any, of these issues are relevant at the NPDES stage and which were waived after plan approval or are reserved for the water quality management permit review.

The Department is required to evaluate certain alternatives when reviewing a plan for a community sewerage system. Section 7(b)(4) of the Sewage Facilities Act provides that no permits, including NPDES permits, may be issued unless a municipality has adopted, and the Department has approved, a sewage facilities plan for those areas of the municipality for which an

official plan is required. 35 P.S. §750.7(b)(4). As noted earlier in this opinion, Wesland and Unity House submitted a joint sewage facilities planning module which Lehman Township and the Department subsequently approved.

The system Wesland and Unity House proposed is a "community sewerage system" under the regulations. A "community sewerage system" is a "community sewage system which uses a method of sewage collection, conveyance, treatment and disposal other than renovation in a subsurface absorption area or retention in a retaining tank." 25 Pa. Code §71.1 (emphasis added).[4] Because Wesland and Unity House proposed a community sewerage system, §71.65 of the Department's regulations requires that the plan revision comport with the Department's regulations at 25 Pa. Code §71.11-71.57, Subchapters B and C of Chapter 71.

Wesland and Pike County Hotels have not demonstrated that they are entitled to judgment as a matter of law with regard to the issues of the effluent limits, the volume or location of the discharge, or the operation of the plant. Because the burden rests upon Wesland and Pike County Hotels as the moving parties to establish that they are entitled to the relief requested, the motion for summary judgment and motion to limit issues are denied with respect to these issues.

In the discussion of the regulations in its memorandum of law, the Department does not specifically refer to "water quality standards"; instead, it addresses "the quality of the discharge" and "the consideration of other alternatives." The Department contends that matters relating to the quality of a proposed discharge are appropriate in an NPDES permit review but that issues involving other alternatives are not. See the Department's Memorandum of Law, pp. 15-16. The Department notes that, because the plan revision must

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[4] A "community sewage system," meanwhile, is "a sewage facility, whether publicly or privately owned, for the collection of sewage from two or more lots, or two or more equivalent dwelling units and the treatment or disposal...of the sewage on one or more of the lots or at another site. *Id.*

comport with the Department's regulations at 25 Pa. Code §71.11 through §71.57, the content requirements at §71.21 apply. See the Department's Memorandum of Law, pp. 15-16. Section 71.21 requires an alternatives analysis. The problem is that the issue of water quality standards falls within both categories--the quality of the discharge and the consideration of other alternatives--and each dictates a different result. On the one hand, water quality standards affect the quality of the discharge; on the other, they are among the factors the Department weighs when evaluating alternatives under 25 Pa. Code §71.21. See 25 Pa. Code §71.21(a)(5)(i)(E).

The issue of the volume of the discharge also falls within two overlapping but mutually inconsistent interpretations by the Department of its regulations. In its memorandum, the Department simultaneously maintains that it must evaluate the flow of the proposed discharge as part of the NPDES permit review and that issues concerning possible alternatives to a proposed discharge must be resolved at the plan approval stage. See the Department's Memorandum of Law, pp. 14-15.

There is support for either position separately. Generally, issues pertaining to the volume of the discharge are relevant in an NPDES permit review, but the volume of the discharge is relevant to certain considerations in the plan approval process. In particular, three variables which affect the volume of a discharge are the anticipated sewage flow from the development, the type of sewage facilities proposed, and the relation between the proposed development and present and future needs. The Department is required to evaluate all three as part of the plan approval process. See 25 Pa. Code §71.52(a)(1)(i-iii), (anticipated sewage flow from the development); §71.52(a)(1)(v), (the type of sewage facilities proposed); and, §71.52(a)(2), (4), (relation between proposed development and present and future needs).

As for the location of the discharge, the Department's position is based on our decision in Bobbi Fuller *et al.* v. DER and Paradise Township, 1990 EHB 1726, aff'd, No. 157 C.D. 1991 (Pa. Cmwlth., Sept. 9, 1991), that issues relating to the location of a sewage treatment plant were precluded in an appeal of the NPDES permit because of appellants' failure to challenge the Department's approval of the municipality's official plan and the Department's issuance of an encroachments permit. The Fuller opinion was also the basis of a ruling in an earlier discovery dispute in this appeal wherein we held that interrogatories pertaining to the location of the discharge were irrelevant in a third-party appeal of an NPDES permit because the location of the discharge is one of the alternatives the Department evaluates as part of plan approval.

Upon further consideration, however, we find that the issue regarding location of the discharge is not as simple as portrayed by Wesland, Pike County Hotels, and the Department. The Department's brief, and this Board's earlier Peters opinion, make no distinction between the location of the plant itself and the location of the discharge as it relates to water quality concerns. The location of the plant is determined at the plan approval stage. The alternatives analysis prescribed at §71.21(a) requires that the Department evaluate the proposal and alternatives with regard to the comprehensive plans developed under the Pennsylvania Municipalities Planning Code, §71.21(a)(5)(i)(D); Title 4 of the Pennsylvania Code, Chapter 7, Subchapter W (relating to prime agricultural land policy), §71.21(a)(5)(i)(G); and, wetlands protection under Chapter 105 of the regulations (relating to dam safety and waterway management), §71.21(a)(5)(i)(I). The Department must also consider present and future demographics, zoning and subdivision regulations, the use and protection of land and water resources, and any Commonwealth agency plans pertaining to the development. 25 Pa. Code §71.21(a)(3).

On the other hand, the choice of the discharge location typically depends less on growth patterns, land use planning, and economic and institutional factors than on the types of technical issues usually reserved for NPDES review: the flow and composition of the discharge; the flow and water chemistry of the receiving stream; *et cetera*. But, the planning regulations also require the consideration of anti-degradation requirements (25 Pa. Code §71.21(a)(5)(i)(E)) and applicable water quality standards and effluent limitations (25 Pa. Code §71.21(a)(5)(iii)) in the evaluation of alternatives. Furthermore, 25 Pa. Code §71.65(c) prescribes that a community sewerage system, such as the one at issue here "meet applicable design and other standards established by the Department under sections 202 and 207 of the Clean Streams Law..." If we are to adopt what we perceive to be the Department's interpretation of these regulations, then what is apparent is that the planning approval under the Sewage Facilities Act, in essence, encompasses all other applicable approvals under the various regulatory statues.[5] Such an interpretation would render the NPDES and water quality management permit processes mere formalities. We are reluctant to so hold in deciding a motion for summary judgment, as this is an issue of first impression and it is unclear from the record before us how the Department administers the planning and permitting programs in this regard.

Two of Peters' challenges involve aspects of the operation of the plant. The first is Peters' contention in Paragraph 9 that the NPDES permit should have required the plant to discharge into ponds on the Unity House property rather than directly into Pond Run Creek. The second is the assertion, in Paragraph 7, that the spray irrigation requirement was impermissibly vague or that, in light of the spray irrigation requirement, the Department authorized too great a discharge into the stream.

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[5] This issue was neither raised nor addressed in Bobbi Fuller, *supra*, since the appellants therein were not disputing the effluent limitations.

We cannot, at this time, rule that the issue of whether the plant should discharge into the ponds first or directly into Pond Run Creek is inappropriate in an NPDES permit review. The question of whether the plant should discharge into the ponds first is intrinsically intertwined with the location of the discharge, and the location of the discharge, as we noted earlier in this opinion, may be an appropriate issue in an NPDES permit review.

Nor is the spray irrigation challenge necessarily inappropriate at the NPDES stage. All wastewater treated at the plant will be either discharged or sprayed for irrigation. As discussed earlier in this opinion, the Department advanced inconsistent interpretations of its regulations on the question of whether it evaluates the volume of the discharge at the NPDES stage. Inasmuch as the amount of spray irrigation determines the amount of discharge, therefore, challenges to the amount of spray irrigation may be relevant in the NPDES permit review process.

Wesland and Pike County Hotels are, however, entitled to summary judgment with respect to the storm water runoff issue. The plan approval alternatives analysis, at 25 Pa. Code §71.21(a)(5), directs the Department to evaluate whether proposed alternatives are consistent with the objectives and policies of plans adopted by the county and approved by the Department under the Storm Water Management Act, the Act of October 4, 1978, P.L. 864, as amended, 32 P.S. §680.1 *et seq.* (the Storm Water Management Act). See 25 Pa. Code §71.21(a)(5)(H). Unlike the other issues Wesland and Pike County Hotels assert Peters waived by failing to appeal the plan approval, it is apparent, both from the regulations themselves and the Department's interpretation of them in its memorandum, that the effects of storm water runoff are considered only at the plan approval stage. The regulations governing plan approval expressly require the storm water evaluation, while the statutes and

regulations governing the NPDES and water quality management reviews do not even allude to the effect of construction on storm water runoff.

O R D E R

AND NOW, this 25th day of March, 1992, it is ordered that:

1) Wesland and Pike County Hotels' joint motion for summary judgment is granted to the extent that it asserts that Peters waived objections to the Department's evaluation of storm water runoff and that Peters do not have standing to allege harm to the Christian Herald Camp, Wicks Pond, local groundwater sources, and the Delaware Water Gap Recreational Area; and

2) Wesland and Pike County Hotels' joint motion for summary judgment and alternative motion to limit issues is denied with respect to all other issues.

ENVIRONMENTAL HEARING BOARD

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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 25, 1992

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M. DIANE SMI
SECRETARY TO THE

CONCERNED RESIDENTS OF THE YOUGH, INC.	:	
	:	
v.	:	**EHB Docket No. 91-544-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and MILL SERVICE, INC., Permittee	:	**Issued:** March 25, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS

By: Joseph N. Mack, Member

Synopsis

A motion to dismiss the appeal of CRY filed by Mill Service is granted. DER's suspension rather than revocation of a Solid Waste Management Permit does not affect the rights of the appellant.

OPINION

This matter originated on December 12, 1991 with the filing of a Notice of Appeal on behalf of Concerned Residents of the Yough, Inc. ("CRY"). The appeal challenges the provisions of an order dated November 15, 1991 issued by the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") which suspended a Solid Waste Management Permit previously issued to Mill Service, Inc. ("Mill Service"), permittee herein. In this order DER suspended Solid Waste Management Permit No. 301071 as amended, and imposed a series of requirements upon Mill Service to qualify for reinstatement of the permit.

CRY's basis for appealing the suspension order is the allegation that DER erred by suspending rather than revoking the subject permit. CRY also filed a petition for supersedeas as well as a motion for summary judgment on the 10th of January, 1992.

Following a conference call between the parties and the presiding Board member on January 14, 1992, in which the Board raised the issue of jurisdiction, Mill Service filed a motion to dismiss on January 27, 1992, as did DER on January 29, 1992. CRY responded to these parallel motions on February 10, 1992. We will deal with the motion to dismiss with the understanding that if that motion is granted there will be no need to deal with the issues of supersedeas and the motion for summary judgment. The gravamen of the parallel motions to dismiss go to two arguments: first, that the Board lacks the jurisdiction to hear the appeal on the basis that the appeal seeks to enjoin DER from processing any reinstatement request regarding the subject permit and to prospectively prevent DER from rendering any decision that would reinstate the permit; and secondly, that the issue which the appellant seeks to raise is not "ripe" for adjudication and/or that the appellant lacks standing to raise the issue as an "interested party" which is directly and immediately impacted by the order of suspension.

The appellant, CRY, argues that it does have standing by virtue of the fact that its members live near the permitted facility and are threatened by its presence and argues further that while the Board does not have equity powers it does have the right in the proper case to substitute its discretion for that of DER. CRY argues that the suspension of the permit of Mill Service by DER affects its members as an inadequate remedy as opposed to the revocation of the same permit.

The key issue seems to be the question of the "standing" of the appellant, CRY; does CRY have a "substantial interest" which will be or has been "directly" or "immediately" affected by the decision which has been appealed. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280-284 (1975), Andrew Saul v. DER, 1990 EHB 281 at 282.

The action taken by DER in the order is to suspend the permit and the operations of the Mill Service Yukon facility under the permit. It is clear that CRY is not seeking to reverse the action taken by DER but rather is seeking to force the Department to revoke the permit.

We have considered a very similar situation in Borough of Girardville v. DER, 1990 EHB 86, where DER suspended the interim status of the permittee, which had the same effect as suspending the permit in the present case. Girardville argues that the proper remedy was for DER to revoke the interim status, not to suspend it. The Board in analyzing the situation held that Girardville could not show that it was "aggrieved" by the decision appealed and, therefore, did not meet the requirements of William Penn Parking Garage, supra, that the decision have an "immediate" and "direct" impact upon its rights. We hold herein that CRY has not demonstrated that it is "aggrieved" and therefore its rights have not been directly and immediately affected. CRY by its appeal seeks to close the landfill of Mill Service but quarrels with the DER as to the form the closing should take. CRY states in paragraph 8 of its response to the motion to dismiss that the "issue is ripe for adjudication by the Board as to whether or not Mill Service should be allowed to reopen the facility" which is clearly not the case. The order closing the facility and suspending the permit sets out specific requirements which must

be satisfied before reopening will be considered by DER, and the reopening, when and if it ever happens, is a patently appealable action.

A similar situation was encountered in the case of Lankenau Hospital v. DER et al, 1990 EHB 1264, in which DER had issued an order suspending the hospital's waste management and air quality control permits and directing cessation of the operation of its incinerator. The order set forth six steps the hospital would have to take before DER would consider reinstatement of the permits. DER and the hospital then entered into a Consent Adjudication thereon. The Penn Wynne Civic Association, an intervenor in the appeal, filed an objection to the Consent Adjudication, asserting that it did not require the hospital to comply with certain regulations prior to reinstatement of the permits. The Board dismissed the objection, holding that it was not yet ripe for adjudication because the hospital had not yet applied for or been granted reactivation.

Finally, CRY asks the Board to substitute its discretion for that of DER and to order the revocation of the permit in question. CRY gives us no legal reason and no precedent for such an action. CRY argues that if the Board does not do so CRY will be in the "untenable position of having to litigate the reopening of the facility after it happens", the situation in which most third party appellants find themselves when before our Board. Based upon all of the foregoing, we will dismiss the appeal of CRY. Because of our dismissal of the appeal of CRY we do not reach the question of the petition for supersedeas and motion for summary judgment filed by CRY.

O R D E R

AND NOW, this 25th day of March, 1992, it is ordered that Mill Service's Motion to Dismiss is granted and the appeal of CRY at docket number 91-544-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

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JOSEPH N. MACK
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DATED: March 25, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

PECIALTY WASTE SERVICES, INC. :
:
v. : EHB Docket No. 90-588-E
:
OMMONWEALTH OF PENNSYLVANIA :
EPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: March 30, 1992

OPINION AND ORDER SUR DEPARTMENT OF ENVIRONMENTAL RESOURCES MOTION TO DISMISS FOR LACK OF JURISDICTION

y: Richard S. Ehmann, Member

ynopsis

In an appeal from renewal of an operating permit for Specialty Waste ervice, Inc.'s ("Specialty") incinerator challenging conditions in the enewed permit which had previously appeared in the prior operating permit, a otion to dismiss is denied. The doctrine recited in Commonwealth v. heeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 280, 348 A.2d 765 1975), aff'd. 473 Pa. 432, 375 A.2d 320, (1977), only prohibits a subsequent ppeal based upon issues necessarily considered during the original permit ssuance process, not those arising subsequent thereto.

Where, however, the renewed operating permit was of limited duration, hat limited duration was unchallenged by the appeal, and a complete pplication for renewal of the permit was not timely filed by Specialty, the ermit expired. When the permit expired the appeal became moot and created rounds to grant DER's Motion To Dismiss.

OPINION

On December 31, 1990, Specialty filed an appeal with this Board from DER's issuance of Operating Permit Renewal No. 46-301-234-A. DER issued this renewal pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 *et seq.* ("Air Act") and 25 Pa. Code §127.24 for Specialty's operation of a Model 750TP Refuse Incinerator in Norristown Borough, Montgomery County. According to the face page of Specialty's permit, which is attached both to its Notice Of Appeal and DER's instant Motion (as Exhibit B), this Operating Permit Renewal was issued on November 30, 1990 and expired on October 31, 1991.

After this appeal was filed, the parties conducted discovery and filed their respective Pre-Hearing Memoranda. Thereafter, on January 30, 1992, DER filed the instant motion which is supported by a detailed affidavit and exhibits identified in the motion and affidavit as Exhibits A through E. Specialty has filed no timely response thereto.[1]

In its Motion, DER alleges that Specialty is challenging Conditions 10, 11, 13, 17, 18, 21, 22, 25 and 29 found in the Operating Permit Renewal. DER then alleges Conditions 10, 11, 13, 17, 18, 21 and 22 are identical to the same numbered conditions in Specialty's initial operating permit, while Condition 29 is identical to the initial permit's Condition 30 except for some

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[1] On February 21, 1992 (two days after Specialty's response to DER's Motion was due), the Board received a one page Motion For Continuance from Specialty's counsel alleging Specialty's CEO and only effective operator was ill and infirm and unable to act on Specialty's behalf. We assume, considering the timing of the filing of the instant Motion and Specialty's Motion For Continuance, that Specialty's Motion relates to the hearings of the merits of this appeal which are scheduled to commence on April 20, 1992 and to compliance with paragraphs in our Pre-Hearing Order No. 2 dealing with this hearing which is to occur in early April. We have prepared this Opinion on that basis.

time periods which were shortened because of the passage of time. Citing Commonwealth v. Wheeling-Pittsburgh Steel Corporation, *supra*, and Del-Aware Unlimited v. DER, 1988 EHB 1097, amongst other cases, DER argues Specialty can no longer challenge these conditions from its prior permit, so the appeal should be dismissed.[2]

According to its Notice Of Appeal, Specialty challenged the conditions contained in the Operating Permit Renewal because these conditions are not placed uniformly on similar incinerator facilities permitted under the Air Act prior to 1987. It also challenged these conditions because:

> The proposed Reasonably Available Control Technology Regulations contained in the December 1, 1990 Pennsylvania Bulletin for similar facilities have not been made final and contain a much different schedule for compliance than contained in the above permit conditions which are hereby being appealed to the Board.

When permit renewals are challenged, it is not uncommon to find portions of the appeal challenged by DER with citations to Wheeling-Pittsburgh Steel Corporation, *supra*. We have dealt with this issue before in Arthur Richards Jr. V.M.D. and Carolyn B. Richards v. DER et al., 1990 EHB 382. As we tried to make clear in that opinion, when a permit renewal occurs the DER decision on renewal may be challenged by appeal to this Board. In such an appeal, the appellant may raise issues which have arisen between the time the permit was first issued and the time it was renewed. Such issues could include changes in statutes or regulations, changed permit condition or be based on the development of previously unavailable evidence. At the same

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2 DER's Motion fails to mention any similarity between Condition 25 and any prior condition and indeed avers only that Conditions 2 through 24 and 26 through 28 are identical, so we could not dismiss Specialty's entire appeal based on DER's theory even if the theory is sound.

time, an appellant cannot raise as a challenge to the renewal arguments which were available to the appellant when the initial permit was issued, nor can he or she challenge the renewal with evidence which arose and was available to appellant prior to the initial permit's issuance. As we said in Mr. and Mrs. Daniel E. Blevins et al. v. DER et al., 1986 EHB 1003, "If an uncontested permit is reissued, matters necessarily considered during the original issuance proceeding are unappealable upon reissuance." 1986 EHB at 1005 (emphasis in original).

Accordingly, Specialty's appeal is limited to those issues not considered during the original issuance of its permit. Since the initial permit was issued on October 20, 1990 (Exhibit A to DER's Motion), issues addressing the proposed regulations which were first published subsequently, in December of 1990, could not have been considered in an appeal from the prior permit. The same may be true of the uniformity of application of permit conditions issue, though that is not clear at present. Thus, for the reasons stated in Richards, *supra*, the motion must be denied.

This does not end our inquiry here, however, because the facts set forth in DER's uncontested Motion and affidavit show this appeal is moot. Specialty's Operating Permit Renewal states on its face that it expired on October 31, 1991. Moreover, Condition 30 of the Operating Permit Renewal, which was not challenged by Specialty's appeal, addresses further renewals of this permit and provides in part that a renewal request "must be received by the Department no later than August 31, 1991". DER's Motion says it received no renewal request by that date. It avers that a renewal request from Specialty was received on October 29, 1991, but that it did not include the required $200 renewal fee. See 25 Pa. Code §127.34. Specialty did send in a

check for $200 with its renewal request, but the check sent with its application to renew was drawn on a closed account. Condition 30 also provides this renewal fee "must" accompany the application. Such a requirement is both logical and proper, since the alternatives are applications for renewal with promises that "the check is in the mail." Such a situation is one which DER could properly and reasonably address in the fashion set forth in Condition 30. According to DER's affidavit, Specialty did not forward a new check to DER until December 10, 1991. Obviously this was long after the permit expired, so that even if the August 31, 1991 deadline in Condition 30 were ignored, there was no renewal request and check in DER's possession until after Specialty's permit had ceased to exist for purposes of its renewal. Because Specialty's permit had expired, a challenge through the instant appeal to the conditions contained therein is moot. Max Funk et al. v. DER et al., 1990 EHB 161; William Fiore d/b/a Municipal And Industrial Disposal Company v. DER, EHB Docket No. 84-010-W (Opinion issued May 14, 1991); Williams Township Board of Supervisors et al. v. DER et al., 1988 EHB 1319. It is well settled that if at any stage in the judicial process an appeal becomes moot, it will be dismissed. Highway Auto Service v. Commonwealth, DER, 64 Pa. Cmwlth. 160, 439 A.2d 238 (1982). Accordingly we must grant DER's motion and enter the following Order.

O R D E R

AND NOW, this 30th day of March, 1992 the Motion To Dismiss filed on behalf of DER is granted and the appeal of Specialty is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 30, 1992

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Wm. Stanley Sneath, Esq.
Southeastern Region
For Appellant:
William J. Moran, III, Esq.
Norristown, PA

med

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HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BC

ELEANOR JEANE THOMAS	:	
	:	
v.	:	EHB Docket No. 91-526-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
RESOURCE CONSERVATION CORP., Permittee	:	Issued: March 19, 1992

AMENDED OPINION AND ORDER SUR PERMITTEE'S PETITION TO DISMISS APPELLANT'S APPEAL AS UNTIMELY[1]

By Richard S. Ehmann, Member

Synopsis

Where an appeal by a third party is filed more than thirty days after DER has issued published notice of issuance of a permit in the Pennsylvania Bulletin, the appeal is untimely filed, and a Petition seeking dismissal based on untimeliness must be granted.

OPINION

On December 5, 1991, this Board received an appeal filed *pro se* by Eleanor Jeane Thomas ("Thomas") from the Department of Environmental Resources ("DER") issuance of Permit No. 101421 to Resource Conservation Corporation ("RCC"). This permit was issued to RCC on August 26, 1991 pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, as

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1 In our opinion issued on March 19, 1992, we incorrectly referred to the permitted facility as "a hazardous waste treatment and disposal facility" in the second sentence of the opinion. This Amended Opinion corrects this error and properly refers to the facility as a municipal waste landfill. The Board apologizes for any inconvenience created by its mischaracterization.

amended, 35 P.S. §6018.101 *et seq.*, for operation of a municipal waste landfill to be located in Shade Township, Somerset County.

On January 15, 1992, RCC filed a Petition To Dismiss Appellant's Appeal As Untimely. The Petition alleges DER issued the Permit on August 26, 1991 and notice of the permit's issuance was published in the Pennsylvania Bulletin dated October 5, 1991. The Petition then asserts that Thomas admits the deadline for filing the appeal has lapsed and that she is correct in this regard, so pursuant to 25 Pa. Code §21.52(a) the appeal is untimely and must be dismissed for want of jurisdiction.

In response, on February 3, 1992, Thomas filed her Petition To Dismiss Permittee's Petition To Dismiss The Appellant's Right For An Appeal On The Grounds The Permittee Did Not Stay Out Of The Appeal Process, But Constantly Interfered With The Appeal Process.[2] DER took no position on this timeliness issue and filed no response to RCC's petition.

Thomas is not a "party" as defined in 25 Pa. Code §21.2, but she is a third party appellant required to file an appeal within thirty days of publication of notice of DER's action in the Pennsylvania Bulletin. Lower Allen Citizens Action Group, Inc. v. Commonwealth, DER, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), affirmed on reconsideration, ___Pa. Cmwlth. ___, 546 A.2d

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[2] On March 12, 1992, we also received an unsolicited addendum from Thomas which supplements her Petition's supporting Brief by adding two "arguments" thereto. Neither argument goes to the timeliness issue now before us. One addresses possible "superfund" interest in the Central City Landfill which Thomas contends is the permittee. The other deals with the alleged lack of a contract for a replacement of the source of the local water supply in the event the landfill contaminates the current source.

1330 (1988). Notice of DER's action was published in the October 5, 1991 Pennsylvania Bulletin. See 21 Pa. Bull. 4677. Accordingly, Thomas' appeal had to be filed with us by November 5, 1991 to be timely filed. It was not.

Thomas' responding Petition does not state that it seeks leave to appeal *nunc pro tunc* nor does it mention our rule concerning *nunc pro tunc* appeals (25 Pa. Code §21.53). Nevertheless, we will review it as if this is what is sought. For an appeal to be allowed *nunc pro tunc* good cause must be shown. The Courts have made it clear this means fraud or a breakdown in the processes of this Board must be shown by Thomas. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986). Negligence or a mistake by an appellant does not excuse a failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980).

In both her Notice Of Appeal and her Petition Thomas admits her appeal is untimely. In her Petition she says that though the Board's rules do not specify it, one more reason to allow her to appeal should be coercion by the permittee.[3] Thomas then alleges that RCC used its money and power by getting some people in this area to act against their own interest through abandonment of their separate appeal to this Board and by urging other local citizens to work against the continuation of that appeal. Thomas' Petition included a long series of attachments, which contain *inter alia* newspaper

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[3] In her Petition, Thomas raises many other issues relating to the merits or lack of merit in DER's issuance of this permit. These issues range from wetlands concerns through suggestions that RCC was incorrect in its projections as to the beneficial impact on the local economy from operation of the facility to arguments that Pennsylvania's laws on waste importation are too weak. Some of these issues are not of the type we could redress and none of them relate to good cause under 25 Pa. Code §21.53(a); accordingly, we have not addressed them herein.

clippings, letters and circulars. A review of them with the unverified Petition suggests that rather than filing her own timely appeal, Thomas relied on an appeal filed with us by these other parties who subsequently abandoned it. Thomas says the decision to abandon this other appeal took the right to appeal away from many people including herself because when it was made, the time for filing a timely appeal had expired.[4] This allegation does not show fraud or a breakdown in the processes of this Board. It fails to show why Thomas could not have initially filed her own individual timely appeal if she wished to do so or how she was personally coerced out of doing so. Even if we assumed the truth of the assertions contained in the unverified petition and attachments, which we will not do, all they suggest as to Thomas and her right to seek leave to appeal *nunc pro tunc* is that Thomas failed to take a timely appeal in reliance on that abandoned appeal. Such allegations do not state cause to allow an appeal *nunc pro tunc*.

Accordingly, the decisions of the Commonwealth Court cited above compel us to enter the following order.

O R D E R

AND NOW, this 19th day of March, 1992, the Petition To Dismiss Appellant's Appeal As Untimely Filed by RCC is granted and this appeal is dismissed because it was untimely filed.

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[4] Thomas also makes allegations based on rumor. We will not act based on rumors which even the Petitioner refuses to dignify by calling them facts.

ENVIRONMENTAL HEARING BOARD

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Chairman

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Member

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Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 19, 1992*

cc: **Bureau of Litigation**
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Eleanor Jeane Thomas
Stoystown, PA
For Permittee:
Patricia E. Campolongo, Esq.
Pittsburgh, PA

*Initially issued March 19, 1992, amended Opinion and Order issued March 30, 1992.

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M. DIANE SMITH
SECRETARY TO THE BOARD

NORTH CAMBRIA FUEL COMPANY	:	**EHB Docket No. 85-297-G**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 31, 1992

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

By the Board

Synopsis

The Board dismisses consolidated appeals from the Department of Environmental Resources' (Department) issuance of two orders to a mine operator. A mine operator is liable under §315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315 (Clean Streams Law), for any discharges on its permitted area. Therefore, the Department's order to the operator to collect and treat three discharges on its mine drainage permit area and to submit a plan for their permanent treatment was proper, as was its subsequent issuance of a compliance order requiring the operator to treat these discharges and to comply with its original order.

BACKGROUND

This matter involves two consolidated appeals. The first appeal at Docket No. 85-297-G was initiated with the July 22, 1985, filing of a notice of appeal by North Cambria Fuel Company (North Cambria) seeking review of a June 28, 1985, order which was issued to it by the Department pursuant to the

Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (SMCRA); the Clean Streams Law, and §1917-A of the Administrative Code, the Act of April 9, 1929, as amended, 71 P.S. §510-17 (Administrative Code). North Cambria conducted surface mining on a 20.5 acre site in West Wheatfield Township, Indiana County, known as the Dietrich Mine. This order directed North Cambria to collect and treat all discharges allegedly on the site to the degree necessary to meet the effluent limitations in 25 Pa. Code §87.102 and Mine Drainage Permit (MDP) 32810135 and to submit a written plan for their permanent treatment or abatement.[1] A petition for supersedeas accompanied the July 22, 1985, notice of appeal.

Then Board Member Edward Gerjuoy, to whom the matter was assigned for primary handling, conducted an evidentiary hearing on the supersedeas petition on August 28, 1985, and in an opinion and order dated September 13, 1985, denied the petition.[2]

On February 4, 1986, the Department issued Compliance Order No. 86-E-080-S to North Cambria pursuant to the Clean Streams Law, SMCRA, §1917-A of the Administrative Code, and the Coal Refuse Disposal and Control Act, the Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 *et seq.* (Coal Refuse Disposal Act), citing North Cambria for a January 17, 1986, violation of 25 Pa. Code §87.102(a)(3) in the discharge from the second treatment pond in the northern section of North Cambria's mine site. The compliance order directed North Cambria to immediately treat all discharges on the site to meet the effluent limitations in 25 Pa. Code §87.102 and to submit the permanent

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[1] The June 28, 1985, order specifically directed North Cambria to treat all of the discharges from the Dietrich Mine, including, without limitation, the discharges flowing from the locations designated as Sample Points E, G, and H. The Department indicated at the merits hearing that it was not seeking to hold the company liable for treatment of discharges at Sample Point G because North Cambria had installed facilities to segregate the discharge at that sample point. (Notes of testimony (N.T.) at pp. 41-42)

[2] See 1985 EHB 755.

treatment plan mandated by the June 28, 1985, order. North Cambria's February 19, 1986, appeal from this compliance order, was docketed at No. 86-105-G, and subsequently consolidated with its earlier appeal at Docket No. 85-297-G.

Hearings on the merits were conducted on May 5, 6, 8, and 9, and December 8, 9, 10, and 23, 1986. A view of the premises was conducted on or about October 6, 1986.

Mr. Gerjuoy resigned from the Board shortly after the hearings on the merits were concluded, so we are preparing this adjudication from a cold record.[3]

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is North Cambria, which has a mailing address of P. O. Box 397, Spangler, PA 15775.

2. Appellee is the Department, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, SMCRA, §1917-A of the Administrative Code, the Coal Refuse Disposal Act, and the rules and regulations adopted thereunder.

3. North Cambria was authorized to conduct surface coal mining on the Dietrich Mine pursuant to MDP 32810135 and Mining Permit (MP) 100010-32810135-01-0, which were issued by the Department on May 3, 1982. (N.T. 45, 55, 56, and 843; Ex. C-2, 5, and 6)[4]

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[3] See Lucky Strike Coal Company and Louis J. Beltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988)

[4] Exhibits for the Department are denoted by "Ex. C-", while exhibits for North Cambria are denoted by Ex. A-".

4. North Cambria's MDP application and the map submitted with its MP application indicated several discharges, including Sample Points E and H. (N.T. 57, 65-66; Ex. C-2, 7)

5. North Cambria's MDP application identified both Sample Points E and H as wet weather springs. (N.T. 65-66; Ex. C-2)

6. Sample Points E and H were within the boundaries of North Cambria's MDP. (N.T. 59, 195, 819; Ex. C-7)

7. North Cambria's MDP application contained laboratory analyses of samples of the discharges at Sample Points E and H taken by North Cambria on October 28, 1981; Sample Points E and H had the following quality for the indicated parameters:[5]

	Sample Point E	Sample Point H
Total Acidity	128	40.0
Total Alkalinity	0	0
Iron (Fe)	0.22	0.28
Manganese (Mn)	0.50	0.36
pH	3.9	4.4
Sulfates	216	152

(Ex. C-2)

8. On June 9, 1982, prior to the commencement of North Cambria's operations on the Dietrich Mine, Department Surface Mine Conservation Inspector (MCI) Thomas McKay inspected the site at the request of North Cambria's mine supervisor. (N.T. 42, 59)

9. During his June 9, 1982, inspection, McKay collected Sample No. 4318023 from a discharge on the northeast side of Township Road 724 (T-724); this discharge, which McKay referred to as Sample Point AA, then flowed through a culvert under T-724. (N.T. 58, 64, 109-110, 134; Ex. C-7 and 14(c))

10. The analysis of McKay's sample collected at Sample Point AA on June 9, 1982, showed the discharge had the following parameters:

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[5] The quality of all parameters is expressed in milligrams per liter (mg/l), with the exception of pH, which is expressed in standard units.

Total Acidity	80
Total Alkalinity	0
Aluminum (Al)	2.88
Fe	3.56
Mn	0.88
pH	3.3
Sulfates	95

(Ex. C-14(a), 14(c))

11. The quality of the discharges at Sample Points E, H, and AA was indicative of acid mine drainage (AMD) - high acidity, low alkalinity, and very low pH. (N.T. 197-198, 971, 974-975).[6]

12. North Cambria began operations on the Dietrich Mine in July, 1982, and completed backfilling in April, 1983. (N.T. 70, 77, 205-206)

13. After North Cambria completed backfilling, the Department continued to sample the discharges at Sample Points E, H, and AA. (N.T. 138-139; Ex. C-14(a))

14. The analyses of these samples showed a worsening of their quality. (N.T. 138-139; Ex. C-14(a))

15. Exhibit C-10, a photograph of Sample Point H, taken on March 7, 1985, shows the seep is a broad discharge and no longer a spring. (N.T. 69, 77, 107, 196; Ex. C-10) As of the time of the hearing, Sample Point H was located about 100 feet south of its pre-mining location. (N.T. 195)

16. Analyses of samples taken at Sample Points E, H, and AA on June 20, 1985, showed the following quality for the indicated parameters.

	Sample Point E	Sample Point H	Sample Point AA
Total Acidity	928	1520	696
Total Alkalinity	0	0	0
Al	146.46	224.6	82.54
Fe	4.08	23.8	33.16
Mn	55.75	110.85	55.8
pH	3.4	3	3
Sulfates	1896	2814	948

(Ex. C-14(a))

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[6] AMD also exhibits elevated sulfates and metals such as aluminum, manganese, and iron. (N.T. 198, 971)

17. Sample Points E, H, and AA exhibit the qualities of AMD. (N.T. 198, 971, 974-975)

18. Sample Points E, H, and AA are located within the boundaries of North Cambria's MDP. (N.T. 59, 110, 195-196, 819; Ex. C-7)

19. Special Condition 49 of North Cambria's MDP prohibited discharges where the pH was less than 6.0 or greater than 9.0, the manganese content exceeded 4.0, and the iron content exceeded 6.0; it also mandated that any discharges from the MDP meet the applicable treatment requirements of state and federal regulations. (N.T. 55-56; Ex. C-5)

20. Sample Points E, H, and AA exceeded the pH and manganese requirements in Special Condition 49; Sample Points H and AA exceeded the iron limits in Special Condition 49.

21. Sample Points E, H, and AA exceeded the applicable effluent limitations in 25 Pa. Code §87.102.[7]

22. North Cambria installed treatment facilities in the northern section of its permit site in response to the Department's June 28, 1985, order. (N.T. 84)

23. On January 17, 1986, McKay and federal Office of Surface Mining Inspector John Stanko visited the Dietrich Mine. (N.T. 84)

24. With McKay observing, Stanko collected Sample No. 272002786 from the discharge point of North Cambria's second and final treatment pond. (N.T. 84-85)

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[7] This regulation contained the following requirements:

(1) **Acid** There shall be no discharge of water which is acid.

(2) **Iron** There shall be no discharge of water containing a concentration of iron in excess of seven milligrams per liter.

(3) **Manganese** There shall be no discharge of water containing a concentration of manganese in excess of four milligrams per liter.

* * * * *

(5) **pH** The pH of discharges of water shall be maintained between 6.0 and 9.0, ...

The regulation was amended subsequent to the issuance of the orders at issue here. See 20 Pa. Bulletin 3383 (June 16, 1990).

25. The January 17, 1986, sample of the discharge from North Cambria's final treatment pond exhibited the following quality:

Parameter	Concentration
Fe	.09
Mn	58.0
pH	6.79

(Ex. C-11)

26. The discharge from North Cambria's final treatment pond exceeded the applicable effluent limitations for manganese in 25 Pa. Code §87.102 and Special Condition 49 of North Cambria's MDP.

27. North Cambria did not submit treatment plans to the Department by August 1, 1985, as required by the Department's June 28, 1985, order. (N.T. 86)

DISCUSSION

Despite the numerous interlocutory opinions in this matter and the parties' voluminous post-hearing briefs, the issue to be decided is simple - may a mine operator be held liable for treatment of AMD on its permit area even if mining activity on an adjacent area permitted to another operator is allegedly the source of that drainage?

North Cambria does not dispute that Sample Points E, H, and AA are located within the boundaries of its MDP, but argues that it cannot be held liable for treating them unless the Department proves they were affected by its mining operations.[8] Along these lines, North Cambria contends the evidence clearly established that the Dietrich Mine was not the source of the polluting discharges and that North Cambria did not affect the quality of the

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[8] In its Memorandum in Opposition to the Department's Motion to Limit Testimony filed with the Board on October 14, 1986, North Cambria contended the Department had not previously raised §315(a) of the Clean Streams Law as a basis for North Cambria's liability. This argument was rejected at 1986 EHB 1132. As North Cambria did not raise this contention in its post-hearing brief, it must be regarded as abandoned. Lucky Strike, *supra*.

Sample Points. Rather, North Cambria contends it established that the discharges were being degraded by water flowing from the adjacent Blairsville Associates site.

The Department, on the other hand, contends that a mine operator is liable for any discharges which originate or flow through its MDP area without regard to the source of the discharges, even if a third party caused them to come into existence. It asserts that even if the AMD which degraded Sample Points E, H, and AA originated solely on the Blairsville Associates site, North Cambria is liable for treatment of the seeps because they surface on and are flowing from its MDP area.

As we indicated in Penn-Maryland Coals v. DER, EHB Docket No. 83-188-W (Adjudication issued January 22, 1992), the law in the Commonwealth is clear - for liability to attach under §315(a) of the Clean Streams Law, the only relevant issue is whether acid mine drainage is being discharged from the permit area. In this case, it is undisputed that Sample Points E, H, and AA are within the boundaries of North Cambria's MDP and the evidence establishes that those Sample Points are discharging AMD. Therefore, it is unnecessary for the Board to determine which party's hydrogeologic testimony is to be accorded greater weight or to ascertain the source of the AMD emanating from North Cambria's MDP. The Department did not abuse its discretion in issuing the June 28, 1985, order to North Cambria.

In so deciding we necessarily reject the notion that North Cambria's allegations concerning the source of the AMD on Blairsville Associates' permit area constitute a valid defense to the issuance of the Department's order. That rejection is implicit in the Commonwealth Court's holding in Thompson & Phillips Clay Company v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 582 A.2d 1162 (1990), pet. for alloc. denied, ___ Pa. ___, 598

A.2d 996 (1991), that the operator was liable even in the absence of a causal link between the AMD and its mining activities.[9]

As for the Department's February 4, 1986, order, we must also conclude that the Department's issuance of that order was not an abuse of discretion. Analysis of the sample taken from the discharge point from the second treatment pond showed a violation of the applicable effluent limitations for manganese, as was alleged in the order. And, the testimony of MCI McKay also established that North Cambria had not submitted its permanent treatment plan by the August 1, 1985, deadline in the Department's June 28, 1985, order. Accordingly, the Department's issuance of the second order was authorized by §610 of the Clean Streams Law and §4c of SMCRA, 52 P.S. §1396.4c.

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proving by a preponderance of the evidence that its order to North Cambria was not an abuse of discretion. 25 Pa. Code §21.101(b)(3).

3. The operator of a coal mine is liable for any discharges on its permitted area, even if the discharges pre-dated its mining activities and regardless of whether the operator affected the discharge or increased the pollutional load. Clark R. Ingram *et al.* v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 595 A.2d 733 (1991).

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[9] Although the Board's opinion at 1986 EHB 1132 directs the parties to brief the issue of whether the Department abused its discretion by not issuing a concurrent order to Blairsville Associates, North Cambria did not directly address the issue in its post-hearing brief. It indirectly dealt with the (footnote continued)

4. Mine drainage which did not meet the requirements of 25 Pa. Code §87.102 and the terms and conditions of North Cambria's MDP was being discharged at Sample Points E, H, and AA within North Cambria's MDP.

5. The Department did not abuse its discretion in issuing the June 28, 1985, order to North Cambria to collect and treat the discharges of AMD at the Dietrich Mine.

6. Mine drainage being discharged from North Cambria's second treatment pond did not meet the applicable effluent limitations for manganese.

7. North Cambria failed to comply with the Department's June 28, 1985, directive to submit its permanent treatment plan by August 1, 1985.

8. The Department's issuance of the February 4, 1986, compliance order was not an abuse of discretion.

(continued footnote)

issue in its arguments concerning the Department's burden of proof. The Department also did not directly address the issue. Instead, it argued that North Cambria's allegations that it could not gain access to Blairsville Associates' mine site constituted a defense to the Department's order. While we would ordinarily hold that it is unnecessary to deal with this issue in light of the parties' failure to address it, we would have no difficulty in concluding that, in light of the applicable precedent, the Department did not abuse its discretion in not simultaneously issuing an order to Blairsville Associates. North Cambria has other available remedies against Blairsville Associates.

O R D E R

AND NOW, this 31st day of March , 1992, it is ordered that North Cambria's appeals consolidated at EHB Docket No. 85-297-G are dismissed and the Department's issuance of the June 28, 1985, and February 8, 1986, compliance orders to North Cambria is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Members Richard S. Ehmann and Joseph N. Mack did not participate in this decision.

DATED: March 31, 1992

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Western Region
For Appellant:
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M. DIANE SMI
SECRETARY TO THE I

WOOD PROCESSORS, INC., et al.	:	
	:	
v.	:	**EHB Docket No. 90-442-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 2, 1992**

OPINION AND ORDER SUR
APPLICATION FOR ATTORNEY'S FEES

By Terrance J. Fitzpatrick, Member

Synopsis

An application for attorney's fees filed by Archie Joyner (Joyner), one of the appellants in this proceeding, is denied. Joyner's application is defective in that it fails to separate counsel fees attributable to his defense from those which are assignable to Wood Processors, Inc. (Wood), the other appellant here. The Board also finds that special circumstances make an award of expenses unjust. While Joyner "prevailed" due to DER's withdrawal of its order, DER immediately issued an amended order which corrected a notice deficiency as to the charges against Joyner. The Board has not yet decided Joyner's appeal from the amended order, and Joyner did not incur significant additional expenses as a result of DER's flawed first order.

OPINION

This proceeding involves an appeal by Wood and Joyner from an Order and Civil Penalty Assessment of DER dated September 21, 1990. In its Order, DER alleged that Wood and Joyner[1] operated three unpermitted solid waste

[1] DER's Order also named an individual, Art Foss, who did not file an appeal.

(construction/demolition waste) processing facilities in Norristown Borough, Colwyn Borough, and the City of Chester. In addition, DER alleged that Wood and Joyner were responsible for the illegal use of construction/demolition waste as fill at four different sites. To remedy these alleged violations, DER ordered Wood and Joyner to cease operations at the three processing facilities, to remove the waste from the three facilities, to remove waste from the sites where it was used as fill, and to pay a civil penalty assessment of $96,000.

Wood and Joyner filed a petition seeking a supersedeas of DER's action. At the supersedeas hearing, DER stated that it was rescinding the paragraphs of its order alleging that Wood and Joyner were responsible for illegal use of solid waste as fill. After the hearing, the Board issued an Order, followed by an Opinion, denying a supersedeas as to Wood but granting a supersedeas as to Joyner. As to Joyner, who is the President of Wood, the Board found that the evidence did not support piercing the corporate veil to hold him responsible. In addition, the Board held that DER could not assert that Joyner was responsible under the "officer participation theory," because DER did not give Joyner notice of this allegation, and, thus, forcing Joyner to defend against it would violate his right to due process of law.

This Opinion and Order addresses an application for counsel fees filed by Joyner on May 24, 1991. In this application, Joyner states that DER issued an amended order on April 24, 1991 (after the Board's supersedeas decision was issued) which withdrew DER's September 21, 1990 Order and Civil Penalty Assessment. Accordingly, Joyner contends that he is a "prevailing party" who is entitled to recover his fees and expenses pursuant to the "Costs Act,"[2] Act of December 13, 1982, P.L. 1127, No. 257, 71 P.S. §2031 *et seq.*

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[2] The Costs Act is more formally titled: "An Act requiring every Commonwealth agency to award certain fees and expenses in certain agency actions and providing for appeals from decisions of an adjudication officer."

Joyner attached documentation to his application to justify recovery of $29,445.51.

DER filed a response opposing Joyner's application. DER contends that Joyner is not a "prevailing party" because the amended order was issued at the same time the previous order was withdrawn, and the amended order was issued for the purpose of correcting any possible notice deficiency regarding the contention that Joyner is responsible under the officer participation theory.[3] DER also argues that Joyner is not entitled to recover his costs because DER's allegation that Joyner is responsible under the theory of piercing the corporate veil, although not accepted by the Board in the supersedeas opinion, was at least "substantially justified."[4] Finally, DER contends that the amount sought by Joyner is excessive in two respects. First, the hourly fees for counsel and for Joyner's expert witness are set too high.[5] Second, DER points out that the amount sought constitutes the fees for both Wood and Joyner (the same counsel represented both), and that Wood has no basis whatsoever for seeking its fees because DER's original order as to Wood was not superseded by the Board.

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[3] DER disagrees with the Board's decision that Joyner did not have adequate notice under the original order.

[4] DER also disagrees with the Board's decision that Joyner was not responsible under this theory.

[5] The Costs Act sets a maximum hourly fee of $75 per hour for counsel fees, unless an increase in the cost of living since passage of the Act warrants a higher fee. 71 P.S. §2032 (definition of "Fees and expenses"). In addition, the Act sets a cap of $10,000 on awards under the Act. (Id.)

Joyner filed a brief to rebut DER's response. Joyner cites federal case law, construing a federal law similar to the Costs Act,[6] in support of his argument that DER's original order was not "substantially justified" because it did not have a "reasonable basis in law and fact." In addition, Joyner argues that the fees he is seeking to recover have been properly stated; these fees cannot be divided between Wood and him because his fees would have been the same even if his counsel had not also represented Wood. This is so, Joyner contends, because his first line of defense in this proceeding was to contest allegations that Wood had operated illegally. Finally, in support of his position that the maximum hourly counsel fee of $75 should be increased, Joyner submitted a document to show that the consumer price index in the Philadelphia area has risen 40.8% from the baseline period (1982-1984) to 1991.

The purposes of the Costs Act are to deter Commonwealth agencies from initiating actions which are "substantially unwarranted," and to remove litigation costs as a deterrent against citizens' challenging of such unwarranted actions. 71 P.S. §2031(c). To accomplish these ends, the Act provides:

> [A] Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

71 P.S. §2033(a). The Act defines a "prevailing party" as one "in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth Agency ... ." 71

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[6] The federal law is the Equal Access to Justice Act, P.L. 96-481, 94 Stat. 2328, 28 USC §2412 *et seq.*

P.S. §2032. The Act defines "substantially justified" to mean when the Commonwealth agency's position "has a reasonable basis in law and fact." Id.

Applying these legal standards to this case, we find that Joyner is not entitled to recover his fees and expenses. First, we agree with DER that Joyner should not be allowed to recover costs which were incurred to defend both Wood and Joyner. There is no allegation here that Wood was a prevailing party, probably because the Board did not supersede DER's Order as to Wood. Joyner's argument that but for Wood's involvement as an appellant he would have had to present defenses as to Wood anyway (and would have incurred the same expenses), in addition to being hypothetical, overlooks the fact that those defenses were not successful. If Wood was not a prevailing party, then Joyner may not recover expenses incurred in asserting defenses as to Wood's responsibility. Therefore, since Joyner did not make any attempt to apportion the costs between Wood and him, and since we have no basis to divide those costs on our own, we must simply reject the entire application.

Second, we find that even if we could apportion the expenses between Joyner and Wood, that "special circumstances [make] an award unjust." See, 71 P.S. §2033(a). It is necessary to look at all the circumstances present here. Joyner is, arguably, a "prevailing party" because DER withdrew its order. See, 71 P.S. §2032 (definition of "prevailing party").[7] However, at the same time that DER withdrew its original order, it issued a new order against Wood and Joyner - and this time DER articulated the officer's participation theory as a basis for Joyner's liability. Under these circumstances, the ultimate outcome of DER's charges against Joyner remain to be determined. While Joyner may, technically, be a "prevailing party" with

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[7] Joyner is not a prevailing party simply because he obtained a supersedeas of DER's order. See, Blumenthal v. DER, EHB Docket No. 89-230-F. (Opinion issued March 1, 1991.)

regard to DER's first order, Joyner has not yet prevailed as to the substance of DER's charges.

Joyner was not significantly harmed by DER's failure to "get it right the first time." He would have had to attend the supersedeas hearing anyway because he is the sole functioning corporate officer of Wood. The only expense he would have been spared is in connection with his legal argument that due process barred DER from asserting the officer participation theory. This surely constitutes an insignificant portion of Joyner's expenses, and it does not justify Joyner's recovery of all of his expenses, even if we could separate his expenses from Wood's. Therefore, we find that the special circumstances of this case make an award of expenses to Joyner unjust.[8]

It follows from the above that Joyner's application for attorney's fees must be rejected.

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[8] This Opinion is not intended to state a rule that an appellant may never recover its expenses incurred in defending against a DER order when DER withdraws the order and replaces it with a new one. In many cases, cost recovery will be warranted in this situation.

ORDER

AND NOW, this 2nd day of April, 1992, it is ordered that the application for counsel fees filed by Archie Joyner is denied.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 2, 1992

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

WASHINGTON COUNTY	:	
	:	
v.	:	**EHB Docket No. 91-168-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 2, 1992

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By: Joseph N. Mack, Member

Synopsis

Partial summary judgment is granted to both Washington County and DER with respect to DER's conditional approval of the County's municipal waste management plan. Summary judgment is granted to DER on the issue of timeliness (deemed approval) since Act 101 does not provide for deemed approval of plans where DER fails to act in a timely manner. Summary judgment is granted to Washington County with respect to Condition No. 5 of DER's approval, which would require the County to adopt a list of designated disposal sites, and Condition No. 6, which would treat any revision to the list of designated sites as a substantial revision subject to municipal ratification. These conditions are declared to be invalid as exceeding DER's authority and are stricken from the Plan.

OPINION

This matter was initiated with the filing of a notice of appeal on April 26, 1991 by Washington County challenging the Department of Environmental Resources' ("DER's") conditional approval of Washington County's Municipal Waste Management Plan ("Plan") submitted pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), Act of July 28, 1988, P.L. 566,

53 P.S. §4000.101 et seq.

Following a conference call between the presiding Board member and counsel for the parties on May 22, 1991, DER filed a Motion to Schedule Joint Stipulation of Facts and Cross-Motions for Summary Judgment in which Washington County joined. In the motion, the parties concurred that no facts are in dispute in this matter and that the outcome of this appeal rests upon the Board's legal interpretation of various provisions of Act 101. The parties requested that this matter be resolved on the basis of cross-motions for summary judgment.

On May 29, 1991, the presiding Board member granted the motion and ordered the parties to file a joint stipulation of facts, and, thereafter, to file cross-motions for summary judgment based upon the stipulated facts and each party's understanding of the law as applied to those facts.

A joint stipulation of facts and exhibits was filed on August 15, 1991. On September 3, each party filed its respective motion for summary judgment and supporting brief. Washington County and DER then filed responses to the other's motion on September 16, 1991 and September 26, 1991, respectively. A supplement to the stipulation was filed December 31, 1991.

The parties agree that this appeal involves the following:

1) The timeliness of DER's notice of the incompleteness and conditional approval of Washington County's plan.

2) DER's interpretation that Act 101 requires that municipal waste plans designate exclusive disposal sites.

3) Whether the aforesaid requirement is constitutional.

4) Whether a major plan revision is required to supplement the Plan's list of designated sites.

(J.S. 23)[1]

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[1]"J.S." followed by a number is a reference to a paragraph in the parties' joint stipulation.

History

We will first review a brief history of the events leading up to this appeal.

On July 24, 1989, Washington County submitted a draft of its Plan to DER. (J.S. 5) On October 17, 1989, DER sent Washington County a letter signed by Sharon Svitek, Resource Recovery and Planning Coordinator in DER's Bureau of Waste Management, which provided review comments of the draft Plan. (J.S. 7; Ex. B)[2] On November 22, 1989, DER issued a second letter, again signed by Sharon Svitek, which provided further review comments of the draft and which addressed the application of waste flow control. (J.S. 8; Ex. C) Washington County submitted its final Plan to DER on March 27, 1990 and it was received by DER on March 29, 1990. (J.S. 10) By letter dated April 27, 1990, DER notified Washington County that a 30 day departmental review extension was necessary. (J.S. 11; Ex. F) Thereafter, on May 25, 1990, DER Secretary Arthur Davis issued a letter to Washington County's Board of Commissioners outlining DER's interpretation of waste flow control under Act 101. (J.S. 13; Ex. G) On May 30, 1990, DER sent notification to Washington County that its Plan was incomplete regarding waste flow control, and requested a response by June 22, 1990. (J.S. 14; Ex. H) Washington County did not formally respond to DER's request. (J.S. 15)

---

[2] Exhibits referenced herein are those to which both parties have stipulated and which were submitted with the joint stipulation.

On September 6, 1990, Washington County sent a letter to DER requesting a decision on the Plan. (J.S. 18; Ex. I) DER responded on October 11, 1990, again providing DER's view on waste flow control and stating that a final decision would be rendered shortly. (J.S. 19; Ex. J)

On March 28, 1991, DER granted conditional approval of Washington County's Plan. (J.S. 20) The approval was based on Washington County complying with certain conditions (Ex. K) including the following two conditions which are subjects of this appeal:

5. That the County insert the following language in their plan on Page 14-2R, No. 4 under Optimal Municipal Waste Collection System; Page 14-17R under Administrative Requirements for local municipalities; and Page 14-19R, No. 5D under Necessary Legislative Program and Implementing Documents:

   > "Additionally, all local municipal ordinances shall contain waste flow control provisions directing the waste collected in their municipalities to any of the County designated disposal sites listed in this plan or any amendments thereto."

   Also substitute the following paragraph for Section 3.3 in Exhibit IV, the Model Municipal Licensing Ordinance:

   > "It shall be unlawful for any person to transport any municipal waste collected within <u>(municipality)</u> to any processing and/or disposal facility other than those facilities which have disposal agreements with the County and are designated disposal facilities under the County's approved municipal waste management plan and any revisions thereto."

6. If Washington County wishes to revise its plan to supplement its list of designated disposal sites, it must comply with the requirements of Act 101, Section 501(d), providing for municipal ratification of a major plan revision. This section requires the County to formally seek comments from the Department and the municipalities before submitting the final plan to the municipalities for ratification. This ratification of the plan will include the revisions to Page 14-2R, 14-17R, and 14-19R, and the Model Municipal Licensing

> Ordinance of the plan as enumerated in the above condition.

Timeliness (Deemed Approval)

Washington County argues that DER's lack of timeliness in reaching a decision with respect to the County's Plan renders the Plan approved as submitted and, therefore, it should not be required to comply with the conditions which DER attached to the Plan approval.

First, Washington County contends that the May 30, 1990 letter, which notified Washington County that its Plan was incomplete and requested further information, was both untimely and improper. Secondly, Washington County argues that the time period in which it took DER to render a final determination - one year from the date on which Washington County submitted its final Plan (J.S. 21) - was untimely and unreasonable.

Section 505(a) of Act 101 provides as follows:

> (a) Department approval options - Within 30 days after receiving a complete plan, the department shall approve, conditionally approve or disapprove it, unless the department gives written notice that additional time is necessary to complete its review. If the department gives such notice, it shall have 30 additional days to render a decision.

53 P.S. §4000.505(a).

As noted previously, Washington County submitted its Plan to DER on March 29, 1990. On April 27, 1990, DER notified Washington County that a 30 day extension was necessary. Then, by letter of May 30, 1990, DER notified Washington County that its Plan was incomplete and requested further information. Not until March 28, 1991 did DER issue a formal notification of conditional approval of the County's Plan.

Washington County asserts that the May 30, 1990 letter advising the County that its Plan was incomplete was an improper response by DER under

§505(a) of Act 101, and, furthermore, that it was not timely since more than 60 days had elapsed from the date on which DER had received the Plan. The County further argues that the time between the County's submission of its Plan and DER's grant of conditional approval - 364 days (J.S. 21) - was untimely and unreasonable. Washington County states that, having heard nothing from DER in what it considered to be a reasonable amount of time after submission of its Plan, it considered the Plan to have been approved and continued with its implementation. Because of DER's delay in acting on the Plan, Washington County argues, the Plan should be deemed to have been approved as submitted.

DER counters by asserting, first, that it was not bound by the time limit of §505(a) since Washington County had not submitted a complete plan, as required under that provision, and, secondly, that even if DER was required to act on Washington County's Plan within 60 days, it did so with Secretary Arthur Davis' May 25, 1990 letter outlining departmental interpretation of waste flow control under Act 101.

We find that DER was required to act on the County's Plan within the time limits imposed by §505(a) and, further, that the May 25, 1990 letter did not constitute official notice of approval, disapproval, or conditional approval as required by §505(a). However, we must reject Washington County's argument that the Plan should be deemed approved as submitted due to the DER's delay in granting conditional approval of the Plan. There is no provision in Act 101 authorizing deemed approval of plans where DER does not act within the time constraints of §505(a). As DER correctly notes in its response, in order for the remedy of deemed approval to occur, there must be explicit language to that effect in the statute. Franconia Township v. DER, EHB Docket No. 89-284-(Opinion and Order issued July 30, 1991). No such language appears in Act 101. Therefore, regardless of whether we find that DER may have acted in an untimely

manner in conditionally approving the Plan, we cannot grant the relief requested by Washington County.[3]

Designation Of Sites - Condition No. 5

With respect to the issue of waste flow control, Washington County challenges Condition No. 5 of DER's approval. Condition No. 5 would require insertion of the following language into the Plan.

> Additionally, all local municipal ordinances shall contain waste flow control provisions directing the waste collected in their municipalities to any of the County designated disposal sites listed in this plan or any amendments thereto.
>
> It shall be unlawful for any person to transport any municipal waste collected within (municipality) to any processing and/or disposal facility other than those facilities which have disposal agreements with the County and are designated disposal facilities under the County's approved municipal waste management plan and any revisions thereto.

In other words, this condition requires the County to designate only certain disposal sites which may be used for the disposal of municipal waste.

Washington County's proposed Plan would simply require that each municipality located within its boundaries transport municipal waste to any permitted processing or disposal facility it chooses. (J.S. 34) In addition, the County has agreements with landfills of sufficient capacity to assure the disposal of municipal waste generated within its boundaries for the next ten years. (J.S. 35)

Designation of sites is discussed under §303 of the act, 53 P.S. §4000.303, which lists the powers and duties of counties. Paragraph (e) of that section provides in relevant part as follows:

> **(e) Designated sites** - A county with an approved municipal

---

[3]We find DER's delay in this matter to be reprehensible. Allowing almost one year to elapse before rendering a final decision on the Plan submitted by Washington County was clearly in violation of the thirty to sixty day timeframe established by §505(a) of Act 101. Although Act 101 may impose no sanctions for such delay, we caution DER that it is expected to act in accordance with the requirements mandated by the act, and specifically §505(a).

> waste management plan that was submitted pursuant to Section 501(a) [submission of plans], (b) [existing plans] or (c) [plan revisions] is also authorized to require that all municipal wastes generated within its boundaries shall be processed or disposed at a designated processing or disposal facility that is contained in the approved plan and permitted by the department under the Solid Waste Management Act ...

53 P.S. §4000.303(e)

Washington County contends that since the designation of sites is not mandated by Act 101, DER cannot require this as a condition of its Plan, and that this option is left to the counties.

In response, DER contends that although §303(e) does not mandate that counties designate certain sites for the disposal, processing, and transpor of municipal waste, DER has the authority to require this pursuant to various other provisions of Act 101. In particular, DER points to the legislative findings of Act 101, among which is "authorizing counties to control the flow of municipal waste ... [in order] to guarantee the long-term economic viability of resource recovery facilities and municipal waste landfills ..." 53 P.S. §4000.102(a)(10). In addition, under the powers and duties of DER pursuant to Act 101, DER points to §301(6) which authorizes DER to "[a]pprove, conditionally approve or disapprove municipal waste management plans ... to implement the provisions and purposes of this act ..." and §301(11) which empowers DER to "[e]ncourage and, where the department determines it is appropriate, require counties and other municipalities to carry out their duties under this act, using the full range of incentives and enforcement authority provided in this act." 53 P.S. §§4000.301(6) and 4000.301(11). DER asserts that §301 vests it with broad powers, including requiring counties to implement waste flow control in their plans.

We agree that §301 vests DER with broad powers to enforce and carry out the purposes of Act 101, and to "require counties ... to carry out their

duties under this act ...", as set forth in §301(11). However, DER must act within the boundaries of what is required under the act. Section 303(e) authorizes counties to designate specific disposal sites within their municipal waste management plans. It does not require that the counties do so.

The same option is given to municipalities under §304(d), which provides as follows:

> **(d) Designated sites** - A municipality other than a county may require by ordinance that all municipal waste generated within its jurisdiction shall be disposed of or processed at a designated permitted facility ... Such ordinance shall remain in effect until the county in which the municipality is located adopts a waste flow control ordinance as part of a plan submitted to the department ... [A]ny such county ordinance shall supersede any such municipal ordinance to the extent the municipal ordinance is inconsistent with the county ordinance.

53 P.S. §4000.304(d)

Nowhere in the act is DER granted specific power to require the designation of exclusive disposal sites. Nor is this a duty imposed on counties by Act 101 which is subject to enforcement by DER pursuant to §301(11). We also point to §505 of Act 101, 53 P.S. §4000.505, which deals with DER's review of municipal waste management plans. Subsection (b)(5) of that section provides as follows:

> (5) If the plan proposes that municipal waste generated within the county's boundaries be required, by means other than contracts, to be processed or disposed at a designated facility under section 303(e), [footnote omitted] the plan explains the basis for doing so.

53 P.S. §4000.505(b)(5)

Thus, if counties elect to designate certain facilities for the disposal of waste under §303(e), their plans must explain the basis for doing so. Clearly, then, the option of designating certain facilities for disposal of municipal waste is left to the counties.

As Washington County correctly notes in its brief, where the language of a statute is clear and free from ambiguity, a court may not deviate from the language of the statute under the pretext of pursuing its spirit. Statutory Construction Act, Act of December 6, 1972, P.L. 1339, 1 Pa.C.S.A. §1921 et seq.; Hardy v. Commonwealth, Department of Public Welfare, 81 Pa. Cmwlth. 428, 473 A.2d 1138 (1984). The language of §303(e) is clear: A county "is also authorized to require that all municipal wastes generated within its boundaries shall be processed or disposed at a designated processing or disposal facility..." (Emphasis added.) The language clearly indicates this is an option provided to counties. Were it mandated, the phrase "is also authorized to require" would read "shall require" or contain similar mandatory language. The same holds true for the language of §505(b)(5).

Moreover, as to the act's aim in authorizing counties to control waste flow, as stated in 53 P.S. §4000.102(a)(10), this can certainly be accomplished in ways other than exclusively designating certain facilities to be used for the disposal, transport, or processing of a municipality's waste.

We do not rule out that there may be circumstances under which the designation of certain sites for the disposal, transport, or processing of municipal waste is necessary as a means of waste flow control, such as where the county owns the landfill or where privately held landfill capacity is scarce. Although DER may not automatically mandate such means of waste flow control as a matter of law, the particular facts of a case may warrant it. However, in the immediate case, DER has given us no reason for requiring site designation, other than to assert that it is within its power to do so.[4]

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[4]But for the parties' stipulation that the resolution of this appeal turns on the Board's legal interpretation of Act 101, a hearing may have been necessary to ascertain in which circumstances DER would mandate the inclusion of flow control mechanisms in county plans.

We therefore find that DER exceeded its authority under Act 101 in requiring Washington County to adopt the language of Condition No. 5 as part of its Plan, and we declare this Condition to be invalid. Because we have found Condition No. 5 to be invalid under the provisions of Act 101, we need not reach the question of its constitutionality.

Major Plan Revision - Condition No. 6

Washington County also challenges Condition No. 6 of DER's approval which reads as follows:

> If Washington County wishes to revise its plan to supplement its list of designated disposal sites, it must comply with the requirements of Act 101, Section 501(d), providing for municipal ratification of a major plan revision. This section requires the County to formally seek comments from the Department and the municipalities before submitting the final plan to the municipalities for ratification.

Thus, it would be necessary to obtain municipal ratification pursuant to §501(d) of Act 101 should the County wish to revise or supplement any list of designated disposal sites contained in its plan.[5]

Section 501(d) of the act states, "All plan revisions that are determined by the County or by the department to be substantial shall be subject to the requirements of sections 503 [development of municipal waste management plans] and 504 [failure to ratify plan]..." 53 P.S. §4000.501(d). No criteria are contained in Act 101 for determining whether a proposed revision is "substantial". This is left to the discretion of DER and the counties.

It is DER's interpretation that any supplementation to a county's

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[5]The meaning of "designated disposal sites" as used in this Opinion is the same as that in Act 101 and differs from the meaning given to the term in paragraphs 31-33 of the parties' Joint Stipulation. In the Joint Stipulation, the parties refer to "designated disposal facilities" as those with which the County has capacity agreements. (J.S. 33) However, there is no requirement in the Plan that the municipalities must direct their waste to only these facilities, which type of limitation is referred to in the Joint Stipulation as "waste flow control". (J.S. 31)

list of designated sites in its Act 101 plan constitutes a substantial revision requiring ratification. (J.S. 39) DER's brief in support of its motion provide us with no reasons for this interpretation, but merely states that DER has the authority under Act 101 to require ratification for any plan revision it deems to be substantial. DER's position on this matter appears to rely on its argument with respect to waste flow control.

Washington County, on the other hand, asserts that since Act 101 does not define what does or does not constitute a major plan revision, a logica interpretation is that it should be reserved for those situations which are far-reaching and unusual. The County argues that a list of designated sites must be fluid, changing periodically as landfills close and new ones are built.

As noted above, Act 101 does not define what constitutes a "substantial" revision. Nor has DER provided us with any basis for treating a revision to the list of designated disposal sites as a substantial revision, other than again to assert that it is within its power to do so. We, therefore, find that DER abused its discretion in requiring Washington County to adopt the language of Condition No. 6 in its conditional approval of the Plan, and we declare this condition to be invalid.

O R D E R

AND NOW, this 2nd day of April, 1992, upon consideration of the cross-motions for summary judgment filed by both parties in this appeal, summary judgment is granted in favor of DER and against Washington County on the issue of timeliness (deemed approval). Summary judgment is granted in favor of Washington County and against DER with respect to Conditions No. 5 and 6 of DER's conditional approval, and said conditions are hereby stricken from the Plar

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TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 2, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Charney Regenstein, Esq.
Western Region
For Appellant:
Katherine B. Emery, Esq.
Washington, PA

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M. DIANE SMITH
SECRETARY TO THE BO

CRONER, INC. and FRANK POPOVICH	:	
v.	:	EHB Docket No. 91-460-E (Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 2, 1992

OPINION AND ORDER
CRONER, INC.'S MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

Where a non-party files a skeleton appeal within thirty days of publication of a notice of DER's action in the Pennsylvania Bulletin, the appeal is timely filed even if the Appellant received actual notice of DER's action more than thirty days before his skeletal appeal was filed with the Board.

OPINION

On September 25, 1991, the Department of Environmental Resources ("DER") renewed Permit No. 56841605 of Croner, Inc. ("Croner"). The permit had originally been issued to Croner on September 3, 1986. According to the permit, which is attached to Frank Popovich's ("Popovich") Notice Of Appeal, the permit is for Croner's Goodtown Preparation Plant.

Popovich has appealed therefrom and his appeal was assigned Docket No. 91-463-E ("Popovich Appeal"). Almost simultaneously therewith, Croner

also appealed from issuance of this permit, challenging certain conditions contained therein, and its appeal was assigned Docket No. 91-460-E ("Croner Appeal"). Thereafter, by Order dated March 4, 1992, we granted Popovich's Motion To Consolidate these appeals for trial.

At the time of consolidation there was pending in Popovich's appeal a Motion To Dismiss that appeal as untimely, which Croner had filed.[1] When we received this Motion on February 20, 1992, we wrote both to counsel for Popovich and counsel for DER advising them that we had received this motion and that they had until March 16, 1992 to respond thereto. No responses thereto have been filed on behalf of Popovich or DER.

According to Popovich's Notice Of Appeal, Popovich received actual notice on September 27, 1991 that DER issued this permit to Croner. On October 19, 1991 notice of renewal of this Permit was published in the Pennsylvania Bulletin. See 21 Pa. Bull. 4991.

On October 29, 1991 the Board received a letter from Popovich saying:

> Dear Sir:
> Many of the residents living by the Preparation Plant and myself are not please with DER decision on issuing the permit under conditions on which it operates. After the informal DER hearing it still operates under most of the conditions which the people had complained about.
> Therefore we are requesting copies of the appeal form.
> Sincerely [sic]
> Frank Popovich

This letter was docketed by the Board's secretary as a skeleton appeal pursuant to 25 Pa. Code §21.52(c). Subsequently, on December 9, 1991, we received Popovich's Notice Of Appeal. Croner does not allege and our docket

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[1] Croner was a party in Popovich's appeal from its inception because renewal of its permit was being challenged by Popovich. See 25 Pa. Code §21.51(f) and (g).

does not show any irregularity in the procedure of this Board in docketing this skeleton appeal or subsequently receiving the Notice Of Appeal.

With these facts before us Croner's motion argues that Popovich's appeal was untimely because it was filed more than thirty days after he received actual notice of this permit's renewal. While this is true, we must deny this Motion because Popovich is a "person" within the meaning of 25 Pa. Code §21.36 and thus may rely on publication in the Pennsylvania Bulletin as the incident which starts the thirty day appeal clock ticking as to the timeliness of his appeal. See Lower Allen Citizens Action Group, Inc. v. Commonwealth, DER, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), affirmed on reconsideration ____ Pa. Cmwlth. ____, 546 A.2d 1330 (1988). Under Lower Allen, *supra*, Popovich is not a "party" whose appeal clock starts ticking upon receipt of actual notice. Indeed, just as Popovich had actual notice of DER's action here, so too did the Lower Allen Citizens Action Group, Inc., in that appeal, and Commonwealth Court made it clear there that such actual notice was not to be determinative of the timeliness of a person's appeal. Since Popovich filed a skeleton appeal on October 29, 1991, only ten days after the Pennsylvania Bulletin published notice of DER's action, his appeal was timely filed. Since it was perfected in accordance with this Board's rules we must enter the following order and deny Croner's Motion.

ORDER

AND NOW, to wit, this 2nd day of April, 1992, Croner's Motion To Dismiss Popovich's appeal is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 2, 1992

cc: **Bureau of Litigation**
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M. DIANE SMIT
SECRETARY TO THE E

WILLIAM RAMAGOSA, SR., et al.	:	
	:	
v.	:	**EHB Docket No. 89-097-M**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 9, 1992**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Where a factual dispute exists on the extent to which "full and complete restoration" of wetlands can be achieved, summary judgment cannot be entered. DER's willingness to accept less than "full and complete restoration" of several sites (at the suggestion of Commonwealth Court) where innocent third parties are involved does not represent an admission that "full and complete restoration" is impossible.

OPINION

The history of the controversy underlying these consolidated appeals has been set forth at length in prior Board decisions published at 1990 EHB 1128 and 1990 EHB 1461, and in a series of opinions and orders issued on June 4, 1991, August 23, 1991, September 9, 1991, October 28, 1991 and December 12, 1991. Before us now is Appellants' Motion for Summary Judgment, filed on September 23, 1991, to which the Department of Environmental Resources (DER) filed an Answer on October 15, 1991.

In their Motion, Appellants allege that DER's Compliance Order of March 10, 1989 (which formed the basis of the first appeal, docketed at 89-097-M) mandated the submission of a plan for the "full and complete restoration" of the wetland sites affected by Appellants' activities. DER meant by this that the sites would be returned to their pre-existing conditions, including the physical, biological and chemical processes that existed prior to disturbance. Appellants allege further that they submitted plans to DER which DER modified and approved on February 1, 1991 (forming the basis for the second appeal, docketed at 91-078-MR and consolidated into the first appeal on May 31, 1991). Appellants maintain that the plans as modified contemplate something less than the "full and complete restoration" of the wetlands, proving that concept to have been impossible from the outset. Since the Compliance Order was based upon that concept, Appellants argue, they are entitled to summary judgment.

DER responds that, soon after issuance of the Compliance Order, the parties engaged in settlement negotiations during which DER indicated a willingness to accept something less than "full and complete restoration" for some of the sites. While Appellants' plans were being considered by DER, Commonwealth Court issued an Order on November 28, 1990 (No. 360 Misc. Dkt. 1989) that, *inter alia*, directed DER to consider remedial action that would have no adverse impact on third parties who had purchased land from Appellants and, in some instances, built houses. The February 1, 1991 approval letter reflects DER's adoption of this suggestion by allowing replacement of wetlands as an alternative to restoration at three of the seven sites. This indulgence was not an admission of impossibility, according to DER, but a recognition of the interests of innocent third parties.

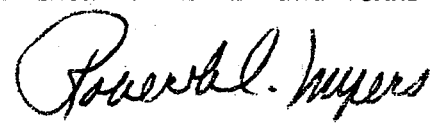
While conceding that "full and complete restoration" can never return wetlands to their natural condition, DER insists that it is possible to approach that result. It points to the February 1, 1991 approval letter which requires four of the sites to be returned as close as possible to their previous state. Thus, one of the sites "will be restored to an emergent/scrub shrub wetland similar to the moat bog which existed" previously.

It is apparent that Appellants and DER disagree on the extent of restoration possible for humans to achieve - a factual dispute that bars the entry of summary judgment: Pa. R.C.P. 1035(b). That factual dispute has not been resolved by DER's issuance of the approval letter on February 1, 1991, accepting something less than "full and complete restoration" for some of the sites where third-party interests are involved. That action was suggested by Commonwealth Court and in no way undermines DER's position on the other four sites.

ORDER

AND NOW, this 9th day of April, 1992, it is ordered that Appellants' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 9, 1992

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and
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M. DIANE SMITH
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PAGNOTTI ENTERPRISES, INC. d/b/a TRI-COUNTY SANITATION COMPANY	:	
v.	:	EHB Docket No. 92-039-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and FOSTER TOWNSHIP SUPERVISORS, Intervenors	:	Issued: April 9, 1992

OPINION AND ORDER
SUR SOLE II'S PETITION TO INTERVENE

By: Richard S. Ehmann, Member

Synopsis

Where a petitioning intervenor seeks to intervene in an appeal before this Board on the side of the Department of Environmental Resources (DER), to be granted intervenor status the petitioner need only show it has an interest which will gain or lose by direct operation of our adjudication of the merits of DER's denial of the application for a landfill permit. As Sole II's members own residential property adjacent to this proposed solid waste disposal facility, run businesses there and will suffer loss in economic value and increased exposure to potential pollution, it has made the requisite showing to be allowed to intervene.

OPINION

On December 26, 1991, DER issued a letter denying Tri-County Sanitation Company's ("TCSC") Municipal Waste Phase II Permit Application No. 101610 for a solid waste disposal facility to be located in Foster Township,

Luzerne County. Not surprisingly, Pagnotti Enterprises, Inc., one of the joint venturers in TCSC (collectively hereafter "TCSC") appealed that denial to this Board.

Thereafter, on February 24, 1992, Save Our Local Environment, II, Lawrence P. and Linda Korpalski, Kenneth Powley and Thomas Meyers, Sr., (collectively "SOLE II") filed a Petition To Intervene. Subsequently, on March 3, 1992, we also received a Petition For Intervention on behalf of Foster Township Supervisors ("Foster").[1] TCSC has filed responses to these Petitions opposing intervention. In its response to SOLE II's Petition, TCSC included New Matter and SOLE II has responded thereto. DER does not oppose intervention. SOLE II's Petition says SOLE II qualifies to be an intervenor. It argues its members own various residences and businesses near the proposed facility and they will suffer economic losses if the facility is allowed to operate. It also argues that its members will be exposed to possible air and water pollution, blowing trash, malodors, increased truck traffic and that a landfill is aesthetically unpleasing. It then alleges SOLE II has been involved in opposition to a permit for TCSC before DER, before Foster, in the Common Pleas Court and Commonwealth Court, and, thus, SOLE II's interest in protecting its members is not disputable.

TCSC responds as to SOLE II that the issues in this appeal do not relate to the economic and environmental harms issues raised by SOLE II and that SOLE II's allegations are thus irrelevant. It also states that the issues raised by the denial letter are highly technical and do not relate to SOLE II's interests and that SOLE II has not shown that DER is an inadequate

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1 Foster's petition is addressed separately.

representative of its interests. In a Reply to TCSC, SOLE II disputes the technical issues argument raised by TCSC and argues that it has made an adequate showing as to its right to intervene under the intervention test in Browning-Ferris, Inc. v. Department of Environmental Resources, ___Pa. Cmwlth.___, 598 A.2d 1061 (1991) ("BFI II").

Until recently, the standards by which we judged the merits of all requests for intervention were clear and free from doubt. As stated in Franklin Twp. v. DER, 1985 EHB 853; City of Harrisburg v. DER, 1988 EHB 946; Wallenpaupack Lake Estates Property Owners v. DER, 1989 EHB 446, and a host of other cases in the past, we evaluated the request by considering five factors, to wit: 1) the nature of the petitioner's interest; 2) the adequacy of representation of that interest by other parties to the proceeding; 3) the nature of the issues before the Board; 4) the ability of the petitioner to present relevant evidence; and 5) the effect of intervention on the administration of the statute under which the proceeding is brought.

Recently, the clarity has ended.

In Glendon Energy Company v. DER, 1990 EHB 1508, we applied this five factor test to the Borough of Glendon's ("Borough") Petition To Intervene and denied same. The Borough appealed this decision to the Commonwealth Court.[2]

While the Borough's Petition For Review was pending before the Commonwealth Court, this Board applied this same five-pronged test twice more in denying Petitions To Intervene. By an opinion and order dated April 12, 1991, we denied Browning-Ferris, Inc.'s ("BFI") Petition To Intervene in

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[2] This appeal bears Docket No. 18 C.D. 1991. It is part of the group of three appeals by the Borough and Glendon Energy Company which the Court decided in Borough of Glendon v. Commonwealth DER, ___Pa. Cmwlth.___, ___ A.2d___ (No. 18 C.D. 1991, Opinion issued January 28, 1992).

Montgomery County v. DER, et al., EHB Docket No. 91-053-E. By another opinion and order dated April 29, 1991, we denied BFI's Petition To Intervene in Clements Waste Services, Inc., et al. v. DER, et al., EHB Docket No. 91-075-E. BFI filed Petitions For Review as to both denials with the Commonwealth Court.[3]

The Commonwealth Court heard the arguments in the BFI matters on the same day and issued two opinions reversing the Board on intervention in both appeals on October 23, 1991. In Browning-Ferris, Inc. v. Department of Environmental Resources, ___Pa. Cmwlth.___, 598 A.2d 1057 (1991) ("BFI-I") which arose from Clements Waste Services, Inc., *supra*, the panel of judges from the Commonwealth Court rejected the five-pronged test which the Board had used and stated that Section 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(e) allows intervention in appeals before the Board by any interested party. Interest was in turn defined as meaning the person or entity seeking to intervene must gain or lose by direct operation of the Board's ultimate decision. In Browning-Ferris, Inc. v. Department of Environmental Resources, __Pa. Cmwlth.___, 598 A.2d 1061 (1991) ("BFI-II"), the Court reversed this Board's decision on intervention in the Montgomery County, *supra*, appeal using the same test.

Subsequently, on January 28, 1992, another panel of the Commonwealth Court handed down its decision in Borough of Glendon v. Commonwealth, DER, *supra*. The Commonwealth Court again rejected the aforementioned five-pronged test, but did not do so using the reasoning in

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3 BFI's petitions for review were taken from our Orders of May 7, 1991, in which we amended our April 12, 1991 and April 29, 1991 orders in these matters.

BFI-I and BFI-II. Indeed BFI-I and BFI-II are neither overturned nor distinguished; they are never mentioned. Rather, the Commonwealth Court, after mentioning that under the Environmental Hearing Board Act any interested person may intervene, went on to say that one who wanted to challenge a governmental action had to have a direct, substantial and immediate interest to have standing to do so.[4] The Court then went on to conclude the Borough's interest there in challenging DER's decision was substantial, immediate and direct, so the Board erred in denying the Borough's Petition To Intervene.[5]

This Board is obliged to attempt to interpret all of these decisions in the instant appeal with regard to these Petitions. To do so requires us either to find that Borough of Glendon, *supra*, narrows the test for whether to allow intervention from that recited in BFI-I and BFI-II or to try to read these opinions so that they do not conflict with each other. Since Borough of Glendon never makes mention of either BFI-I or BFI-II, we are unwilling to find it intended to narrow the holding in those appeals and, accordingly, we elect to try interpret the approaches to intervention in these decisions without addressing whether the Commonwealth Court intended a retreat in

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4 The opinion cites William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), and Franklin Township v. Department of Environmental Resources, 500 Pa. 1, 452 A.2d 718 (1982) for this position.

5 The obvious question as to whether to test petitions to intervene via BFI-I, *supra*, or Borough of Glendon, *supra*, and whether one can interpret these opinions consistently is further complicated by Commonwealth Court President Judge Craig's unreported opinion in Paradise Watch Dogs v. Commonwealth, DER, No. 2143 C.D. 1990. Writing for his panel in this August 9, 1992 Opinion, Judge Craig applied the five pronged test referenced above and found in 25 Pa.Code §21.62 and reversed this Board as to intervention by Paradise Watch Dogs in the appeal by New Hanover Corporation found at EHB Docket 90-225-W.

Borough of Glendon, *supra*. The only way that we see to reconcile these interpretations is to disregard the unreported opinion, reject our prior test for intervention, as BFI and Borough of Glendon, both do, and to look at whether the intervenor seeks to support or oppose the government's actions in the pending proceeding. Where support is intended, it is clear BFI-I and BFI-II allow any interested party to intervene. However, under Borough of Glendon, where the petitioning intervenor seeks to oppose the government's action, he or she may only be allowed to intervene if the intervenor can show an interest which is substantial, immediate and direct. While this interpretation raises questions as to why there are two standards for intervention, they are questions which we will not address but leave to the appellate courts.

Applying this "BFI/Glendon" test to the instant petition, it is clear that SOLE II supports DER's rejection of TCSC's application and, thus, that it need merely show its interest in this proceeding.

SOLE II seeks to intervene in support of DER's decision and in opposition to a permit for TCSC. It also avers a desire to protect its members, and, under our prior test on intervention, we might have found its interests adequately represented by DER and Foster, especially absent any allegation by SOLE II as to an inadequacy in that representation; this question is no longer before us under either BFI-I or Borough of Glendon, *supra*. Clearly, the health, safety and welfare of SOLE II's members could be adversely impacted if we were to reverse DER's denial of this permit. So, too, its members' properties and businesses could be adversely impacted.

Thus, it is clear SOLE II has an interest which will be directly impacted by our decision in this appeal. Accordingly, we must grant SOLE II's Petition To Intervene and thus we enter the following Order.[6]

ORDER

AND NOW, to wit, this 9th day of April, 1992, the Petition To Intervene on behalf of SOLE II is granted and the caption of this appeal is amended to read:

PAGNOTTI ENTERPRISES, INC. d/b/a TRI-COUNTY SANITATION COMPANY	:	
v.	:	EHB Docket No. 92-039-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, and FOSTER TOWNSHIP SUPERVISORS and SAVE OUR LOCAL ENVIRONMENT, II, LAWRENCE P. and LINDA KORPALSKI, KENNETH POWLEY and THOMAS MEYERS, SR., Intervenors	:	

It is further ordered that the Intervenors shall comply with Pre-Hearing Order No. 1 on the same schedule as DER.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 9, 1992

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6 In so doing, we are not authorizing SOLE II to raise any additional reasons why it contends this Permit application should have been denied by DER. SOLE II will be confined to the issues raised by DER's letter and TCSC's appeal therefrom as are all of the other parties.

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M. DIANE SMITH
SECRETARY TO THE BO

BANEY ROAD ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 91-137-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
DENNIS and TARA YETTER, Intervenors and	:	
WALKER TOWNSHIP SUPERVISORS	:	**Issued: April 10, 1992**

OPINION AND ORDER
SUR BANEY ROAD ASSOCIATION'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

Where there is a dispute between the parties as to facts upon which arguments in favor of summary judgment are based, the motion for summary judgment must be denied as to these arguments. The motion for summary judgment must be sustained where DER admits it failed to conduct an independent review of the townships' land development module to determine the consistency of the module's proposal with the requirements of 25 Pa. Code §71.21(a)(5)(i), but instead for this determination relied solely upon the municipalities' representation that their module met these requirements. Where DER also admits to having failed to perform any Article I Section 27 analysis of the municipalities' proposal concerning sewage planning and

disposal in this subdivision, but admits to having relied on the municipalities to have done same, a motion for summary judgment asserting this argument must be granted.

OPINION

On April 4, 1991, Baney Road Association ("Baney") filed its appeal with this Board from DER's March 15, 1991 letter to the Walker Township Supervisors ("Walker Township"). DER's letter approved a Planning Module for New Land Development submitted for the five lot Yetter Subdivision located in Walker Township and Delaware Township in Juniata County.[1] Dennis and Tara Yetter ("Yetters"), intervenors herein, are the owners and proposed developers of the 16.15 acre tract to be subdivided. Baney's Notice Of Appeal describes Baney as an *ad hoc* association of persons residing near Baney Road, which is the road providing access to the Yetters' land.

After filing this appeal and conducting discovery, Baney filed its instant Motion For Partial Summary Judgment. This Motion contains seven separate arguments on which Baney says it is entitled to summary judgment. Baney's seven arguments can be broken down into three specific groups. The first is that DER failed to independently review the township's module for consistency with the requirements of 25 Pa. Code §71.21(a)(5)(i) as required under 25 Pa. Code §71.55(a)(4). Secondly, DER failed to perform its duties under Article I Section 27 of the Pennsylvania Constitution as they pertain to

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[1] DER sent identical letters concerning the subdivision to Walker Township and Delaware Township (portions of two of the five lots lie within Delaware Township), and Baney sent a copy of its Notice Of Appeal to each township. However, it only attached a copy of DER's letter to Walker Township to its Notice Of Appeal. Since it is required to specify in its Notice Of Appeal which DER action it is challenging and to attach a copy of it, we deem this appeal to be a challenge to DER's approval only as it pertains to Walker Township.

approval of this module during DER's review of same. Finally, Baney asserts that in reviewing and approving this module, DER failed to properly calculate the nitrate loadings which would reach the groundwater from the five septic systems. In support of these assertions Baney attaches DER's answers to Baney's Interrogatories and an affidavit by Peter Robelen of Geo Services, Ltd., concerning the content of DER's file on this subdivision, the alleged omissions recited above as reflected therein, and his calculation of the nitrate loadings.

It is clear that we are empowered to grant motions for summary judgment. Robert L. Snyder et al. v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 588 A.2d 1001 (1991).[2] As Baney's Brief in support of its Motion points out, the test for granting such motions requires movant to show through pleadings, deposition, affidavits and answers to interrogatories that there is no genuine issue of material fact and movant is entitled to judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978); County of Schuylkill et al. v. DER et al.,

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[2] In its response to the Motion, DER argues we should not decide the Motion's merits until Yetters are served a copy of the Notice Of Appeal and Motion and Walker Township is served with Baney's Motion. Yetters' response asserts Baney's appeal is untimely because Baney never served Yetters a copy of the Notice Of Appeal. Baney had no obligation to serve Yetters under 25 Pa. Code §21.51 (f)(3), but only an obligation to serve the municipality which submitted the module for the subdivision. Since Yetters are now parties to this proceeding and have filed a response to Baney's Motion, DER's objection is also moot. As to DER's objection on service of the Motion on Walker Township, the Board notified the Township of the motion; Baney subsequently filed a certificate of service on Walker Township and the township has not participated in this proceeding in any fashion, so this objection is moot, too.

1989 EHB 918. In deciding the merits of this motion, we must construe it in a light most favorable to DER, Yetters and Walker Township. Plymouth Township v. DER et al., 1990 EHB 1288.

With this test before us, it is obvious certain arguments raised in Baney's Motion must fall. Baney argues a DER failure to determine compliance with §71.21(a)(5)(i) by Walker Township as required through §71.55(a)(4) in relation to applicable county storm water management plans. DER's response to the Motion says no such plans exist for Juniata County and DER has attached an affidavit to its response by Eugene E. Counsil, head of DER's Division of Waterways and Storm Water Management, which supports this assertion. Since Baney's assertion of this alleged failure by DER contains within it an implication that such a county plan exists, DER's response creates a dispute as to a material fact. Thus, on this argument we must deny the motion.

The same is true as to Baney's wetlands argument. DER's response denies the existence of any wetlands on the Yetters' property. DER has attached an affidavit to its Response from an employee named Marc Cooley to this effect.[3] As a result, on this issue, too, there is a disputed material fact, i.e., the existence of wetlands. This dispute bars entry of summary judgment in favor of Baney on this issue.

Next, we address Baney's remaining arguments based on 25 Pa. Code §71.21(a)(5)(i) and the Constitution. Under the regulations in 25 Pa. Code Chapter 71, each municipality is required to adopt an Official Plan which deals with existing sewage disposal problems and addresses future sewage

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[3] Yetters have attached a copy of portions of Mr. Cooley's deposition transcript to their brief which is coextensive with this affidavit on this point and consistent therewith.

disposal needs. See 25 Pa. Code §§71.11 and 71.31. After the plan is adopted municipally, it is submitted to DER for review and approval or disapproval according to criteria established in this chapter of regulations. See 25 Pa. Code §71.32(d). Thereafter, new real estate development proposals within the municipality are addressed through the municipal submission to DER of proposals in the form of "new land development revisions" to the municipality's Official Plan. See 25 Pa. Code §§71.52 and 71.53. Again, pursuant to 25 Pa. Code §71.54, DER reviews each proposed Official Plan revision pursuant to criteria set forth in these regulations. The effect is thus a continuing process of revision of the Official Plan.

Section 71.55 of 25 Pa. Code creates a limited exception to this revising process. Apparently the regulation drafters intended to create an accelerated process for approval of small real estate developments without requiring that they be put through the more extensive plan revision process set forth in §71.54. Section 71.55 provides in the portions pertinent to this Motion:

> (a) A municipality does not have to revise its official plan when the Department determines that the proposal is for the use of individual onlot sewage systems serving detached single family dwelling units in a subdivision of ten lots or less and the following apply:
>
> (1) The proposal, in addition to the existing or proposed subdivision of which it is a part, will not exceed ten lots.
>
> (2) The subdivision has been determined to have soils and site conditions which are generally suitable for onlot sewage disposal systems under §71.62 (relating to individual and community onlot sewage systems).
>
> (3) For the purposes of determining whether a proposal qualifies for an exception under this section, the enumeration of lots shall include only lots created after May 15, 1972.

(4) The proposal is consistent with the requirements of §71.21(a)(5)(i)-(iii) (relating to content of official plans).

25 Pa. Code §71.55.

It then goes on in subsection (b) to delineate the documentation which the municipality is to submit to DER for purposes of facilitating DER's determination referenced in §71.55(a).

The module addressing Yetters' proposed subdivision shows that Walker Township is dealing with a five lot subdivision with single family houses served by on lot septic systems. See Exhibit A to Baney's Motion and Exhibit 2 to DER's response. It is also clear that the municipality's planning commission has determined the proposal is consistent with the township's official plan. Lastly, on its face, it states that the township asserts the proposal is consistent with the requirements of 25 Pa. Code §71.21(a)(5)(i). See DER Exhibit 2.

Baney reads DER's obligation under §71.55(a)(4) as imposing a duty on DER to determine whether the module's sewage disposal proposal--land development proposal is consistent with all of the requirements of Section 71.21(a)(5)(i) and to resolve all inconsistencies properly. Thus DER must determine if the module for these lots shows consistency with both state comprehensive water quality management plans and Sections 4 and 5 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.4 and 691.5(c). Baney also says these regulations require DER to determine the impact of the development on water quality, including review of E&S control plans; to determine the impact of the proposal on prime agricultural lands; and to determine the impact of this proposed development on rare, endangered or threatened plant and animal species.

Additionally, Baney argues that DER must perform an assessment of the development's impact on archeological and historic resources pursuant to DER's duties under Article I Section 27 of the Pennsylvania Constitution and must seek ways to minimize environmental impacts therefrom. Baney says the facts show either DER failed to do this or that DER lacked the information on which to conduct such a review.

In response DER argues that its duty is only to determine if the proposal in the module is consistent with §71.21(a)(5)(i), "which was previously ascertained by the Townships". DER denies it has any duty to independently review the module for consistency with 4 Pa. Code Chapter 7 Subchapter W, the Pennsylvania Natural Diversity Inventory or to review any E&S plan. DER also denies any duty to independently determine if the project will adversely impact on archeological or historic sites or to contact the Pennsylvania Historic and Museum Commission because DER asserts that it need only determine compliance with §71.21(a)(5)(i), which the two municipalities did for it. In essence, DER contends that under §71.55(a), its duty as to the module's proposal and consistency with 71.21(a)(5)(i) may be determined in any way it chooses, including letting the municipality tell DER that the municipality's proposal is, itself, consistent.

Yetters' brief supports that position taken by DER, arguing DER need not establish the module's compliance with the factors enumerated in §71.21(a)(5), only consistency therewith, and, thus, a less stringent standard of review applies. It then argues that requiring DER to independently assess consistency makes only for duplicative efforts, which is nonessential. The brief then argues the regulation intends expedited review of small subdivisions and this is best accomplished by using DER's current procedure.

While DER's Brief is correct where it contends that as a rule DER's interpretation of there regulations it administers is entitled to great weight and should only be disregarded when clearly incorrect, this is one time DER is clearly incorrect. Under its interpretation, DER is letting the regulatee municipality tell DER that the municipality's own proposal fulfills the requirements of this regulation, and DER is accepting this representation as its own determination of compliance under §71.55(a). DER may not make this determination in this fashion. DER must consider the materials submitted to it to determine if they provide sufficient information on various subject matter areas, and where they do, independently exercise its judgment in making this determination under §71.55(a). Determinations of compliance with regulations are not for the regulatee, except incidentally in determining what information to submit to DER for DER to review in making the DER decision. To hold otherwise makes the regulations nothing more than guidelines. DER's duties as to the Clean Streams Law, *supra*, the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et. seq.*, and Chapter 71 is to both administer and enforce. Baney's citation to Township of Heidleberg et al. v. DER et al., 1977 EHB 266, is absolutely on target in this regard. As we said there:

> Here we find the department failed to exercise any discretion in reviewing Washington Township's requested plan revision. That in itself is an abuse of discretion.

1977 EHB 266, 273.

We can not say it more clearly here. In accord, see Morton Kise et al. v. DER et al., EHB Docket No. 90-457-MR (Opinion issued July 9, 1991). DER has failed to fulfill its responsibility under §71.55(a) as to this module.

We point out further that as was stated in Morton Kise, *supra*, DER has duties in review of these proposals under Article I Section 27 of the Pennsylvania Constitution, also. DER's duties include those alleged by Baney to have been violated by DER as to historical issues and analysis for adverse environmental impact minimization. Payne v. Kassab, 468 Pa. 226, 361 A.2d 263 (1976).

Having sustained Baney's appeal on the arguments addressed above, we need not consider the arguments of the parties over the "nitrate loading" issue. Empire Coal Mining and Development, Inc. v. DER, EHB Docket No. 91-115-MR (Opinion issued February 11, 1992).

DER's approval of this module based on these facts was an abuse of its discretion and its duties under Section 71.55(a). Baney's motion says it seeks a partial summary judgment and remand to DER to perform its duties under Section 71.55(a). It may be that there is inadequate information from which to make this determination in the module submitted by Walker Township, but that is for DER to address by requiring more information and then conducting its evaluation based upon the information then available. A remand compelling DER to perform its duties is appropriate since we cannot finally adjudicate the adequacy of the performance of these duties until they are, in fact, performed. We will retain jurisdiction over this appeal until DER completes this review, and we therefore enter the following order.

O R D E R

AND NOW, this 10th day of April, 1992, it is ordered that Baney's Motion For Summary Judgment is granted for the reasons set forth in the foregoing opinion and the planning module submitted by Walker Township and

Delaware Township is remanded to DER for the purposes of performing its duties under 25 Pa. Code §71.55(a) and Article I Section 27 of the Pennsylvania Constitution. It is further ordered that within thirty days, counsel for DER shall file a written report of the amount of time needed by DER to make the determination required under Section 71.55(a) and Article I Section 27. At that time, further orders, as appropriate, shall be issued by this Board, which retains jurisdiction over the instant appeal in the interim.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 10, 1992

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For Permittee:
Walker Township Supervisors
c/o Nancy Baillie, Secretary
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M. DIANE SMITH
SECRETARY TO THE BOARD

BANEY ROAD ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 91-137-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
DENNIS and TARA YETTER, Intervenors and	:	
WALKER TOWNSHIP SUPERVISORS	:	

ORDER

AND NOW, this 1st day of May, 1992, upon consideration of the letter of April 20, 1992 from counsel for Baney Road Association and the Opinion and Order in this matter dated April 10, 1992, it is ordered that the Board's Order of April 10, 1992 is amended to read:

> AND NOW, this 10th day of April, 1992, it is ordered that Baney's Motion For Summary Judgment is granted for the reasons set forth in the foregoing opinion, the approval by the DER of the planning module is revoked and the planning module is remanded to DER for the purposes of performing its duties under 25 Pa. Code §71.55(a) and Article I Section 27 of the Pennsylvania Constitution. It is further ordered that within thirty days, counsel for DER shall file a written report of the amount of time needed by DER to make the determination required under Section 71.55(a) and Article I Section 27. At that time, further orders, as

appropriate, shall be issued by this Board, which retains jurisdiction over the instant appeal in the interim.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 1, 1992

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M. DIANE SMITH
SECRETARY TO THE BC

ROY MAGARIGAL, JR.	:	
	:	
v.	:	EHB Docket No. 91-329-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 16, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL

Robert D. Myers, Member

Synopsis

Where DER rescinds the action forming the basis of an appeal to the Board, the appeal will be dismissed as moot since the Board can no longer grant any effective relief. The fact that a controversy may still exist between DER and the appellant is immaterial. Unless there is some DER action stemming from the controversy the Board is powerless to intervene.

OPINION

This appeal was filed on August 9, 1991 to contest a July 12, 1991 letter issued by the Department of Environmental Resources (DER) to Appellant. The letter, signed by James C. Nelson of DER's Bureau of Forestry, instructed Appellant to remove from Little Moores Run Road barricades considered illegal by DER. The letter stated further that, if Appellant did not act by August 1, 1991, the District Forester would be ordered to remove the obstacles.

On September 19, 1991 Nelson sent a letter to Appellant's legal counsel, withdrawing the July 12, 1991 letter but continuing to assert DER's

position that Little Moores Run Road is a public road. On November 13, 1991 DER filed a Motion to Dismiss the Appeal on the basis that it is now moot. Appellant filed a Reply on December 2, 1991, taking issue with the mootness claim.

An appeal becomes moot when an event occurs which deprives the Board of the ability to provide effective relief. Such an event is DER's rescission of the action forming the basis of the appeal: *Robert L. Snyder et al. v. DER*, 1989 EHB 591. When that occurs, there is no relief that the Board can give an appellant. The Appellant in this appeal resists the application of the principle because, in its rescission letter, DER continues to assert that Little Moores Run Road is a public road. Clearly, the legal status of this road is at the heart of the controversy between Appellant and DER - a controversy that has not been resolved by DER's rescission. However, our jurisdiction depends on the existence of something more than a controversy. There must be some DER action stemming from the controversy to form the subject matter of our adjudication. Without such action, we are powerless to intervene.

In his Reply, Appellant requests that, if we dismiss the appeal as moot, we allow him to file an application for fees and expenses under the Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.* Obviously, we have no authority to grant or deny permission for a litigant to proceed under that statute. Our function is simply to process such applications as are filed with us pursuant to provisions of the statute.

ORDER

AND NOW, this 16th day of April, 1992, it is ordered as follows:

1. DER's Motion to Dismiss Appeal for mootness is granted.

2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 16, 1992

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M. DIANE SM
SECRETARY TO THE

SPANG & COMPANY	:	
	:	
v.	:	EHB Docket No. 87-042-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 17, 1992

OPINION AND ORDER SUR DEPARTMENT OF ENVIRONMENTAL RESOURCES' MOTION IN LIMINE

By: Richard S. Ehmann, Member

Synopsis

A Motion in Limine seeking to limit evidence in a reopened merits hearing to that identified in the Petition To Reopen is granted. The Motion in Limine is denied without prejudice to its refiling insofar as it also seeks to limit expert opinion testimony to a certain opinion based upon answers to interrogatories and an expert's deposition. It is denied in this fashion because further answers to those interrogatories have been ordered by this Board, DER's Motion in Limine has been granted in part as to the evidence which may be offered at the merits hearing, and the expert's deposition predated the filing of the expert's report, as a result these events may moot the issues in this aspect of the motion in whole or in part.

OPINION

The instant matter arises from an appeal by Spang & Company ("Spang") from an administrative order issued to it by the Department of Environmental Resources ("DER") on January 6, 1987. That order modified Spang's proposal

concerning closure of three lagoons at the Spang manufacturing facilities located in East Butler, Butler County. Subsequently Spang's appeal moved through pre-hearing procedures and a merits hearing. After that hearing's conclusion but prior to the issuance of this Board's Adjudication on March 27, 1990, Spang petitioned to reopen the record to allow it to offer some further evidence, but Spang's Petition was denied. The Board's Adjudication sustained DER's action and Spang appealed therefrom to the Commonwealth Court, in part challenging the propriety of the denial of its petition to reopen.[1]

The Commonwealth Court sustained Spang on its argument that we erred in denying Spang's petition, remanded the appeal to the Board and directed that we grant Spang's Petition.[2] After reargument was denied, the matter was returned to the Board for further proceedings. We have allowed the parties a period of time to undertake discovery as to the matters allegedly covered by Spang's Petition and to file Amended Pre-Hearing Memoranda addressing solely the issues raised by that Petition. As a result, and just prior to our scheduling of a further merits hearing in this appeal DER filed a Motion In Limine and a Motion To Dismiss Objections And For Sanctions. We have received Spang's reply to both motions and disposed of the interrogatory objections and sanctions questions in our Order of April 1, 1992. This Opinion addresses the Motion In Limine issues.

According to Spang's Petition, after the initial merits hearing was concluded in March of 1989, Spang caused a sample of the sludge generated by

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[1]A more detailed description of the procedural history of this matter is set forth in the adjudication as found at 1990 EHB 308.

[2]The Court's opinion is reported as Spang & Company v. Department of Environmental Resources, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991).

the pre-treatment plant at its Magnetics Division to be analyzed. This pre-treatment plant's effluent discharged to Spang's lagoons, as did the Manufacturing and Tool Division's copper electroplating line. DER contends the latter line is the source of some or all of the cyanide in these lagoons, and thus that the lagoons contain hazardous wastes, which in turn generates a series of legal consequences with regard to Spang's closure thereof. Spang's post-hearing analysis of the Magnetics Division sludge showed a level of cyanide which according to its Petition, "would at least in part, account for the cyanide concentrations found in the sludge samples taken from the impoundments". The Petition said "although the concentration of cyanide expected in the wastewater from the Magnetics Division is incidental, the sludge analysis clearly indicates that it is enough to account for the cyanide found in the impoundment samples which showed insignificant concentrations of cyanide" (emphasis in original). The petition sought entry of an order reopening the record to hear evidence of the tests conducted on the sludge from Spang's Magnetics Division treatment plant.

It is important to understand what was sought by Spang's Petition and directed by the Commonwealth Court because DER's Motion says Spang now wants to go substantially beyond what was in its Petition at the reopened merits hearing. According to DER's Motion, during the deposition of Spang's Timothy Keister, Mr. Keister indicated he has recently been conducting additional analysis of the treatment plant sludge in anticipation of testimony with regard thereto at the reopened merits hearing.[3] DER also alleges Keister said he is conducting research as to sources of cyanide within Spang's plant

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[3]A copy of Keister's deposition and Spang's interrogatory answers are attached to DER's Motion.

to discover the sources of cyanide in this sludge and that Spang expects to offer testimony as to the analysis of various materials at Spang's plant. DER argues that absent the Board's granting of a Petition To Reopen the record as to this new material, it is improper for it to be before us at the reopened hearing.

In response, Spang asserts all the evidence it will introduce is within the scope of the "issues" raised by its Petition To Reopen the Record. Spang suggests the issue raised by its Petition is: Is there a second non-hazardous source of cyanide which could account for the cyanide in the lagoon's sludge? Spang also argues that DER has waived any objections to the evidence Spang seeks to offer by conducting discovery on the issues to which DER's Motion now objects because DER only learned of this work by asking Mr. Keister questions about it. Finally, Spang argues if subsequent analysis of the Magnetics Plant's sludge showed no cyanide DER would wish to introduce this evidence.

We must reject Spang's broad expansionist view as to what it may put before us at this hearing. As the parties are aware, in 1989, after nearly two full years in which to conduct discovery, marshall all legal arguments and gather all evidence, this Board held a full hearing (three days in length) on the merits and each party presented all of the evidence it wished to offer. Each party has also submitted a lengthy post-hearing brief setting forth its arguments based thereon and we issued our adjudication. We are now instructed to rectify our error concerning omission of certain 1989 data which Spang sought to introduce through its Petition To Reopen. Commonwealth Court did not instruct us to reopen the record and hold a hearing to receive any and all further evidence which a party may wish to offer even if it includes evidence

developed subsequent to the Commonwealth Court issuing its opinion telling us to consider this 1989 data. The Court instructed us to grant Spang's petitior to reopen but Spang's petition sought only the authorization to present this Board with newly discovered evidence in the form of an "analysis of a waste water stream which flowed from [Spang's] Magnetics Division and also discharged into the lagoons". Spang & Company, at ___, 592 A.2d 817. Obviously, the 1991 Commonwealth Court Opinion on a 1989 Petition to Reopen could not address evidence being prepared in 1992. Equally obvious is the realization that if an administrative tribunal like this Board is to ever be able to reach the point at which it can render a decision, there must be a cut off point beyond which parties cannot generate "evidence" to submit in support of their respective arguments raised before that tribunal. According to the instructions of the Commonwealth Court, at this point in this appeal that point is upon receipt of this 1989 data.

In so saying, there is no implication that we accept only the evidence of collection and analysis of this 1989 sample, although the Petitior says it only seeks reopening for the limited purpose of hearing "additional analytical evidence" regarding same. Clearly, Spang may offer us limited expert testimony concerning how it believes the sample's analysis fits within the framework of the other evidence previously offered and its previously raised contentions based thereon, including whether the lagoon's contents can be classified hazardous wastes. Remembering that the initial hearing was held three years ago, we believe it is reasonable to allow this clarification to the extent Spang believes it necessary.

Spang's argument of a DER waiver of objections does not convince us to change this position, either. On January 15, 1992, we ordered the parties

to complete any additional discovery by March 16th; at that point the instant motion was not decided, let alone pending before us, so DER could not know if it would prevail in regard thereto or not. Accordingly, we believe its counsel properly acted to protect his client's position to the extent he could by conducting discovery to explore the breadth of the contentions Spang might seek to put forth at this hearing. Since discovery can serve both to provide a party information favorable to its position and information concerning the extent of its opponent's position, engaging in discovery cannot act as a waiver of DER's position set forth in its Motion. We also observe in passing that within Spang's waiver argument is the seed of a tacit admission that Spang is indeed trying to broaden the scope of the reopened hearing beyond that directed by the Commonwealth Court, since if there is no broadening occurring there can be no assertion of waiver of objection to any attempt to broaden. Finally, in rejecting this argument after having read Mr. Keister's deposition, we do not see a pattern in the questions asked by DER's counsel suggesting a DER belief that all of the issues which Spang contends are raised by its Petition are indeed raised thereby. Rather, it appears that Mr. Keister's answers to the questions from DER's counsel, at least in some cases, lead counsel for DER to ask further questions to clarify the breadth and meaning of the prior answers.

Having come to the above conclusions, however, we are not done with this Motion because DER's Motion in Limine is two-pronged. It also seeks an Order limiting the testimony of Spang's experts in accordance with Spang's answers to interrogatories and Mr. Keister's deposition which preceded the filing of Spang's interrogatory answers. While we agree that Spang is bound to its answers to DER's interrogatories and further limited in expert opinion

testimony as set forth above, we also recognize that Keister's expert report and affidavit have now been furnished to DER (after the deposition). Additional answers to DER's interrogatories have also been filed by Spang, which has been ordered to provide still further fuller answers to DER's interrogatories based on our rejection of Spang's "general objections" to all of DER's interrogatories. Between this limitation on testimony, the furnishing of Keister's expert report and affidavit, Spang's amended answers to DER's interrogatories and those answers to be forthcoming from Spang, it may be that this aspect of DER's Motion is now moot in part, if not in whole. Neither DER nor this Board will be able to tell if this is so until Spang's further interrogatory answers are filed. Accordingly, we must deny this portion of the motion without prejudice to DER's right to subsequently refile same and we enter the following Order.

ORDER

AND NOW, to wit, this 17th day of April, 1992, it is ordered that DER's Motion in Limine is granted in part and denied in part. It is granted insofar as it seeks to limit the evidence to be heard at the reopened merits hearing to the analytical evidence as to the cyanide in the Magnetics Division treatment plant's sludge identified in Spang's Petition To Reopen Record and the expert testimony on how it relates to Spang's previously raised contentions. It is denied without prejudice as to DER's request to limit the expert testimony which Spang may offer solely to opinions that the presence of cyanide in the Magnetics Division treatment plant's sludge indicates cyanide was present in one of three wastewater streams entering that treatment plant.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 17, 1992

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M. DIANE SMITH
SECRETARY TO THE BO

PAGNOTTI ENTERPRISES, INC. d/b/a/ TRI-COUNTY SANITATION COMPANY	:	
v.	:	EHB Docket No. 92-039-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and FOSTER TOWNSHIP SUPERVISORS, Intervenor	:	Issued: April 20, 1992

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION

By: Richard S. Ehmann, Member

Synopsis

In an appeal of the Department of Environmental Resources' (DER) denial of a Municipal Waste Phase II permit application, reconsideration of an Order granting intervention to the supervisors of the township where the landfill is to be located is denied because the order is interlocutory and there are no exceptional circumstances present.

OPINION

Appellant Pagnotti Enterprises, Inc., d/b/a Tri-County Sanitation Company (collectively TCSC) commenced this action on January 27, 1992 by filing an appeal of DER's December 26, 1991 denial of its Municipal Waste Phase II Permit Application with this Board. TCSC's permit application sought approval of a solid waste disposal facility proposed to be located in Foster Township, Luzerne County.

On March 3, 1992, we received a Petition For Intervention, filed by the supervisors of Foster Township on behalf of the Township, which alleged that the township supervisors have an interest in this appeal in that the landfill is to be located in Foster Township, posing a potential for environmental problems in the township "including but not limited to the contamination of ground water, aquifers, and other environmental hazards" and that the supervisors have an interest in maintaining the health, safety, and welfare of the residents and citizens of the township.

On March 5, 1992, the Board issued a letter to counsel for TCSC and DER, advising them of the Petition For Intervention and stating that any response to the petition must be received by the Board no later than March 16, 1992. The Board then received a letter from counsel for TCSC on March 11, 1992, which requested a copy of the petition and stated that TCSC would be unable to respond by March 16, 1992, since it had not yet received a copy of the petition. This letter did not request an extension of the Board's March 16, 1992 deadline, nor was any subsequent request for such an extension filed. We sent counsel for TCSC a copy of the petition on March 13, 1992 via fax. Subsequently (and after expiration of the March 16th deadline), on March 18, 1992, we received a letter from counsel for TCSC which advised that it anticipated filing a response to the petition by March 20, 1992.

On March 19, 1992, we issued an Order which stated:

> Upon consideration of the Petition For Intervention ... and the lack of any timely objection thereto on behalf of either party, it is ordered that the Petition is granted ... .

The following day, March 20, 1992, we received TCSC's Response to the Petition.[1]

Presently before the Board is TCSC's Motion For Reconsideration of March 19, 1992 Order, which seeks vacation of that order and an evaluation of its response to the petition. TCSC bases its motion on that part of our Order which cited the lack of any timely objection to the petition. It then sets forth several reasons why the Board should consider its Response, including: the initial failure of the Foster Township supervisors to serve it with a copy of the petition; its letter (which we received on March 11, 1992) advising the Board of its inability to respond by the deadline; its receipt of an initial copy of the petition on March 13, 1992, making it impossible to timely file its response with the Board; its March 18, 1992 letter and its telephone notification advising the Board it anticipated filing a response by March 20, 1992; and its promptness in filing a response once it received a copy of the petition.

Since our March 19, 1992 Order was interlocutory, we will only grant reconsideration of such an order if there are exceptional circumstances present. William Ramagosa, Sr., et al. v. DER, EHB Docket No. 89-097-M (Opinion issued December 12, 1991); Luzerne Coal Corporation et al. v. DER, 1990 EHB 23. We could deny reconsideration of our interlocutory order without comment, but we will provide the rationale for our Order since it was not accompanied by an Opinion. Joseph Blosenski, Jr., et al. v. DER, EHB Docket No. 85-222-MR (Opinion issued March 3, 1992).

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1 We also received a certificate of service reflecting that the Petition For Intervention had been served on counsel for appellant and DER on March 18, 1992.

As indicated in our March 19, 1992 order, upon consideration of the Petition, we determined the Foster Township Supervisors, on behalf of the Township, clearly have an interest in this appeal which merits intervenor status. See §4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(e); Browning-Ferris, Inc. v. DER, ___ Pa. Cmwlth. ____, 598 A.2d 1057 (1991); Browning-Ferris, Inc. v. DER, ___ Pa. Cmwlth. ___, 598 A.2d 1061 (1991). Should we ultimately reverse DER's denial of TCSC's permit application, the residents of Foster Township stand to be adversely affected by the proposed landfill through the potential contamination of ground water, aquifers, and other environmental hazards alleged in the Petition. We have previously found alleged harm to the interests of a township's residents to be sufficient to create standing to appeal in the township. South Fayette Township v. DER, et al., EHB Docket No. 89-044-F (Opinion issued June 6, 1991). Indeed, our Supreme Court has stressed the responsibility of local government for protection and enhancement of the quality of life of its citizens, and has held the interest of a township in the establishment and operation of a toxic waste landfill within its boundaries to be sufficient to confer standing on the township to challenge DER's issuance of a solid waste permit. Franklin Township v. Commonwealth, DER, 499 Pa. 162, 452 A.2d 718 (1982). The Commonwealth Court, following Franklin Township, recently held the interest of a borough in which a proposed incinerator was to be located was sufficient to warrant the borough's intervention in an appeal by the permittee of DER's issuance of a conditional solid waste permit for the incinerator. Borough of Glendon v. DER, 18 C.D. 1991 (Slip Op. issued January 28, 1992). The Commonwealth Court indicated the borough's interest was sufficient to warrant its intervention

because of its responsibility to its residents who use a park located in close proximity to the proposed incinerator and its jurisdiction over that park.

A reading of TCSC's reasons for seeking reconsideration of our Order granting the Foster Township Supervisors intervention reveals no exceptional circumstances which require us to reconsider our Order, since our grant of intervention was in keeping with the above-cited case law, regardless of TCSC's efforts to respond to the Petition in a timely manner.[2]

Accordingly, reconsideration must be denied.

ORDER

AND NOW, this 20th day of April, 1992, it is ordered that the Motion For Reconsideration of March 19, 1992 Order filed by Pagnotti Enterprises, Inc., d/b/a Tri-County Sanitation Company, is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

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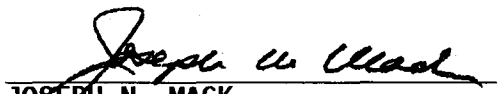
2 We have also reviewed the allegations contained in TCSC's Response to the Petition and find no exceptional circumstances which would prompt us to reconsider our Order raised therein, either. We note that having now had the opportunity to respond to the petition, TCSC's arguments relating to the Board's failure to consider its response are moot.

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 20, 1992

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

R. L. MANEY COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 89-019-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 21, 1992

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

By Robert D. Myers, Member

Syllabus:

Where a surface miner fails or refuses to correct violations of his permit and of the regulations, DER is justified in forfeiting his bonds. The Board, in setting forth the procedural history of the appeal, discusses the difficulties faced by non-lawyer litigants who appear *pro se*.

Procedural History:

The Board docket and files applicable to this appeal reflect the problems faced by non-lawyer litigants who attempt to handle their appeals *pro se* and the predicament faced by the Board when trying to be helpful to such litigants while remaining impartial. Citizen participation before governmental agencies at all levels is common, encouraging individuals to represent their own interests without legal assistance.

While this expression of the "do-it-yourself" philosophy can be handled by most agencies, it creates a dilemma for the Board which, like the courts, is strictly an adjudicatory body with no legislative or policy making

functions at all. Like the courts, we are charged with treating all litigants the same and with dispensing justice (within our narrow jurisdictional field) with the utmost fairness and impartiality. Fulfilling that charge means that we can give only limited assistance to *pro se* litigants and can extend to them only limited forbearance.

On January 20, 1989 R. L. Maney Coal Company (Appellant)[1] filed a Notice of Appeal from a December 19, 1988 letter from the Department of Environmental Resources (DER) forfeiting 5 bonds in the aggregate amount of $44,580 because of Appellant's failure to correct alleged violations of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, 52 P.S. §1396.1 *et seq.*, at a mine in Karthaus and Covington Townships, Clearfield County.

Because Appellant did not indicate on the Notice of Appeal that copies had been served on DER's Office of Chief Counsel and on the particular DER official who took the bond forfeiture action, the Board questioned Appellant about this on January 26, 1989, advising him that his appeal could be dismissed if he did not respond within 10 days. When no response was received, a second notice was sent out on February 16, 1989. Appellant's response, received on February 22, 1989, enclosed copies of letters showing that service had been made on February 7, 1989. Although this date was beyond the 10 days allowed by the Board's Rules of Practice and Procedure, 25 Pa. Code §21.51(f), we imposed no sanctions.

The Board's standard Pre-Hearing Order No. 1 was issued on February 24, 1989. Among other things, it directed that discovery should be completed and Appellant's pre-hearing memorandum should be filed no later than May 10, 1989. Appellant requested a 90-day extension of this date, citing difficulty

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[1] The record indicates that the business is a sole proprietorship owned by R. L. Maney. See Finding of Fact No. 1.

in getting copies of DER's file materials. The Board granted the extension on May 11, 1989. At or about this time, a Board legal assistant discussed with Appellant by telephone the difficulty he faced prosecuting his appeal without a lawyer to help him. Appellant indicated he could not afford one.

On July 27, 1989 DER filed a Motion to Compel Answers to Interrogatories. Receiving no answer from Appellant, the Board granted the Motion on August 18, 1989. In the meantime, Appellant had defaulted in filing his pre-hearing memorandum which was due on August 11, 1989. He was sent a default letter on August 24, 1989; and responded on September 6, 1989, again citing difficulty in copying DER's records. The Board on September 11, 1989 ordered the parties to resolve the copying problem and to advise the Board of revised dates for discovery and pre-hearing memoranda. This was done on October 5, 1989 and confirmed the following day in a Board Order establishing November 26, 1989 for completion of discovery and December 11, 1989 for filing of Appellant's pre-hearing memorandum.

Appellant defaulted in meeting this revised filing date and was sent another default letter on December 19, 1989. On January 2, 1990 he requested an extension, citing no reasons and stating no specific number of days. On January 17, 1990 the Board granted an extension to February 15, 1990. Again, Appellant defaulted and was advised on February 21, 1990. In response to Appellant's oral request for additional time, the Board granted an extension to April 2, 1990. He called again on that date and promised to have his pre-hearing memorandum filed by April 13, 1990. He failed to keep that promise and yet another default letter was sent to him on April 20, 1990. Finally, on April 30, 1990 what purported to be a pre-hearing memorandum was received by the Board.

DER's pre-hearing memorandum was due 15 days after the filing by Appellant. When DER failed to file within that period, a Rule to Show Cause was issued on May 23, 1990. DER filed a Response on May 30, 1990 revealing that Appellant had not served a copy of his pre-hearing memorandum on DER (as required by the rules) and had never answered DER's interrogatories in obedience to the Board's August 18, 1989 Order.[2] On June 5, 1990 the Board entered an Order discharging the Rule to Show Cause, directing Appellant to correct deficiencies in his pre-hearing memorandum, but declining to sanction him for ignoring the August 18, 1989 Order (since DER had been lax in seeking enforcement).

Appellant sought a 30-day extension to correct deficiencies in his pre-hearing memorandum and the Board gave him until July 23, 1990. On that date he requested another extension. Finally, the Board issued an Order directing him to correct the deficiencies by September 14, 1990 or suffer the imposition of sanctions which could include dismissal of the appeal. On the due date Appellant advised the Board that he was still waiting for copies of material from DER. A Board conference call with Appellant and DER legal counsel on September 21, 1990 resulted in a new agreement for production of documents but failed to have the desired effect.

As a result, another preemptory Order was issued to Appellant on December 6, 1990 directing him to complete his filings by December 31, 1990 or suffer sanctions. On January 2, 1991 Appellant apologized for his default, claiming disability as a result of an accident. The Board gave him until

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[2] In its Response, DER stated that, upon receiving the Board's Rule, it secured a copy of Appellant's pre-hearing memorandum from the Board's files. DER pointed out deficiencies in Appellant's pre-hearing memorandum that made it impossible for DER to file an adequate memorandum in reply.

January 31, 1991 to comply. Partial compliance took place on that date. After a request for an extension, DER filed its pre-hearing memorandum on April 17, 1991.[3]

The appeal was placed on the list of cases to be scheduled for hearing. Attempts were made to schedule it for two separate periods during the month of August 1991. Appellant objected because of the alleged unavailability of one of his witnesses and because of the difficulty in shutting down his operation in order to come to a hearing. A hearing was finally scheduled to begin on October 8, 1991. The Board's standard Pre-Hearing Order No. 2, issued August 6, 1991, required the parties to take certain action by September 24, 1991. This included the filing of copies of all exhibits intended to be introduced at the hearing and the filing of a stipulation listing:

(a) exhibits to which no objection will be made;

(b) exhibits to which objections will be made;

(c) expert witnesses whose qualifications will not be challenged;

(d) evidence which will not be challenged;

(e) facts agreed upon; and

(f) relevant legal issues.

Pre-Hearing Order No. 2 also contained two warnings - that the failure to file exhibits could result in exhibits being excluded from the record and that the failure to file the stipulation and exhibits could result in the cancellation of the hearing.

Appellant had filed some exhibits on January 30, 1991. No supplemental filing was made in response to Pre-Hearing Order No. 2. On

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[3] While Appellant telephoned the Board to discuss his concerns and requests for time extensions, the Board had great difficulty reaching him by telephone. Messages were left but were frequently ignored.

October 2, 1991 DER filed a Pre-Hearing Statement of Issues and Facts in lieu of the stipulation required by Pre-Hearing Order No. 2. This filing recited at the outset that the parties had been unable to agree on a stipulation and that DER was filing the Statement as its unilateral response to Pre-Hearing Order No. 2. The Statement went on to set forth DER's list of the 5 items required to be dealt with in the stipulation. With respect to Appellant's exhibits, DER stated that it could not determine which documents Appellant intended to introduce at the hearing but stated that it objected to the admissibility of certain specifically identified exhibits filed by Appellant on January 30, 1991. Appellant made no filing of his own in place of the stipulation required by Pre-Hearing Order No. 2.

At the beginning of the hearing on October 8, 1991, Administrative Law Judge Robert D. Myers, a Member of the Board, asked Appellant if he wanted an attorney to represent him. Appellant replied: "I don't feel it is necessary, sir" (N.T. 3). DER, which has the burden of proof in appeals of this nature, then presented its case-in-chief through the testimony of 1 witness[4] and the introduction of 5 exhibits.

When DER rested, Appellant complained about DER's objections to his exhibits and revealed that, because of these objections, he was not prepared to introduce the exhibits. He then attempted to present photographs that had never been listed as exhibits, filed with the Board or disclosed to DER. When DER objected, the presiding judge explained to Appellant that he had violated Board procedures designed to promote candor and fair play. Typical of Appellant's reactions was this statement:

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[4] As is the case with many *pro se* litigants, Appellant's "cross-examination" of DER's witness consisted more of Appellant's argument and direct testimony than it did of questions to the witness. While a certain amount of this was tolerated, the presiding Administrative Law Judge sustained objections to much of it, repeatedly explaining to Appellant that he would have the opportunity of testifying himself after DER's case-in-chief was completed.

> Then I might as well just go home, mightn't(sic) I, because there is no chance for a poor person to be represented in the hearing (N.T. 47).

to which the presiding judge replied:

> Well, you can say that if you want. We advise all persons who come before us that if they don't have an attorney, they run the risk of having difficulties just like this, because we can't bend over backward to help you (N.T. 47-48).

Angry over the situation with his exhibits, Appellant refused to present any evidence. As a result, the hearing was adjourned. Despite the time elapsed since this appeal was filed and despite the Board's indulgent attitude toward Appellant, we have only DER's evidence before us. The record consists of the pleadings, a transcript of 54 pages and 5 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant is R. L. Maney, an individual trading and doing business as R. L. Maney Coal Company, a sole proprietorship (Notice of Appeal; DER Exhibit No. 2).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of SMCRA and of the rules and regulations adopted pursuant to SMCRA.

3. Appellant was issued by DER, on April 8, 1985, Surface Mining Permit No. 17793121 (Permit) pertaining to a mine in Karthaus and Covington Townships, Clearfield County (DER Exhibit No. 1).

4. In connection with the Permit, Appellant executed and delivered to DER the following Collateral Bonds for Surface Mining:

Date	Collateral	
February 19, 1985	CD 5-01842 $10,000)	
	CD 5-01843 $10,000)	Keystone Natl. Bank
	CD 5-4524-C $ 8,530)	
July 17, 1985	CD 5-4754-C $ 7,950	Keystone Natl. Bank
September 9, 1986	CD 5-5130-C $ 8,100	Keystone Natl. Bank
	$44,580	

With the Collateral Bonds Appellant also delivered to DER assignments of the CDs pledged as collateral (DER Exhibit No. 2).

5. During Appellant's mining operations, DER inspectors reported violations such as mining off the bonded increments, failure to construct sedimentation control facilities and treatment facilities, and failure to backfill concurrent with mining. Compliance Orders were served on Appellant directing him to cease operations and to correct the violations by specific dates (N.T. 13-24; DER Exhibits Nos. 3, 4 and 5).

6. As a result of an inspection conducted by DER on April 28, 1987, Compliance Order 87H076 was issued on the following day. It cited Appellant for (a) failure to construct sedimentation ponds in accordance with approved plans, (b) failure to have the sedimentation ponds certified by a registered professional engineer, (c) failure to construct treatment facilities of adequate size, and (d) failure to backfill concurrent with mining. Appellant was directed to cease operations and correct the violations immediately since the compliance dates for all violations had passed (N.T. 20-24; DER Exhibit No. 5).

7. Appellant did not appeal any of the Compliance Orders to the Board.

8. Appellant did not correct the violations listed in Compliance Order 87H076. The conditions at the mining site had not changed to any great extent from April 28, 1987 to the date of the hearing (N.T. 24-26).

9. On December 19, 1988 DER issued a letter to Appellant forfeiting the Collateral Bonds identified in Finding of Fact No. 4 because of Appellant's failure to correct the violations listed in Compliance Order 87H076 (Notice of Appeal).

DISCUSSION

DER has the burden of proof in this appeal. To carry the burden of proof, DER must show by a preponderance of the evidence that the bond forfeiture was lawful and an appropriate exercise of its discretion: 25 Pa. Code §21.101(a). Section 4(h) of SMCRA, 52 P.S. §1396.4(h), provides that DER shall forfeit bonds when a permittee fails or refuses to comply with the requirements of SMCRA. Those requirements include compliance with the terms of the permit and compliance with the applicable rules and regulations: 52 P.S. §1396.24.

The violations cited by DER are covered by the following provisions of the regulations: 25 Pa. Code §87.108(b) and §87.112(b)(1) - sedimentation ponds; 25 Pa. Code §87.107(a) - treatment facilities; and 25 Pa. Code §87.141(c)(1) and (2) - backfilling. Appellant's failure to construct sedimentation and treatment facilities in accordance with the approved plans also constitutes a violation of the Permit.

It is clear that the violations of the regulations and the Permit amount to violations of SMCRA. Appellant's failure or refusal to correct those violations authorized DER to forfeit the bonds. The action was lawful and an appropriate exercise of DER's discretion.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that its action was lawful and an appropriate exercise of its discretion.

3. Appellant violated the terms of the Permit and of the regulations at 25 Pa. Code §87.107(a), §87.108(b), §87.112(b)(1) and §87.141(c)(1) and (2).

4. These violations constituted violations of SMCRA.

5. Appellant's failure or refusal to correct the violations authorized DER to forfeit the bonds.

6. DER's forfeiture action was lawful and an appropriate exercise of discretion.

ORDER

AND NOW, this 21st day of April, 1992, it is ordered that Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 21, 1992

cc: **Bureau of Litigation**
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Harrisburg, PA
For the Commonwealth, DER:
Marc A. Roda, Esq.
Central Region
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R. L. Maney, Esq.
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sb

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M. DIANE SMITH
SECRETARY TO THE BOARD

CLEMENTS WASTE SERVICES, INC. RECYCLING WORKS, INC. and BRIAN CLEMENTS	:	
v.	:	EHB Docket No. 91-075-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, BERKS COUNTY, BROWNING-FERRIS, INC. Intervenor and WESTERN BERKS REFUSE AUTHORITY, Intervenor	:	Issued: April 21, 1992

OPINION AND ORDER SUR PETITIONING INTERVENOR'S MOTION TO REOPEN DOCKET AND DECIDE PETITION TO INTERVENE

By: Richard S. Ehmann, Member

Synopsis

After the party appellant has withdrawn its appeal with prejudice and the Board has closed its docket on the appeal, a non-party's Motion To Reopen The Docket To Decide Petition To Intervene which was pending when the appeal was withdrawn will be denied, as the petitioning intervenor/movant is not a party in the appeal because its petition to intervene had not been granted before the appeal was withdrawn and thus it lacks the party status necessary to object to the appeal's withdrawal.

OPINION

Before the Board for disposition at this time in this appeal is a novel motion by a non-party in a closed appeal seeking to have the docket in that proceeding reopened so that the Board may decide its petition to intervene which was pending at the time the appellants withdrew their appeal.

Because of the uniqueness of this motion we feel it essential to set forth some of the relevant procedural history of this proceeding.

On February 25, 1991, Clements Waste Services, Inc., Recycling Works, Inc. and Brian Clements (collectively "Clements") filed an appeal with this Board from the Department of Environmental Resources' ("DER") conditional approval of Berks County's ("Berks") Municipal Waste Management Plan ("Plan"). Notice of DER's approval of Berks' Plan was published in the January 26, 1991 edition of the Pennsylvania Bulletin. See 21 Pa. Bull. 386. The Plan was promulgated by Berks pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 566, No. 101, as amended, 53 P.S. §4000.101 *et seq.* ("Act 101"). Clements' Notice Of Appeal sets forth the reasons why it believes DER's conditional approval of the Plan was unlawful and an abuse of DER's discretion. We note at this point that while another appeal of this Plan was filed with this Board by Montgomery County,[1] no appeal of this Plan was ever filed by Pottstown Landfill, a division of SCA Services of Pennsylvania, Inc. ("SCA") which is the petitioning intervenor/movant.

Thereafter, Browning-Ferris, Inc. ("BFI") and Western Berks Refuse Authority ("WBRA") sought and were granted, intervenor status herein after the Commonwealth Court opined that we had erred in initially rejecting BFI's Petition To Intervene. See Browning-Ferris, Inc. v. Department of Environmental Resources, ____Pa. Cmwlth.____, 598 A.2d 1057 (1991) ("BFI").

On March 2, 1992, while this appeal was continuing to move through discovery and our pre-hearing procedure, we received a Petition To Intervene filed on behalf of SCA. By Order dated March 3, 1992, we advised the parties

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1 It was previously found at EHB Docket No. 91-053-E but was withdrawn on April 9, 1992.

of our receipt of this Petition and, giving our standard 10 day period for filing any responses thereto, directed that the responding parties consider the elements of the current test for intervention as set forth in BFI and Borough of Glendon v. Commonwealth, DER, No. 18 C.D. 1991 (Opinion issued January 28, 1992).

On March 12, 1992, BFI filed a copy of its opposition to SCA's Petition. DER filed its separate response opposing the Petition on that date too. Thereafter, on March 13, SCA filed a Memorandum of Law in support of its Petition while Clements, Berks and WBRA filed their responses opposing SCA's Petition. On the next business day, to wit, Monday, March 16, 1992, before the Board could prepare an opinion and order addressing the issues raised by SCA's Petition and the parties' responses thereto, Clements filed its Praecipe To Withdraw Case With Prejudice, asking therein that the appeal be listed as "withdrawn with prejudice, discontinued and ended". In response thereto, on March 17, 1992, we entered our Order providing:

> AND NOW, this 17th day of March, 1992, the appeal in the above captioned matter having been withdrawn with prejudice, the docket will be marked closed and discontinued.

In so doing, we did not decide the merit of SCA's Petition or enter any orders thereon.

Thereafter, on March 24, 1992, we received the instant motion from SCA. On March 30th we notified the parties thereof and directed that they file any and all responses thereto with this Board by April 9, 1992. BFI and

DER both filed detailed responses and supporting briefs.[2] On April 10, 1992, SCA's counsel sent us an unsolicited letter responding to the legal arguments raised in BFI's response.

With this background painted in we now turn to SCA's Motion. SCA starts out by asserting that Clements and BFI agreed to a termination of this appeal and that our Order of March 17th in response to Clements' Praecipe was premature because SCA's rights as an intervenor in this proceeding are independent of the rights of the appellants (Clements) and SCA's petition must be decided by the Board regardless of the actions of Clements. Further SCA asserts 25 Pa. Code §21.120(a) requires that this alleged BFI/Clements agreement to settle this matter be approved by this Board and be published in the Pennsylvania Bulletin. According to SCA, Section 21.120(a) also provides that no settlement agreement will be approved by this Board until 20 days after publication and approval then will only come if no objections are filed. Next, SCA asserts that Clements may withdraw its appeal pursuant to 25 Pa. Code §21.120(e) but only if it complies with 1 Pa. Code §35.51. SCA then argues that Clements did not comply with 1 Pa. Code §35.51 because it failed to specify the reasons for withdrawal and because under Section 35.51 withdrawals may occur only after expiration of 30 days. Accordingly, SCA contends its Petition To Intervene still pends and the Board is obligated, by 1 Pa. Code §35.31(b), to decide it as soon as practicable.

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[2] By letters, each dated April 9, 1992, Berks and WBRA informed this Board that they join in the detailed and briefed responses of BFI and DER. Clements filed a formal one paragraph response to SCA's Motion dated April 9, 1992, joining DER and BFI in opposition thereto and specifically incorporating BFI's arguments therein as it own.

Our initial reaction to SCA's Motion was to disregard it because it was filed by a non-party. See footnote 1 of Howard Will v. DER, 1987 EHB 335, at 336. On further evaluation, we have decided to deny it with this written Opinion so as to instruct those appearing before us in the future, in the event such a motion should then be contemplated. By so doing, we do not intend to convey to any reader that SCA has managed, by filing this motion, to achieve party status. It has not and that is of major significance as explained below.

One is a party before this Board under 25 Pa. Code §21.2 if one has the right to institute, defend or otherwise appear and participate in a proceeding before this Board. This section goes on to say a party shall be an appellant, appellee, plaintiff, defendant or intervenor. Here, Clements is our party appellant and DER is our party appellee. Berks is also a party appellee since DER's approval of its Plan is what Clements is challenging. See 25 Pa. Code §21.51(g). Finally, BFI and WBRA are parties by virtue of the Board having issued Orders making them intervenors.

Until its Petition To Intervene is granted by Order of this Board, SCA is not a party before this Board and is thus a stranger to this litigation. Obviously, SCA disagrees. In support of its contention that SCA has rights in this appeal independent of those of Clements, SCA's counsel cites us to appeal of Municipality of Penn Hills, 519 Pa. 164, 546 A.2d 50 (1988) ("Penn Hills"). SCA cites no other cases for support of its contentions that its rights in this appeal are independent of the parties herein. Penn Hills may be cited for the proposition that an intervenor's rights as a party are not contingent on the rights of the other parties in "this" proceeding. However, Penn Hills is not on point for SCA. Penn Hills

began as a tax assessment appeal by various governmental entities which said certain tax assessments were too low. U.S. Steel Corporation sought to intervene therein and was allowed to become an intervenor. Thereafter the municipalities withdrew their appeals challenging the assessments but U.S. Steel Corporation, as an assessed property owner, sought further to reduce the assessment on its property. A further reduction was granted and then challenged on appeal by Penn Hills and the other taxing bodies. This brief explanation of Penn Hills shows why it does not apply here. There, U.S. Steel Corporation had been granted the status of intervenor whereas here, when Clements withdrew its appeal, SCA's Petition To Intervene was still pending, thus SCA had not become a party. SCA's argument would thus be valid if advanced by WBRA, which had already been granted intervenor status, but it fails as to SCA. Moreover, as pointed out by DER's Brief, the Court's opinion in Penn Hills took pains to recognize the unique facts of that case and the distinct procedures of the Board of Property Assessment Appeal and Review. Finally, also as DER's Brief points out, in Appeal of Foltz, 22 Pa. Cmwlth. 562, 566, 349 A.2d 918 (1976), the Court said a petitioning intervenor may not intervene in nonexistent litigation. In accord see Northampton Residents Association v. Northampton Township Board of Supervisors, 14 Pa. Cmwlth. 515, 322 A.2d 787 (1974). This litigation no longer exists, thus SCA cannot obtain intervenor status.

SCA also asserts that Clements' withdrawal of this appeal did not follow the procedure prescribed by 1 Pa. Code §35.51 and 25 Pa. Code §21.120 and is thus invalid. If a party were asserting these arguments we might pay them heed. As stated above, SCA is not a party. It has the same status as any other stranger who might object to withdrawal of an appeal, settlement of

a dispute, entry of summary judgment in favor of a party or the entry of a full adjudication of the merits of an appeal. That role does not afford it the status needed to file its instant Motion. Moreover, none of the parties in this appeal join in SCA's Motion. Just the opposite is true. All of the parties oppose same. Since no party has raised these arguments or SCA's other challenges to this settlement, we need not address their merits.

Had we done so, it is clear that if there is an agreement between BFI and Clements (a matter *dehors* the record except in SCA's unverified motion), it does not bind DER, change the Plan or change DER's approval thereof; as such 25 Pa. Code §21.120 does not apply. We also would have found that as to SCA's 1 Pa. Code §35.51 argument, the section applies, but we are satisfied that Clements' Praecipe implicitly states Clements no longer desires to prosecute its appeal, which is a reason to end same, and since we are not empowered by the rules to question its reasons for a simple withdrawal of its appeal (which leaves us with the *status quo ante*), the Praecipe satisfies 1 Pa. Code §35.51. Moreover, 1 Pa. Code 35.51 further states that the withdrawal is effective 30 days after the notice of withdrawal is filed unless the Board orders it is not withdrawn (for good cause), so this section does not address a more promptly issued Board Order allowing withdrawal in accordance with our routine procedure. Accordingly, we issue the following Order.

O R D E R

AND NOW, this 21st day of April, 1992, the Motion To Reopen Docket And Decide Petition To Intervene is denied.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 21, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
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CITY OF BETHLEHEM	:	**EHB Docket No. 85-452-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 22, 1992

OPINION AND ORDER
SUR CROSS-MOTIONS FOR
PARTIAL SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

A permittee's cross-motion for partial summary judgment regarding the Department of Environmental Resources' (Department) failure to specify bypass points in its National Pollutant Discharge Elimination System (NPDES) permit is granted. The Department abused its discretion where it incorporated a condition in the permit authorizing bypasses in limited instances but refused to include the bypass points in the permit.

OPINION

This matter was initiated with the City of Bethlehem's (City) October 25, 1985, filing of a notice of appeal challenging the Department's issuance of NPDES Permit No. PA 0026042. The permit, which was issued pursuant to §402 of the federal Clean Water Act, 33 U.S.C. §1342, and §202 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202 (Clean Streams Law), authorized the City to discharge sewage from its wastewater

treatment facility to the Lehigh River in Northampton County. The City challenged various terms and conditions of the NPDES permit as an abuse of the Department's discretion, including its failure to include five emergency bypass points as discharge points in the permit.[1]

A hearing on the merits scheduled for September 19, 1989, was postponed at the request of the parties, who advised the Board that they had reached an amicable resolution of a number of issues in the appeal and that the bypass issue could be resolved through the filing of cross-motions for summary judgment.[2]

The crux of the City's motion for summary judgment is that the Department's failure to include the five bypass points in the City's NPDES permit is an abuse of discretion because it will subject the City to liability under state and federal law in the event of bypass. In support of this argument, the City cites federal regulations governing the NPDES permit program which recognize excusable bypasses (40 CFR §122.41(m)) yet mandate that all point sources be subject to an NPDES permit (40 CFR §121.1(b)). The City also contends that the Department's failure to include the bypass points in the permit has precluded it from raising the defense of impossibility of compliance and enabled the Department to extract multiple penalties for a single infraction.

---

[1] A bypass involves the intentional diversion of the wastewater from the treatment facilities. 40 CFR §122.41(m)(1). The City alleges in Paragraph G of its notice of appeal that when influent to the plant exceeds 30 million gallons per day (MGD), which is approximately twice the average design flow of the plant, it is forced to bypass a portion of the influent.

[2] The parties filed a partial settlement agreement which was approved by the Board on April 3, 1990, and published at 20 Pa.B. 2231 (April 21, 1990). The Department agreed to raise the summer monthly average discharge limit for ammonia nitrogen from 3.0 to 5.0 milligrams per liter (mg/l), to raise the average monthly BOD-5 limit from 20 to 25 mg/l, and to delete limits for hexavalent chromium, free cyanide, and nickel. In exchange, the City agreed to abandon its challenges to the ammonia nitrogen, nickel, hexavalent chromium, free cyanide, zinc, and copper limits. The parties also agreed to attempt to negotiate a settlement regarding the period for compliance with the summer ammonia nitrogen limit. This compliance period and the bypass issue are the only remaining issues in the appeal.

The Department's motion for summary judgment, which was supported by affidavits, argues that the failure to include the bypass points in the NPDES permit is entirely consistent with the applicable state and federal regulations, as well as the legislative purpose of the Clean Streams Law and the Clean Water Act.[3]

The Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Robert L. Snyder *et al.* v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 588 A.2d 1001 (1991). Here, there are no material facts at issue, so our task is to determine if either party is entitled to judgment as a matter of law. For the reasons which are set forth below, we hold that the City is entitled to judgment in its favor.

The parties have devoted much of their memoranda of law to discussing issues relating to regulatory objectives, potential enforcement consequences, and the City's obligations under the municipal wasteload management regulations found at 25 Pa. Code §94.1 *et seq.* They have generally avoided discussing the pertinent issue - whether the Department abused its discretion by failing to include the five bypass points in the City's permit. To reach that determination, we must examine applicable federal and state regulations and the terms and conditions of the City's permit.

The NPDES permit program, which was authorized by §402 of the Clean Water Act, 33 U.S.C. §1342, established a national program for regulating discharges into the waters of the United States. The U.S. Environmental Protection Agency, which was entrusted with the responsibility for

---

[3] Each party filed a response to the other's motion; the issues raised therein are not germane to the Board's disposition of these motions.

administering and enforcing the permit program, was also empowered to delegate this responsibility to the states if the states could demonstrate that they satisfied certain minimum program requirements set forth in §402(b) of the Clean Water Act and its implementing regulations at 40 CFR Pts. 122 and 123. Pennsylvania was delegated this authority by the Environmental Protection Agency in 1979.

The permitting program already established in §§202, 307, and 315 of the Clean Streams Law was the vehicle for implementing the NPDES program in the Commonwealth. 25 Pa. Code §92.5. Discharges into the surface waters of the Commonwealth are prohibited unless authorized by an NPDES permit. 25 Pa. Code §92.3. The discharge must be treated to meet effluent limitations based upon the more stringent of the applicable technology-based treatment standards, the applicable water quality standards, or other treatment requirements (*e.g.*, antidegradation provisions). 25 Pa. Code §§92.17, 92.31, and 95.1 and Chevron U.S.A., Inc. v. DER, EHB Docket No. 85-410-M (Adjudication issued June 24, 1991). Thus, any discharge of sewage into the waters of the Commonwealth must be pursuant to an NPDES permit and in accordance with the effluent limitations contained therein.

The content of an NPDES permit application and the terms and conditions of the permit are prescribed by federal regulations. See 40 CFR §§122.41 and 123.25. The permit application must contain a depiction of all intake and discharge structures. 40 CFR §§122.21(f)(7) and 123.25(a)(4). Among the permit conditions which must be incorporated in any NPDES permit, whether state or federally-issued, is the bypass provision in 40 CFR §122.41(m). See 40 CFR §123.25(a)(12).

The City submitted its application for an NPDES permit on a form (ER-BWQ-288.31) prepared by the Department, as required by 40 CFR §122.21(f)

and 25 Pa. Code §92.21(a). See Exhibit D to the City's notice of appeal.[4]

Item 3 of the face sheet of the permit application states:

> Complete an Attachment 1 for each present or proposed discharge to surface waters. Separate descriptions of each discharge are required even if several discharges originate in the same facility. Please be sure to cover any discharges originating in the same facility. Please be sure to cover any discharges of raw, partially treated or completely treated sewage, both continuous and intermittent from the sewerage system (sewers, pumping stations, treatment facilities) owned by the applicant.

In addition, Attachment 1, Question 5 requires the applicant to provide information concerning the nature, frequency, volume, and duration of bypasses and the reason for bypasses. The City provided such information, as well as an indication of all bypass points.

The City's permit contained the following condition, which is consistent with 40 CFR §122.41(m):

> **H. Bypassing**
>
> 1. Bypassing Not Exceeding Permit Limitations: The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded but only if the bypass is for essential maintenance to assure efficient operation. This type of bypassing is not subject to the reporting and notification requirements of Part A.2.D. above.
>
> 2. In all other situations, bypassing is prohibited unless the following conditions are met:
>
>   (a) A bypass is unavoidable to prevent loss of life, personal injury or "severe property damage";
>
>   (b) There are no feasible alternatives to a bypass, such as the use of auxiliary treatment facilities,

---

[4] The permit application incorporates an affidavit wherein an official swears to the truth, completeness, and accuracy of the information set forth therein. See 25 Pa. Code §92.21(c).

retention of untreated wastes, or maintenance during normal periods of equipment down-time; (This condition is not satisfied if the permittee could have installed adequate backup equipment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance.); and

(c) The permittee submitted the necessary reports required under Part A.2.D. above.[5]

Thus, the City's NPDES permit recognizes bypasses under certain limited situations.

The City's previous NPDES permit[6] (Exhibit E to the City's notice of appeal) also contained a bypass provision at Part B, Paragraph H:

> The diversion or bypass of any inadequately treated discharge by the permittee is prohibited, except: (1) where unavoidable to prevent personal injury, loss of life or severe property damage; or, (2) where there are no other alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime, and (3) where the permittee promptly but in no event later than 24 hours after the permittee learns of the bypass, submits notice of the bypass or an anticipated need for bypass to the Department and the Enforcement Division Director. The permittee shall supply as a minimum the information requested in MANAGEMENT REQUIREMENT(I).

The bypass points were enumerated at Part C, Paragraph B of the permit with the stipulation that they were "considered as emergency bypasses or overflows" and were "permitted to discharge only in the event of an emergency." No

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[5] The reporting conditions in Part A.2.D. are not relevant to this controversy.

[6] NPDES permits are issued for a term not to exceed five years. 25 Pa. Code §92.9(a). The permittee must then apply to have its NPDES permit reissued. 25 Pa. Code §92.13.

effluent limitations were prescribed for the bypasses, but monitoring requirements were imposed.

The problem, as the City alludes to in its arguments relating to the enforcement consequences of the Department's failure to include the bypass points in the NPDES permit, is that even if a bypass is in accordance with Condition H(1), it is still not lawful under the Clean Streams Law unless that discharge (bypass) point is recognized in the NPDES permit.[7] The Department's refusal to include the bypass points in the NPDES permit places the permittee in a Catch-22 situation - it can bypass in limited situations, provided that effluent limitations are not exceeded, yet it cannot discharge unless the discharge point is specified in the NPDES permit, which the Department refuses to do.

The Department has argued vociferously that inclusion of the bypass points condones pollution in violation of the Clean Streams Law and would essentially result in the City avoiding its obligation to, *inter alia*, conduct Sewer System Evaluation Surveys and to comply with the municipal wasteload management regulations at 25 Pa. Code §94.1 *et seq.* We cannot see how either would follow from mere designation of bypass points. The City's notice of appeal does not challenge the bypass provisions in Paragraph H, and its obligations to perform a Sewer System Evaluation Survey and comply with Chapter 94 are independent of its obligations under Chapter 94.[8]

As for the Department's allegations that specifying bypass points would place an undue burden on its staff, the Department's past practice, as evidenced by the City's previous permit, was to include the bypass points.

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[7] The Department could still pursue its administrative, civil, and criminal remedies for violation of the Clean Streams Law, for although a permittee may be bypassing and not violating effluent limitations, as required by 25 Pa. Code §95.1, it is still discharging without a permit in violation of §§202 and 307 of the Clean Streams Law.

[8] We do recognize that violations of the NPDES permit limitations may lead to a determination that the treatment plant is hydraulically or organically overloaded and, therefore, trigger obligations under Chapter 94.

Furthermore, Condition H and the bypass points could be cross-referenced.[9] The Department also claims that it could not devise effluent limitations for the bypass points, but those effluent limitations are already specified in the bypass condition of the NPDES permit.

Finally, in reaching our conclusion that the Department abused its discretion by not including the bypass points in the permit, we are not reaching any conclusion as to the City's possible defenses to Department enforcement actions where the City discharges from the bypass points contrary to Condition H in the NPDES permit. That determination would be premature.

O R D E R

AND NOW, this 22nd day of April, 1992, it is ordered that:

1) The Department's motion for partial summary judgment is denied.

2) The City's motion for partial summary judgment is granted;

3) On or before July 20, 1992, the Department shall amend the City's NPDES permit consistent with this opinion; and

4) On or before May 21, 1992, the parties shall file a report with the Board concerning the status of the remaining issue in this appeal.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

[9] It would seem logical that the location of a bypass would be important from public health and safety and water quality concerns.

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann did not participate in this decision.

DATED: April 22, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

POHOQUALINE FISH ASSOCIATION	:	
	:	
V.	:	**EHB Docket No. 91-084-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 22, 1992**

OPINION AND ORDER
SUR MOTION TO DISMISS
FOR LACK OF STANDING

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss for lack of standing is denied. The Appellant has sufficiently alleged that he will suffer specific injury as a result of the action which has been appealed.

OPINION

This proceeding involves an appeal by the Pohoqualine Fish Association (PFA) from an action of the Department of Environmental Resources (DER) dated February 4, 1991. In this action, DER issued a letter of approval of a planning module for land development in connection with an eight (8) lot subdivision known as Penny Creek Estates in Chestnuthill Township, Monroe County. The first four (4) of the lots are building lots, all approximately one (1) acre in size, and are located adjacent to McMichaels Creek. The remaining four (4) lots are located in the front of the property furthest from the stream, and average about 10,000 square feet in size. The latter four (4) separate lots are for the purpose of installing four (4) individual sandmound systems each serving one (1) individual residence located on the four (4)

building lots. According to PFA, the land area encompassed by these building lots is unsuitable for on-lot sewage systems because of the nature of the soils and the fact that the lots are located in a flood plain area of the adjacent McMichaels Creek. (See Affidavit of James Hartzler Appellant's memorandum in opposition to Motion to Dismiss.) The approval of the module was granted pursuant to the Pennsylvania Sewage Facilities Act, 35 P.S. §750.1-75.20a.

This Opinion and Order addresses the motion to dismiss for lack of standing filed by DER on April 23, 1991. In this motion DER alleges that PFA lacks standing to appeal because its Notice of Appeal fails to allege that the action appealed from would cause any adverse impact on PFA or any of its members.

PFA filed a response to DER's motion on June 20, 1991. PFA argues that the association meets the criteria for standing to appeal the decision of DER in approving the planning modules. First, PFA asserts that it has a substantial interest in the existing water quality of the McMichaels Creek since the recreational use of the stream by PFA members for trout fishing is dependent upon the water quality of the stream. PFA contends that if the water quality were degraded, rendering the stream less desirable for trout, this would essentially destroy PFA. PFA alleges that they will be harmed substantially by pollution resulting from improperly planned sewage facilities

Appellant, PFA, owns property adjacent to and downstream from the property which is the subject of this appeal. PFA avers that their club is a downstream riparian property owner, and the use and enjoyment of this property is totally dependent on the maintenance of the water quality in the McMichaels Creek.

In order to have standing to appeal, one must have a "substantial interest" which will be "directly" and "immediately" affected by the decision which has been appealed. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168 at ___, 346 A.2d 269, 280-284 (1975) and Andrew Saul v. DER and Chester Solid Waste Associates, 1980 EHB 281, 282-283. A "substantial interest" is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 86,; 555 A.2d 793, 795 (1989) and S.T.O.P. v. DER, and Envirotrol, EHB Docket No. 91-382-W (Opinion issued March 5, 1992). An interest is "direct" if the matter complained of caused harm to the party's interest. South Whitehall, 521 Pa. at 86-87, 555 A.2d at 795. The "immediacy" of an interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it. *Id.* In other words, the injury cannot be a remote consequence of the action. William Penn, 346 A.2d at 283, and McGolgan v. Goode, 133 Pa. Cmwlth. 391, 576 A.2d 104 (1991).

PFA has a substantial interest directly and immediately affected by the agency action which is the subject matter of this appeal. PFA's interest is "substantial." PFA is composed of members of a Fishing Association whose recreational use of the stream for trout fishing is dependent on the water quality. Obviously, if the quality of the stream is degraded and becomes less desirable for trout fishing, the Association's interests would be harmed. PFA owns most of the land surrounding the proposed subdivision, which adds additional weight to their argument that their interests will be harmed.

PFA's interest is also "direct" and "immediate." The interest is "direct" because, by claiming that DER failed to properly evaluate the proposed facilities pursuant to existing regulations, PFA has asserted that

the planning module approval harmed its interest. The interest, finally, is "immediate," if the assertions in the notice of appeal and the response to the motion to dismiss are true, there is a close causal connection between the action complained of and the injury to PFA.

As for DER's assertion that PFA lacks standing to appeal because its notice of Appeal fails to allege that the action appealed from would cause any adverse impact on PFA or any of its members, DER's authority is misplaced. The Board's rules of practice and procedure do not impose such a requirement that would require standing to be evident on the face of the notice of appeal. S.T.O.P., *supra*. 25 Pa. Code §21.51, which governs the commencement, form, and content of appeals, does not address standing at all; it provides only that "the appeal shall set forth in separate numbered paragraphs the specific objections to the actions of the Department." The Board, moreover, has previously held that dismissal for lack of standing is inappropriate where facts alleged in the answer to a motion to dismiss established the potential for direct, immediate, and substantial harm to the Appellants. Throop Property Owners Association v. DER and Keystone Landfill, Inc. 1988 EHB 391, S.T.O.P., *supra*.

ORDER

AND NOW, this 22nd day of April, 1992, it is ordered that DER's motion to dismiss for lack of standing is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: April 22, 1992

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M. DIANE SMITH
SECRETARY TO THE B

PETROMAX, LTD.	:	
	:	
v.	:	EHB Docket No. 92-083-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 23, 1992

OPINION AND ORDER
SUR TIMELINESS OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

Where the appellant seeks leave to have its appeal treated as an appeal *nunc pro tunc* because of settlement negotiations between it and DER, the appeal must be dismissed as untimely filed, since the appellant has failed to show the occurrence of a non-negligent happenstance where unique and compelling circumstances are present.

OPINION

According to Petromax, Ltd.'s ("Petromax") Notice Of Appeal, it is challenging the denial by the Department of Environmental Resources ("DER") of Petromax's application for a residual waste processing facility to be located in Collier Township, Allegheny County. DER's letter of January 24, 1992 denying this permit application is attached to Petromax's Notice Of Appeal, wherein Petromax says it received same on January 28, 1992.

Our docket shows that Petromax filed its appeal from this DER decision with this Board, by fax, on February 28, 1992. Because 25 Pa. Code §21.52(a) provides that our jurisdiction does not attach to appeals filed more than thirty days after a party like Petromax received notice of DER's action, and February 28, 1992 is thirty-one days after Petromax received this permit denial letter, on March 6, 1992 we issued Petromax a Rule To Show Cause why the appeal should not be dismissed as untimely.[1]

On March 26, 1992, Petromax filed its Response to our rule. In it, Petromax alleges that DER denied its application for Permit because DER asked Petromax for additional information supporting the application, then denied the permit when DER mistakenly concluded it had not received information from Petromax in response to its request. Petromax's Response also avers that DER corresponded with Petromax prior to denying the application and it has acknowledged this blunder. It then alleges that after the denial letter's receipt Petromax asked to meet with DER to try to avoid unnecessary litigation and a meeting occurred on February 27, 1992. At this meeting it is alleged that DER indicated it was unable to withdraw this permit denial letter but could resolve this matter through a settlement of any appeal to this Board, by Petromax, from the denial. Petromax then says the meeting ended after 5:00 p.m. on February 27, 1992 and it promptly filed its appeal on February 28, 1992.[2]

The case law in Pennsylvania makes it clear that unless the requirements for an appeal *nunc pro tunc* are met, we lack jurisdiction over

---

[1] DER's denial letter and Petromax's own Notice Of Appeal form also spell out the need to file any appeal within thirty days.

[2] DER has made no filing in response to Petromax's allegations.

all untimely appeals. Rostosky v. Commonwealth, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). While it does not explicitly say Petromax seeks leave to appeal *nunc pro tunc*, we will treat Petromax's response to our Rule as if that is what is sought because its appeal was filed outside the timeliness window found in 25 Pa. Code §21.52(a). Generally, to show *nunc pro tunc* grounds a petitioner must demonstrate fraud or a breakdown in the Board's procedure. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); American States Insurance Co. v. DER, 1990 EHB 338. A failure to timely file is not excused by neglect or a mistake by either a party such as Petromax or its counsel. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980). Petromax makes no allegation of fraud or breakdown in the processes of this Board.

In Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), the Supreme Court held non-negligent failure of counsel to file an appeal would constitute grounds for an appeal *nunc pro tunc* when the error was quickly discovered and leave to appeal *nunc pro tunc* was promptly sought. As discussed at length in American States Insurance Company, *supra*, however, this approach is now limited to cases involving non-negligent happenstance where unique and compelling facts are present, and this Board follows this line of cases.

While Petromax does not reference this ground for allowance of a *nunc pro tunc* appeal, it is clear this would be the only basis for allowing such an appeal. We must reject this appeal on this ground, too, however. Case law arising from appeals to this Board make it clear that the existence of attempts to resolve disagreements with DER are not grounds for allowance of appeals *nunc pro tunc*. Grand Central Sanitary Landfill, Inc. v. DER, 1988 EHB

738; Mack Altmire v. DER, 1988 EHB 1022. It is clear that nothing prevented Petromax from filing a timely appeal for protective purposes. Id. Parties frequently file such "protective appeals" while resolving matters with DER. In light of these prior decisions we cannot find unique or compelling circumstances here warranting an allowance of an appeal *nunc pro tunc*. As a result, we are compelled to make our rule absolute and to enter the following order.

ORDER

AND NOW, this 23rd day of April, 1992, it is ordered that this Board's Rule To Show Cause dated March 6, 1992, is made absolute and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 23, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

VALLEY PEAT & HUMUS CO., INC.	:	
	:	
v.	:	**EHB Docket No. 91-158-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 27, 1992**

OPINION AND ORDER SUR
MOTION TO DISMISS FOR
LACK OF JURISDICTION

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss an appeal as untimely is denied where there is a question as to the date upon which the Appellant received notice of the action which it is seeking to appeal.

OPINION

This proceeding arises from an appeal filed after DER issued Permit No. 54900204 to Valley Peat and Humus Co., Inc. (Valley Peat) granting a road variance in order to remove coal refuse material within one hundred (100) feet of the outside right-of-way of Township Road T-708 (Briar City Road). Permit No. 54900204 outlined seven (7) special conditions. Special Condition #5 imposed the following restriction upon Valley Peat:

> The permittee shall not allow William Lavelle, Jr.[1] to serve as the operator or superintendent of this surface mining operation or to hold any

[1] Lavelle apparently had been prosecuted and convicted by the Commonwealth for a felony involving the illegal disposal of industrial and residual wastes in an abandoned underground mine.

> position of employment of any sort with the permittee, or to provide services as a consultant, subcontractor, independent contractor or in any other manner, whether paid or unpaid.

On April 22, 1991, the Board received a letter, via telefacsimile, from Valley Peat. The following information was provided:

> As per our conversation with your office, we are requesting an appeal hearing regarding special condition #5 of our surface mining permit. This condition prohibits us from retaining a specific employee due to a [sic] his criminal record.
>
> We are awaiting the proper forms from your office to file the formal appeal.

[Appellant's letter dated April 19, 1991. Received and docketed April 22, 1991.]

On April 25, 1991, this Board sent an Acknowledgment of Appeal and Request for Additional Information to Valley Peat, requesting specific information which was missing from the April 19, 1991 letter. On May 6, 1991, Valley Peat filed a Notice of Appeal. In response to Paragraph 2(d) of the Notice of Appeal form, which asks for the date and means by which the appealing party received notice of the DER action, Valley Peat handwrote and typed the following phrase - "issued - 2/28/91 - hand-delivered." The word "issued" was written in blue ink whereas the date and method were typed.

This opinion and order addresses DER's motion to dismiss for lack of jurisdiction filed on June 7, 1991. DER moves for dismissal on grounds that Valley Peat's appeal was not timely filed because Valley Peat received notice of the permit with its restriction on February 28, 1991, but did not file the appeal until May 6, 1991.

DER argues in its brief that Valley Peat's appeal must be dismissed for lack of jurisdiction pursuant to 25 Pa. Code §21.52, subsection (a), which provides in pertinent part:

> Except as specifically provided in §21.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in subsection (b).

Valley Peat responded in a letter dated June 26, 1991, raising two objections:

> 1. Surface Mining Permit #54900204 was hand delivered to William A. LaVelle, Jr. [T]he exact date of receipt is unknown. We have requested that the Department furnish us with this information.
>
> 2. An appeal request was faxed to the Environmental Hearing Board on April 22, 1991, while we awaited the necessary forms.

Since DER is the moving party, we must resolve any questions regarding the facts in favor of Valley Peat. Snyder, et al. v. DER, 1988 EHB 1084.

The only evidence which DER cites to establish the date upon which Valley Peat received notice of the permit is Valley Peat's statement in its notice of appeal. This evidence is insufficient because it is ambiguous; it is not clear on the face of the document whether the date relates only to when the permit was issued, or whether it also indicates when the permit was hand-delivered. Since Valley Peat contends in its response to the motion to dismiss that it does not know when the permit was received, we must construe the date stated in the notice of appeal as referring only to the date that the permit was issued. It follows that since we cannot determine when Valley Peat received the permit, we cannot determine whether it appealed within 30 days of such receipt.

In summary, because the date of Valley Peat's receipt of DER's actior is unclear, we must deny DER's motion to dismiss.[2] In addition, since Valley Peat is not represented by counsel, we will direct DER to inform us whether it has complied with Valley Peat's request for information regarding the date of receipt.

---

[2] We might add that we also disagree with DER's assertion that Valley Peat filed its appeal on May 6, 1991. This was the date upon which Valley Peat filed its formal notice of appeal; however, Valley Peat filed a "skeleton appeal" on April 22, 1991. See 25 Pa. Code §21.52(c). For purposes of deciding this motion, it does not matter which filing date we rely upon since we do not know when Valley Peat received the permit.

ORDER

AND NOW, this 27th day of April, 1992, it is ordered that:

1) DER's motion to dismiss is denied.

2) DER shall inform the Board by May 8, 1992 whether it has complied with Valley Peat's request (alluded to in its response to the motion to dismiss) that DER furnish information regarding the date upon which the permit was delivered to Valley Peat.

3) The deadline for filing of DER's pre-hearing memorandum is continued until further order of the Board.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: April 27, 1992

cc: **Bureau of Litigation**
Julia Smith Zeller, Esq.
Central Region
For Appellant:
Michele Mandarano, President
Valley Peat & Humus Co., Inc.
Dunmore, PA
jm

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TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE

POLAR/BEK, INC.	:	
	:	
v.	:	**EHB Docket No. 91-387-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 29, 1992

OPINION AND ORDER
SUR MOTION FOR
SUMMARY JUDGMENT

By: Joseph N. Mack, Member

Synopsis

Summary judgment is granted to DER. Where Polar/Bek failed to appeal a special condition of its permit for the construction of a spa and pool, it is barred by the doctrine of administrative finality from challenging that condition in this appeal of DER's refusal to issue an operating permit based on Polar/Bek's failure to comply with the special condition in its permit for the construction of the spa.

DER's grant of approval for the construction of the spa with the special condition constituted a final, appealable action, even though it contained no notice of appeal rights.

OPINION

This appeal was filed by Polar/Bek, Inc. on September 16, 1991 from the Department of Environmental Resources' ("DER's") letter of August 22, 1991 refusing to conduct a start-up inspection of a spa and pool facility ("facility" because of Polar/Bek's failure to construct the facility in accordance with a special condition of its construction permit requiring the installation of

four surface skimmers. The letter also explained that an operating permit could not be issued until the inspection verifying compliance with the construction permit conditions had been conducted. In its notice of appeal, Polar/Bek challenges DER's denial of the operating permit as being arbitrary and capricious and an abuse of its authority.

The matter before the Board is a motion for summary judgment filed by DER on January 24, 1992. Polar/Bek filed a memorandum in opposition thereto on or about March 3, 1992. In its motion for summary judgment and supporting brief, DER contends that Polar/Bek is precluded by the doctrine of administrative finality from maintaining this appeal because it had the opportunity to appeal the four skimmer requirement at the time the construction permit was issued. DER further argues that because Polar/Bek did not challenge the special condition when the construction permit was issued, it may not now make that challenge in an appeal of DER's denial of the operating permit.

Polar/Bek responds by arguing that the July 2, 1991 letter approving the construction permit was not a final order because it was only one letter in a series of communications and because the letter did not contain a specific notice that it was a final action or that it was appealable.

Turning to DER's motion, summary judgment may be granted when the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, 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(b); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1329 (1978).

The undisputed material facts in this case are as follows: On July 2, 1991, DER issued Public Bathing Place Permit No. 1491102 ("the construction permit") to Polar/Bek for the construction of the State College Park Pool and Spa in Ferguson Township, Centre County. The construction permit

contained a number of special conditions including the following: "B. The Spa shall be constructed with a minimum of four surfact skimmers." (Ex. F)[1] Polar/Bek did not appeal the construction permit. (Ex. G)

On August 19, 1991, DER received Polar/Bek's Certificate of Construction certifying that the facility had been completed in accordance with the plans and specifications approved by DER on July 2, 1991, with the following exception: "Spa was not constructed according to special condition 'B'. Two surface skimmers were installed. See correspondence from David Bromberger, P.E. of Aqua Pool, Inc., installer." (Ex. H)

Thereafter, on August 22, 1991, DER issued a letter to Polar/Bek stating that the failure to comply with special condition "B" of the constructio permit was not acceptable and that no operating permit would be issued for the facility until DER conducted an inspection verifying that the facility met all conditions of the permit. This letter is the subject of the appeal.

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." Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 250, 348 A.2d 765, 767 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977). (quoting Philadelphia v. Sam Bobman Department Store Co., 189 Pa. Super. 72, 149 A.2d 518 (1959)); E. P. Bender Coal Co. v. DER, EHB Docket No. 90-487-MJ (Opinion and Order Sur Motion for Summary Judgment issued May 14, 1991). In other words, when one fails to appeal a final action of DER, he may not thereafter challenge any matter which could have been challenged by the earlier appeal.

---

[1]The exhibits referred to herein are those attached to DER's motion for summary judgment.

Polar/Bek states that it "could only conclude that the communication of July 2 was nothing more than an informal response to the matters raised in its prior communication to DER." However, the July 2, 1991 correspondence contained a construction permit entitled "Public Bathing Place Permit" which granted the permittee approval to construct a pool and spa subject to special conditions. This can hardly be considered an informal response or mere negotiations. Therefore, we find that the July 2, 1991 correspondence constituted a final action which was appealable.

Because Polar/Bek did not contest the special condition of its construction permit requiring that the pool be constructed with four skimmers, it is precluded by the doctrine of administrative finality from raising any challenges to that requirement, other than to assert that it complied with the condition, which it has not alleged.

Because there are no other material facts in dispute and because Polar/Bek is precluded from challenging the basis for DER's denial of the operating permit, we find that DER is entitled to summary judgment.

O R D E R

AND NOW, this 29th day of April, 1992, it is hereby ordered that the Motion for Summary Judgment filed by DER is granted, and summary judgment is granted in favor of DER. It is further ordered that the appeal of Polar/Bek at Docket No. 91-387-MJ is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 91-387-MJ

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 29, 1992

cc: **Bureau of Litigation:**
Library, Brenda Houck
For the Commonwealth, DER:
Julia Smith Zeller, Esq.
Marylou Barton, Esq.
Central Region
For Appellant:
J. Philip Bromberg, Esq.
Pittsburgh, PA

ar

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M. DIANE SMITH
SECRETARY TO THE BOARD

MCDONALD LAND & MINING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 90-464-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 30, 1992**

OPINION AND ORDER SUR APPLICATION FOR AWARD OF FEES AND EXPENSES

By Richard S. Ehmann, Member

Synopsis

The Board awards fees and expenses in the amount of $10,000 under the Costs Act to McDonald Land & Mining Co., Inc. ("McDonald"), the prevailing party in the appeal to the Board from an adversary adjudication initiated by the Department of Environmental Resources ("DER"). Previously, the Board entered an Adjudication in McDonald's favor in its appeal from DER's Orders to collect and treat all of the water in an unnamed tributary adjacent to its mine site including in large part some "off-site" acid mine drainage for which DER argued McDonald was liable.

Where McDonald's application alleges DER's position lacked substantial justification, it is DER which bears the burden of proof that DER's position in the appeal was "substantially justified".

DER's allegation that special circumstances exist which make it unjust to award fees in this case had not been established by DER. It is true an award may chill DER enforcement, but since one purpose of the Costs

Act is to recompense parties like McDonald for costs incurred in prevailing i ill-considered enforcement actions, it is clear the legislature recognized that such awards could chill enforcement to some degree.

The amount of the fees charged McDonald by one of its consultants, while apparently properly disputed by DER under this Act, is immaterial here as to the amount awarded because even without these fees, McDonald's qualifying costs exceed the $10,000 maximum award under the Costs Act.

OPINION

On January 9, 1992, McDonald filed its Application For Award Of Fees And Expenses pursuant to the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 *et seq.* (Costs Act). This application was filed as a result of an Adjudication dated December 18, 1991, wherein the Board sustained an appea by McDonald from three DER compliance orders. Compliance Order 904093 directed McDonald to submit a plan to DER to provide treatment of all water flowing at Monitoring Point No. 2, an unnamed tributary of Wilson Run adjacent to McDonald's Schrot mine. Compliance Order 904093A extended the deadline for McDonald's compliance with Compliance Order 904093. Compliance Order 904124AE found McDonald in non-compliance with Compliance Order 904093, directed such compliance, and said McDonald was subject to a $750 per day minimum penalty for non-compliance. In its application McDonald seeks an award of $10,000 to offset the fees and expenses it incurred in connection with its successful appeal of all three orders. On January 30, 1992, we received DER's Response To Application For Award Of Fees And Expenses.

Section 3 of the Costs Act (71 P.S. §2033) provides in relevant part:

> (a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that

> party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.
>
> (b) A party seeking an award of fees and expenses shall submit an application for such award to the adjudicative officer...within 30 days after the final disposition of the adversary adjudication.

It is clear that McDonald prevailed here and is a party as defined in 71 P.S. §2032.[1] It is also clear the three DER orders constitute adversary adjudications initiated by DER, which in turn, is a "Commonwealth agency". Further, it is undisputed that McDonald's application is timely. As we held in Swistock Associates Coal Corporation v. DER, 1990 EHB 1212, with these prerequisites satisfied "the Board is to award fees and other expenses to [McDonald] unless we find that DER's position was substantially justified" or special circumstances make an award unjust.

DER's first disagreement with McDonald's Petition is relatively minor. McDonald's Application seeks compensation for the cost of retaining Meiser & Earl, Inc. to conduct a hydrogeologic investigation in connection with this appeal and to present testimony regarding same at the hearing. DER contends that McDonald seeks compensation for this expense at an hourly rate in excess of that allowed pursuant to 4 Pa. Code §2.17. Though DER appears to be correct, we need not address this issue. Even if this expense item is computed as DER suggests, McDonald's legal fees alone, about which DER

---

[1] DER does not dispute that McDonald prevailed, but neither admits nor denies McDonald's net worth as an organization, which must be less than $2,000,000 to qualify under this Act. DER's Response admits McDonald's Statement of Assets and Liability supports this contention. McDonald's Statements of Assets and Liabilities for 1990 and 1991 are attached as Exhibits A and B to its Petition. As this is the only evidence on this point before us, it is clearly sufficient in these circumstances to qualify McDonald as a party under the Costs Act.

offers no objection as to calculation, are $14,550. Thus, by themselves, these fees justify an award of $10,000. Since, as we held in Swistock Associates Coal Corp., *supra*, $10,000 is a total cost ceiling and the maximum we can award, we need waste no further time on this issue.

The real disputes over an award to McDonald under this Act arise because the parties disagree over whether DER's position was substantially justified and because DER contends special factors exist which would make an award unjust.

In this regard DER's first argument is that McDonald is not entitled to fees merely because it prevailed. Rather, says DER, McDonald must show that DER's position was not substantially justified because DER's failure to make its case for issuing the Orders involved in this appeal does not, by itself, produce a Costs Act award, Swistock Associates Coal Corp., *supra*. DER is correct that sustaining an appeal by itself does not create a right to an award. However, we disagree with DER on whether McDonald has the burden of proof here or whether it should be DER's burden. We were confronted by this same issue in McDonald Land & Mining Co. v. DER, EHB Docket No. 91-173-E (Opinion issued March 24, 1992). There, we said:

> Section 3(b)(3) of the Costs Act, 71 P.S. §2033(b)(3), requires McDonald to make an allegation that DER's position was not substantially justified. This section does not establish which party must convince us on this aspect of McDonald's Petition, however. Clearly, McDonald bears the responsibility of pleading each of the prerequisites to qualify for an award of any fees or costs. Our reading of Section 2 of the Costs Act suggests an award must be made unless we find there is substantial justification for DER's position. In turn, this suggests that as long as McDonald alleges no substantial justification exists, it has fulfilled the requirements for the form of an application, and, if DER contests that allegation, it must show us how its position was indeed substantially justified. Further, 25 Pa. Code §21.101(a) of the Board's Rule of Practice and Procedure provide the burden of proof

> in proceedings before us is generally on the party asserting the affirmative. Thus, as to allegations of substantial justification and that special circumstances exist in this appeal which make an award unjust, DER bears this burden and must meet it using the record as it existed when McDonald's application was filed.

We adopt this same reasoning here and place this burden of proof as to substantial justification on DER.

DER's response contends that DER's position was substantially justified and that it presented competent expert and fact evidence supporting same. From this it concludes "its position had a reasonable basis."

Our reevaluation of the appeal's record based on McDonald's application shows a lack of substantial justification for DER's position. In drawing this conclusion we do not say there was no justification for DER's position. This is not an appeal where DER's position was without any factual justification, but the test is not some amount of justification, the test is "substantial justification".

The adjective "substantial" is defined with words such as strong, solid, stout, real rather than imaginary, ample, of considerable worth or value. See Webster's New World Dictionary 2nd Ed. 1420. Section 2 of the Costs Act (71 P.S. §2032) defines a "substantial justification" as one having a reasonable basis in law and fact. In turn, "reasonable" is defined with phrases such as: "amenable to reason; just; showing sound judgment; not extreme, immoderate or excessive." See Webster's New World Dictionary 2nd Ed. 1193. Using such definitions when considering whether DER's position in this appeal was substantially justified as used in Section 3 of the Costs Act makes the question whether DER's case had a solid factual basis showing sound analysis of the facts and sound expert opinions based on the facts. To arrive at a decision on this question, we do not look solely at how DER's witnesses

presented their evidence on direct examination by DER's lawyer but how their evidence held up when subjected to cross-examination and how it held up when weighed against that offered by McDonald.

Both in the hearing on McDonald's successful Petition For Supersedeas and at the merits hearing, DER's case consisted of the testimony of the same two witnesses: Floyd Schrader and David Bisko (and the exhibits introduced through same).[2] As evidenced in our adjudication, the issue in dispute in this appeal was whether McDonald was responsible for an off-site discharge or whether the discharge could properly be attributable to another mining company on whose reclaimed mine site the discharge was located and whose mine site was overlapped by a small portion of McDonald's subsequently operated site. This off-site discharge contributed a large portion but not all of the flow of water at the point in the tributary at which DER ordered McDonald to collect and treat all flows.[3] DER offered virtually no evidence as to the other miner's operation of its mine, that site's reclamation, or the extent of mining on that site, except for a few samples of water quality at a point in the tributary downstream of both mines. Even this sample analysis evidence shows significant water quality changes during the first operator's coal extraction and site reclamation work.

---

[2] DER also called Steve Kepler as a witness at the supersedeas hearing briefly, but his testimony does not figure into the balance of the "substantially justified equation".

[3] As mentioned in the adjudication, requiring McDonald to treat the entire flow at this point troubled us for the reasons outlined there. We do not reach the issue of how this DER position impacts on substantial justification because we find the assertion that McDonald is liable for the major discharge to the unnamed tributary was not substantially justified from a factual standpoint.

Schrader's testimony showed a discharge of mine drainage from the first mine to this tributary and his decision to allow it to continue to occur while approving the release of the bonds posted to prevent such post mining discharges. Such conduct did little for Schrader's credibility. Schrader's testimony was also much less than credible when it came to his advising the first miner to treat a discharge of mine drainage, that treatment trench's true location and his conversations with Dorothy Colna and Leo Nelen of McDonald concerning whether the trench treated the "off-site" discharge which is the subject of this appeal or some additional mine drainage from this first mine site. In turn, this adversely impacted on the weight given to portions of his testimony which were not disputed by other evidence and whether DER's position was indeed factually reasonable.

DER's only other witness was its hydrogeologist, David Bisko, who was assigned the job of gathering evidence and concocting a theory therefrom to support DER's orders. According to his testimony, Mr. Bisko was never on the first mine site until after being given this task. He never visited McDonald's mine site in terms of justifying DER's previously issued orders until after it also had been backfilled, regraded and revegetated.[4] As a result, he had to rely in part on the "facts" provided by Mr. Schrader whose testimony is discussed above. Moreover, Bisko admitted that the first miner's operations affected the main acid mine drainage discharge to this unnamed tributary, (the off-site discharge in this appeal), and that this discharge

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[4] Mr. Bisko did visit McDonald's site once during mining and prior to being given this task, but McDonald's mining was not occurring in the area which he testified was draining to this tributary and he did not conduct a hydrogeologic evaluation of the site in relation to this discharge at that time. He conducted his hydrogeologic investigation only after <u>both</u> sites had been backfilled, regraded, topsoiled and revegetated.

itself predated McDonald's mining operations (though the quality has changed with time). Further, Bisko formed his conclusions as to liability while being seriously unaware of the breadth and depth of the first miner's excavation to the point that he based his conclusion on McDonald's liability, in part, upon the "facts" that that miner only mined on the west of this tributary, mined through alkaline overburden throughout its operation and only affected certain coal seams, when these facts were untrue. DER's case and thus its substantial justification did not deal effectively with the written reports of another of its own inspectors (Nancy Reig) which came from DER's own files and assigned responsibility for this discharge to the first miner. Nor did DER deal effectively with the clear testimony from former employees of the first miner who detailed the large area, immediately north and up slope of both the tributary (as it exists today) and this discharge, which the first miner mined. It appears from the photographs and testimony that the first miner mined at least the major portion of the headwaters of this tributary. We will not second guess as to why DER did not investigate the extent of the first miner's operation or talk to its inspectors or former inspectors who inspected that mine during coal extraction there and we confine ourselves to the record, Swistock Associates, *supra*. But this record shows that Bisko's supervisor at DER issued DER's Order to McDonald without first having DER's expert hydrogeologists determine if there was any hydrologic connection between McDonald's operations and this off-site discharge. Only thereafter, as an apparent afterthought, did they send Bisko out to create a theory of connection between McDonald's mine and the discharge. Even then, it appears Bisko was not given or did not gather the existing evidence counter to the conclusion of liability reflected in DER's order to allow himself to weigh it

during formulation of his opinion on responsibility. Clearly, such omissions go to the issue of the reasonableness of DER's position in this litigation. In reaching this conclusion, we recognize the difficulty in the preparation and presentation of a groundwater case on behalf of DER, but conclude that with possible "off-site" discharge cases DER experts and fact witnesses must have a sound footing on which to formulate their opinions. When the facts revealed in the hearing show the opinion to be on unsound footing and DER's case hangs upon that opinion, we must find that DER's position was not one with a solid factual basis showing sound reasoning. It was not substantially justified.

Finally, we reject DER's assertion that special factors exist which make an award to McDonald unjust. DER says such an award will "chill" DER enforcement of environmental laws, particularly in circumstances dealing with hydrogeology. When the legislature enacted this statute, it stated its intent in Section 1, 71 P.S. §2031(c) to be:

> (1) Diminish the deterrent effect of seeking review of or defending against administrative agency action by providing in specified situations an award of attorneys fees, expert witness fees and other costs against the Commonwealth. [and]
>
> (2) Deter the administrative agencies of this Commonwealth from initiating substantially unwarranted actions against individuals, partnerships, corporations, associations and other nonpublic entities.

It would thus appear that any time an award is made by this Board against DER but in accordance with the intent of this act, as expressed above, it might be said to have a "chilling" effect on enforcement, and while we do not make

awards with that intent as our goal, we cannot fulfill our obligations under this statute without such a chill occurring. Jay Township et al. v. DER, 198 EHB 36.

Further, DER has not pointed us to any special circumstances other than this "chilling effect" which would warrant our rejecting McDonald's application, although in an appropriate case we can see that such circumstances might indeed exist. DER does contend the inexact science of hydrogeology may give rise to several opinions as to a particular site and it must be able to base its positions on its experts' opinions. We agree DER must rely on its own witnesses, but that reliance cannot be blind or DER runs the risk of a successful application under the Costs Act. McDonald Land & Mining Co., Inc., *supra*.

DER also asserts as a special circumstance its limited enforcement resources and argues that an award here may cause it to refrain from actions where there is doubt about the outcome and a costs award could be made, with the result that the state's citizens and the environment will suffer. If these allegations constitute special circumstances to bar an award, they would also leave DER as the sole arbiter of whether its own action are substantially justified or not. That is obviously not how the legislature and governor intended the Costs Act to work when it was passed and became law. DER may indeed have limited enforcement resources, but it should always use them only in places where its position is sound or where it recognizes its risks and elects to proceed knowing they exist. This does not mean DER should only prosecute clear violations or never make a test case. However, DER should always exercise mature competent judgment before committing its resources to any matters, whether factually clear cut violations or test cases.

Finally, we must point out that this case's special circumstances, including but not limited to issuance of DER's initial order before undertaking any hydrogeologic evaluation of a connection between this acid discharge and McDonald's mine, appear to make this case the type which the legislature intended this act to address.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 30th day of April, 1992, it is ordered that the Applications For Award Of Fees and Expenses filed by McDonald on January 9, 1992, is granted. DER shall, within 30 days, pay $10,000 to said corporation.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 30, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Western Region
For Appellant:
Carl A. Belin, Jr., Esq.
Clearfield, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

/ENEZIA TRANSPORT SERVICE, INC.	:	
	:	
v.	:	EHB Docket No. 92-097-E
	:	
:OMMONWEALTH OF PENNSYLVANIA	:	
)EPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 30, 1992

OPINION AND ORDER
SUR TIMELINESS OF APPEAL

:y: Richard S. Ehmann, Member

ynopsis

Where an appeal is filed with this Board more than thirty days after eceipt of notice by the cited party, the appeal must be dismissed as untimely iled.

OPINION

On January 28, 1992, Venezia Transport Service, Inc. ("Venezia") of arietta, Ohio received Traffic Citation/Summons A-126252 charging it with ailing to have a "Municipal Waste" sign on its truck as required by Section 101(e) of the Municipal Waste Planning, Recycling and Waste Reduction Act, ıe Act of July 28, 1988, P.L. 556, No. 101, as amended, 53 P.S. 4000.1101(e). According to the Citation which is attached to Venezia's)tice Of Appeal, this alleged offense occurred on I-80 in Greene [sic])wnship, Clinton County.

On March 9, 1992, Venezia filed an appeal from this Citation with ıis Board. Because it initially appeared that this appeal might thus have :en filed more than thirty days after the citation's issuance, on March 16,

1992, we issued Venezia a Rule To Show Cause why the appeal should not be dismissed as untimely.

The Rule's return date was April 6, but to date, Venezia has failed to make any response thereto.

25 Pa. Code §21.52(a) provides that this Board's jurisdiction does not attach to an appeal filed more than thirty days after Venezia's receipt of notice of this action. As Venezia's Notice Of Appeal states, it received the citation on January 28, 1992. Accordingly, its appeal had to be filed with us by February 27, 1992 to be timely under Section 21.52(a). Since we did not docket receipt of this appeal until March 9, 1992, it is untimely and we have no other option but to dismiss it as untimely. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).[1] Accordingly, we enter the following Order.

ORDER

AND NOW, this 30th day of April, 1992, it is ordered that the Rule To Show Cause is made absolute and the appeal by Venezia is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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1 By letter dated March 24, 1992, counsel for the Department of Environmental Resources ("DER") advised us that Venezia agrees with DER that this Traffic Citation/Summons was issued by the State Police and is not appealable to this Board. Accordingly, he says that Venezia will be withdrawing a series of appeals from these citations. We have not heard from Venezia in this regard and thus have proceeded to address this timeliness issue.

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

ATED: April 30, 1992

c: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Carl B. Schultz, Esq.
Central Region
For Appellant:
John L. Edner, Safety Director
Marietta, OH

ed

COMMONWEALTH OF PENNSYLVANIA
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MR. AND MRS. CONRAD MOCK	:	
	:	
v.	:	EHB Docket No. 90-166-MR
	:	(consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 1, 1992

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

By Robert D. Myers, Member

Syllabus

The Board sustains DER's action in denying Appellants' application for a permit authorizing them to place fill on 0.87 acres of wetlands in order to construct an auto maintenance facility. In reaching this result, the Board concludes that Appellants did not fully consider options to reduce or eliminate the impact of their proposed project on the wetlands, that Appellants' proposal to replace the wetlands with 0.38 acres of man-made wetlands did not adequately compensate for the loss, and that the public benefits cited by Appellants did not outweigh the environmental harm. The Board also considers and rejects Appellants' claim that DER's action amounts to an unconstitutional taking of their property, ruling that investment-backed expectations in riparian land must take into account the long history of governmental regulation and the likelihood of future regulation.

Procedural History

Mr. and Mrs. Conrad Mock (Appellants) filed a Notice of Appeal on April 26, 1990 from an April 12, 1990 letter of the Department of Environmental Resources (DER) denying Appellants' Encroachment Permit Application No. E09-357 to place and maintain fill on a tract of land in Plumstead Township, Bucks County. Appellants filed a second Notice of Appeal on December 6, 1990 from DER's denial of their request for Section 401 Water Quality Certification. This appeal was docketed at 90-530-MR and, at the suggestion of the parties, was consolidated into the first appeal (90-166-MR) on January 3, 1991. On March 26, 1991 the Board approved a Partial Stipulation of Settlement that removed the Section 401 Water Quality Certification issue from the consolidated appeals.

A hearing was held in Harrisburg on July 9 and 10, 1991, before Administrative Law Judge Robert D. Myers, a Member of the Board, at which all parties were represented by legal counsel and presented evidence in support of their positions. Appellants filed their post-hearing brief on August 28, 1991; DER filed its post-hearing brief on September 27, 1991. Appellants filed a reply brief on October 17, 1991.

The record consists of the pleadings, a partial stipulation of facts, a transcript of 386 pages and 46 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellants are individuals with a mailing address of 102 West Street Road, Feasterville, PA 19047-7817 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as

amended, 32 P.S. §693.1 *et seq.*, the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations adopted pursuant to said statutes.

3. Appellants are part owners of a 5.2-acre tract of land (Site) in Plumstead Township, Bucks County, purchased in February 1963 by Appellants and others for $9,000 (Stip.[1]; N.T. 29-31).

4. The Site is located along the east side of Easton Road, U.S. Route 611, L.R. 156, just north of Doylestown, Pa. in an area zoned C-2, Highway Commercial (Stip.; Appellants' Exhibit No. 11(a)).

5. Road frontage along the western (Easton Road) boundary is 267.03 feet. The rear (eastern) boundary is 587.05 feet. While the southern boundary (532 feet) is nearly at right angles with these two, the northern boundary (589.08 feet) veers to the northeast to create a tract much wider in the rear than in the front (Appellants' Exhibit No. 11(a)).

6. Pine Run Creek, flowing in a northeast-southwest direction, meanders through the site along the northern boundary and passes under a bridge located on Easton Road about 50 feet south of the northern boundary. (Appellants' Exhibit No. 11(a)).

7. Much of the Site south and southeast of Pine Run Creek is relatively flat but rises in elevation toward the southeast corner (18 feet above the creek bank) and southwest corner (8 feet above the creek bank). The entire Site is wooded. (Appellants' Exhibit No. 11(a)).

8. All of the Site is within the 100-year floodplan of Pine Run Creek except for the higher-elevation areas in the southeast and southwest corners. These upland areas amount to about 1-1/4 acres. The larger area is in the southeast corner and is separated from the smaller area in the southwest corner by about 100 feet. (Stip.; Appellants' Exhibit No. 11(a)).

9. Slopes in the southeast upland area are 10% - 20% (N.T. 55).

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[1] The Partial Stipulation of Facts presented at the outset of the hearing (N.T. 3).

10. The relatively flat areas of the Site (3.94 acres) constitute wetlands (Stip; N.T. 150).

11. The land in the vicinity of the Site is highly developed with commercial and industrial establishments. These include a tire store south of the Site, a cement factory east of the Site, a medical facility north of the Site and an oil company, auto dealership and banks west of the Site (across Easton Road). The Site is the only undeveloped land in the immediate vicinity (N.T. 13, 58, 152).

12. The Site has not been occupied, subdivided or developed since Appellants purchased it. Appellants have expended some funds for the payment of taxes and for reservation of sewage connections, and have recovered some of their expenditures by selling part-interests in the Site. Because the Site is undeveloped, the portion bordering Easton Road receives a certain amount of trash tossed into it from the highway. That portion of the Site also experiences some erosion and sediment pollution from a stormwater pipe discharging into it (Stip.; N.T. 14, 28-31, 85-86, 87-88, 227-228; Appellants' Exhibits Nos. 3 and 4).

13. When the minimum yard requirements (front, side and rear), set forth in the Plumstead Township Zoning Ordinance in effect in 1988, are considered, the areas available for development purposes are reduced to 1/100 of an acre in the southwest upland and 1/10 of an acre in the southeast upland. This latter area would be increased by 2/10 - 3/10 of an acre under the revised yard requirements in the 1989 Zoning Ordinance (Stip.; N.T. 54-55, 100-103, 118; Appellants' Exhibits Nos. 11(a) and 12).

14. In 1979 Appellants filed an application with DER seeking a permit authorizing the placement of a retaining wall along Pine Run Creek and the placement of fill behind it to a height above the 100-year flood elevation. This project would have filled in all of the wetlands on the Site. DER issued a letter accepting the calculations and methodology but stating that permits

would not be issued until land development was imminent. No work was done on the project and no permits were ever issued (N.T. 49-52, 97-99).

15. On December 5, 1985 Appellants entered into an Agreement of Sale with Midas Realty Corporation (Midas), agreeing to convey the Site to Midas for $175,000 but contingent on Midas' securing all necessary permits and approvals for constructing and operating a Midas Muffler Shop on the Site (N.T. 16-17, 52; Appellants' Exhibit No. 2).

16. On February 11, 1986 Midas filed with DER an application for a Water Obstruction Permit authorizing the placement of fill on a portion of the Site for the construction of a Midas Muffler Shop and parking areas (N.T. 52-53, 61-63; Appellants' Exhibits Nos. 11(a) & 13).

17. The Midas project included, *inter alia*, a stormwater detention basin and the extension of a 36-inch reinforced concrete pipe designed to carry off-site runoff to an outlet structure to be constructed in the south bank of Pine Run Creek near the Easton Road bridge (N.T. 63; Appellants' Exhibit No. 11(a)).

18. Submitted as part of the Midas application was a report containing calculations showing that stormwater runoff and 100-year floodplain elevations would not be increased by the proposed project (N.T. 64, 68-71; Appellants' Exhibit No. 17).

19. The design of the Midas project satisfied Plumstead Township's standards for stormwater management and floodplain use and Bucks County Conservation District's standards for erosion and sedimentation control (N.T. 71-73; Appellants' Exhibits Nos. 15 & 16).

20. Since the placement of the outlet structure was outside of the floodway, it qualified for a General Permit from DER. Authorization for this aspect of the project was issued by DER on April 29, 1986 (N.T. 63-64; Appellants' Exhibit No. 14).

21. After encountering opposition from officials of DER and the U.S. Army Corps of Engineers (C.O.E.) to the filling in of wetlands, Midas decided to discontinue its permit application and no DER action was ever taken with respect to it (N.T. 77-79).

22. Appellants returned Midas' downpayment and the Agreement of Sale became a nullity (N.T. 17-18).

23. After the Midas sale fell through, Appellants decided to develop the Site themselves by constructing an auto repair facility, a permitted use in the C-2, Highway Commercial District of Plumstead Township (Stip.; N.T. 18).

24. Appellants filed with DER and the C.O.E. a Joint Permit Application seeking authorization for the project. The Application was resubmitted to DER in its entirety (with additional information) on July 11, 1988 (N.T. 82-83; Appellants' Exhibit No. 20).

25. The design of Appellants' project was basically the same as the design of the Midas project. It proposed (a) the filling of 0.87 acres of wetlands, an area roughly 150 feet wide by 240 feet long lying between the two upland areas; (b) the construction of a 5,000[2] square foot building and 37 parking spaces[3] on the filled-in area; (c) the construction of a detention basin east of the parking area; and (d) the extension of the 36-inch reinforced concrete pipe and the installation of the outlet structure near Easton Road (Stip.; N.T. 19, 73-75; Appellants' Exhibit Nos. 11(b)).

26. Appellants' project also proposed a 0.38-acre wetlands replacement area to be created by Appellants in the southeast upland area. Pursuant to this proposal existing wetlands soil would be excavated (from wetland areas to be filled in) and stockpiled. The upland area would be

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[2] The testimony of Russell G. Benner, Jr. indicated the size to be about 40 feet by 100 feet (N.T. 74). This would amount to 4,000 square feet. However, the Application states 5,000 square feet and our measurements of the building as depicted on Appellants' Exhibit No. 11(b) satisfies us that 5,000 square feet is the more accurate figure.

[3] Under the current zoning ordinance 51 parking spaces would be required (Stip.).

excavated to the elevation of the adjacent wetlands area and the wetlands soi would be placed on it. Wetlands plantings - sedge, sensitive fern, common skunk cabbage, spice bush, silver maple and red ash - would be placed in the replacement area (Stip.; N.T. 75-77; Appellants' Exhibit No. 11 (b)).

27. In addition, Appellants proposed to place a double row of conifers to separate the wetlands area from the remainder of the Site and to deed-restrict the wetlands area to prevent any future development (Appellants' Exhibit No. 20).

28. Appellants' Application contained copies of approval letters obtained in connection with the Midas application in 1986. See Findings of Fact Nos. 19 & 20 (Stip.; N.T. 83-84; Appellants' Exhibit No. 20).

29. Included in Appellants' Application was a Comprehensive Environmental Analysis. In this Analysis, Appellants claimed that the net loss of 0.5 acres of wetlands (13% of the total on the Site) was offset by the following public benefits:

(a) elimination of illegal dumping that takes place on the Site adjacent to Easton Road;

(b) reduction in air and noise pollution by the establishment of an auto maintenance facility specializing in replacement of mufflers and air filtration devices;

(c) elimination of erosion and sedimentation pollution from off-site surface water by carrying these flows to Pine Run Creek by extending the 36-inch reinforced concrete pipe;

(d) creation of 20-30 permanent jobs; and

(e) providing an additional auto maintenance facility convenient to the growing population of the area

(N.T. 84-89; Appellants' Exhibit No. 20).

30. Dennis Brown, a fish and wildlife biologist for the U.S. Fish and Wildlife Service, visited the Site on June 22, 1988. As a result of his

observations, the Fish and Wildlife Service recommended that the C.O.E. deny Appellants' Application. The Service's June 28, 1988 letter stated that the "filling of high quality wetlands for building and parking lot construction is clearly inconsistent with the 404(b)(1)[4] Guidelines." (Stip.; N.T. 295-298; DER's Exhibit No. 26).

31. On July 8, 1988 the U.S. Environmental Protection Agency (EPA), relying on the Fish and Wildlife Service's observations, recommended that the C.O.E. deny Appellants' Application (Stip.; N.T. 143-144; DER's Exhibit No. 28).

32. On July 7, 1988 the Pennsylvania Fish Commission, relying on the Fish and Wildlife Service's observations, recommended that the C.O.E. deny Appellants' Application (Stip.; N.T. 287-288; DER's Exhibit No. 27).

33. Appellants responded to the comments of the Fish and Wildlife Service, EPA, and the Pennsylvania Fish Commission in a letter to the C.O.E. dated July 26, 1988. Among the statements made in this letter, Appellants agreed to pipe waters from a spring (that would be covered with fill) from the mouth of the spring to Pine Run Creek (N.T. 92-93; Appellants' Exhibit No. 21).

34. On August 19, 1988 the Pennsylvania Fish Commission, having reviewed Appellants' Application, recommended that DER deny the Application. The reviewer's comments made light of the public benefits that Appellants cited and observed that they could be provided just as easily from an alternative upland location (Stip.; N.T. 282-287; DER's Exhibit No. 29).

35. The Pennsylvania Fish Commission also advised DER on the same date that Pine Run Creek is a warmwater fishery with low fishing pressure. As such, it would be used primarily as a bait fishery - providing minnows for use elsewhere (N.T. 285, 292-293; DER's Exhibit No. 29).

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[4] The reference is to section 404(b)(1) of the Clean Water Act, Public Law 92-500, 82 Stat. 816, 33 U.S.C.A. §1344(b)(1).

36. On September 23, 1988 DER notified Appellants of its concern about the impact of the proposed project on the wetlands. Appellants were instructed to provide additional information and justification with respect to 5 specific concerns related to 25 Pa. Code §105.14. §105.15 and §105.16 (N.T. 146-147; DER's Exhibit No. 4).

37. Appellants responded to DER's September 23, 1988 letter on September 30, 1988, enclosing a copy of their July 26, 1988 letter to the C.O.E. (See Finding of Fact No. 33). At the conclusion of their response, Appellants informed DER that no additional clarification of their position could be provided and that DER should take action on their Application (N.T. 89-92; Appellants' Exhibit No. 21).

38. Applications for Encroachment Permits are reviewed by DER by considering the factors listed in 25 Pa. Code §105.14(b).[5] If that review discloses the potential for significant environmental harm, then under the provisions of §105.16(a) DER consults with the applicant to examine ways to reduce or eliminate the harm. This includes consideration of mitigation measures defined in §105.1. DER also consults with other governmental agencies. If, after these consultations, DER is still convinced that significant environmental harm will occur, then the public benefits of the project are evaluated and weighed against the environmental harm. The benefits must outweigh the harm in order to justify issuance of a permit to place fill in wetlands (N.T. 133-135).

39. Most of DER's review of Appellants' Application was performed by Roland Bergner, a water pollution biologist, but he left his position with DER prior to making a final recommendation on the Application. Richard C. Shannon, Jr., another water pollution biologist, completed the review by utilizing the material already in the file (N.T. 129, 138-139).

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[5] Chapter 105 of the regulations was substantially revised effective October 12, 1991. The references to sections of Chapter 105 in this Adjudication are to versions in existence on April 12, 1990 when the Application was denied.

40. Shannon concluded that only 2 of the 10 factors listed in §105.14(b) were of concern - (a) the effect on water quality and aquatic habitat, and (b) the need to be located in close proximity to water (N.T. 159-164).

41. Having concluded that the project would involve the potential for significant environmental harm, Shannon then considered Bergner's consultations with Appellants, examining ways to reduce or eliminate the harm by utilizing mitigation measures in §105.1. Shannon concluded (a) that Appellants had not fully addressed factor (i) by considering alternative uses and alternative sites, (b) that factor (ii) was not applicable, (c) that Appellants had addressed factor (iii) by proposing a buffer zone and deed restrictions, (d) that the replacement wetlands proposed with respect to factor (iv) were not sufficient either in size or quality to be a suitable substitute, and (e) that replacment wetlands could not properly be considered, in any event, since Appellants had not adequately considered factor (i) (N.T. 166-172).

42. Still convinced that significant environmental harm would occur, Shannon evaluated the public benefits of the project and weighed them against the environmental harm. he concluded that the benefits claimed by Appellants (Finding of Fact No. 29) were marginal at best, and not enough to outweigh the environmental harm (N.T. 173-182).

43. Shannon prepared a Record of Decision on October 27, 1989 recommending denial of the Application for three reasons:

(a) an auto repair facility is not a water dependent activity;

(b) the loss of wetlands will eliminate fish and wildlife habitat, alter flood storage capabilities and decrease water quality improvement; and

(c) the lack of any demonstrated public benefits sufficient to offset the environmental harm.

(N.T. 182; DER's Exhibit No. 7).

44. Shannon visited the Site on January 25, 1990, found the wetlands to be exceptional, in his opinion, and took a number of photographs (N.T. 149-156; DER's Exhibits Nos. 10 through 21).

45. Shannon's supervisor, Khervin D. Smith (Chief of the Environmental Review Section of the Division of Rivers and Wetland Conservation), agreed with Shannon's conclusions and recommended denial of the Application (N.T. 320, 323-325).

46. Eugene E. Counsil (Chief of the Division of Waterways and Stormwater Management) reviwed Shannon's and Smith's recommendations, agreed with them and recommended to his superior, Joseph J. Ellam (Director, Bureau of Dams and Waterways Management), that the Application be denied (N.T. 353-354, 356-358).

47. The Application was denied in a letter dated April 12, 1990 and signed by Ellam (Stip.; N.T. 358; DER's Exhibit No. 9).

48. In August 1990 Appellants met with representatives of DER to discuss possible alternatives to the design of the project that would address DER's concerns. DER officials made two suggestions: develop the Site as a wetlands nursery; or limit commercial development to the upland area in the southeast corner of the Site with access provided from the Easton Road either by securing permission to use an existing access road on the land south of the Site or by constructing a bridge over the wetlands separating the two upland areas on the Site (N.T. 19-20, 359-360).

49. Developing the Site as a wetlands nursery did not make sense to Appellants (N.T. 20).

50. Appellants were unsuccessful in gaining permission to use the access road on the land south of the Site. Besides, they considered the idea of limiting commercial development to the uplands in the southeast corner of the Site to be unsound for the following reasons:

(a) too little visibility;

(b) too close (30-40 feet) to the noise and dust of the cement factory;

(c) too little developable space - 1/10 acre to 4/10 acre (N.T. 20-22, 38-40, 43, 56-58, 80, 118; Appellants' Exhibit No. 5).

51. Placing the proposed commercial development, as presently designed, in the southeast corner of the Site would still impact about .5-acre of wetlands (N.T. 373-379; Appellants' Exhibit No. 25).

52. Plumstead Township's Zoning Ordinance lists 25 categories of uses permitted by right in the C-2 Highway Commercial District, 3 categories of uses permitted by conditional use and 17 categories of uses permitted by special exception. The uses encompass a broad range of commercial, office and institutional activities (N.T. 60; Appellants' Exhibit No. 12).

53. Subsequent to DER's denial of their Application, Appellants sought and obtained a reduction in the assessed value of the Site for tax purposes from $5460 to $650 (N.T. 23-25; Appellants' Exhibit No. 8).

54. The Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants, the Site could have a value of $175,000 (the amount offered by Midas) or more (N.T. 16, 25, 80-82, 94; Appellants' Exhibit No. 9).

55. The wetlands on the Site are classified as palustrine forested wetlands with substantial areas of scrub/shrub wetlands and emergent wetlands. This diverse system provides high quality habitats for certain fish and wildlife species and is valuable for water quality improvement and flood storage (N.T. 149-157, 297).

56. Appellants' proposed project would completely destroy 0.87 acres of these wetlands, eliminating their ability to function as a habitat for fish and wildlife species and to provide water quality improvement and flood

storage (N.T. 158-159).

57. Most wetlands in the Doylestown area exist along stream corridors and provide important refuges for wildlife in the midst of highly developed areas (N.T. 152, 298).

58. The wetlands on the Site are classified by the Fish and Wildlife Service as Category 2 - wetlands which are considered replaceable - rather than Category 1 - wetlands too unique to be replaced. Category 1 wetlands would all be considered "important" wetlands as defined in 25 Pa. Code §105.17(a) (N.T. 315-318).

59. DER did not treat the wetlands on the Site as "important" wetlands during its consideration of Appellants' Application. Shannon and Smith now believe that the wetlands are "important" (N.T. 183-184, 340).

DISCUSSION

Appealing from a permit denial, Appellants have the burden of proof: 25 Pa. Code §21.101(c)(1). To carry the burden, Appellants must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion: 25 Pa. Code §21.101(a).

Appellants make two arguments. The first, to which they devoted most of their brief, is that DER's denial of the Application constitutes an unconstitutional taking of their property. The second, stated as an alternative, is that the permit should have been granted. Unfortunately, they barely outline the second argument. It seems to us that, before considering whether the denial amounts to an unconstitutional taking, we need to determine whether the denial was supported by statute and regulation and was an appropriate exercise of DER's discretion.

There is no suggestion that Appellants could have proceeded with their project without a permit. Section 6(a) of the DSEA, 32 P.S. §693.6(a), mandates a permit for every water obstruction or encroachment, including the placement of fill (see definitions in §3, 32 P.S. §693.3). To be entitled to

a permit, Appellants had to show compliance with the provisions of the DSEA and of the regulations adopted under it: §9(a), 32 P.S. §693.9(a). Those regulations constitute Chapter 105 of 25 Pa. Code and, more specifically, the sections on permit application processing at §105.14 and §105.16. In addition, §105.17 and §105.411(3) are potentially applicable where wetlands are involved.

The procedure to be followed in reviewing applications is set forth in §105.14 where 10 specific factors are listed for DER's consideration. Shannon found only 2 of these factors to cause concern - the effect of the project on water quality and aquatic habitat (§105.14(b)(4)), and the need for the project to be located near water (§105.14(b)(7)). Appellants made no effort to undermine or rebut Shannon's findings in this regard, and we find them to be reasonable. Obviously, these concerns involved the potential for significant environmental harm, requiring DER to proceed under §105.16(a) by consulting with Appellants and other governmental agencies.

DER held such consultations, one purpose of which was to explore ways to reduce the potential environmental harm to a minimum. This included "mitigation", defined in §105.1 as follows:

> an action or actions undertaken to:
> (i) minimize impacts by limiting the degree or magnitude of the action and its implementation;
> (ii) rectify the impact by repairing, rehabilitating, or restoring the impacted environment;
> (iii) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; or
> (iv) if the results listed in subparagraphs (i)-(iii) of this definition cannot be achieved, compensate for the impact by replacing or providing substitute resources or environments.

DER determined that factor (ii) was inapplicable and that factor (iii) had been adequately addressed by proposals for a buffer zone and deed restriction. We need to focus only on factors (i) and (iv). Potential ways to minimize environmental impacts under factor (i) are relocating the project

off-Site, confining it to the upland areas on-Site, reducing the size, or changing the use. Since an auto repair facility does not have to be located near water, it is not a use bound by its nature to a wetland environment. For this reason, there is less justification for tolerating the impact on wetlands when a facility of this sort is proposed. DER was correct in concluding that Appellants had not given this option serious consideration.

Confining development to the upland areas was considered, however, and rejected by Appellants. Since most of the upland area is in the southeast corner of the Site, it follows that the proposed building and parking areas would have to be located there. Appellants found this objectionable from a business standpoint. First of all, the facilities would have low visibility from Easton Road - located at the rear of a wooded Site. Second, they would be too close to the noise and dust of the cement factory. DER made no effort to counter this testimony, and we will accept it as reasonable. It is also apparent that, even if the facilities were placed in the southeast corner of the Site, it would still be necessary to destroy wetlands in the course of building an access road. Appellants estimate that the impacted area - 1/2 acre - would be similar to the net impact of their project as proposed.

Nothing in the record suggests that Appellants considered reducing the size of the project or changing it to a different use.

DER maintains that, since Appellants did not fully satisfy factor (i), the proposal for replacement wetlands under factor (iv) could not technically be considered. Despite this legal position, DER reviewed the replacement proposal and found it to be inadequate because it involved the replacement of 0.87 acres of natural wetlands by only 0.38 acres of manmade wetlands. Appellants made no claim that their proposal constituted an appropriate replacement. They simply pointed out that no other space was available on the Site to construct replacement wetlands. While this certainly is true on the basis of their project as designed, it overlooks the

possibility that the proposed facility could be reduced in size and the possibility that on-Site wetlands can be supplemented by off-Site wetlands. We agree with DER that Appellants' replacement proposal does not "compensate"[6] for the environmental impact by "replacing or providing substitute resources or environments" as stated in factor (iv).

Convinced that, after considering mitigation measures, significant environmental harm would still occur, DER was required by 25 Pa. Code §105.16 to evaluate the public benefits of the proposed project and weigh them against the environmental harm. DER went through this procedure and concluded that the harm outweighed the benefits. Appellants did little to challenge this conclusion. Our review of the benefits cited by Appellants leads us to the same conclusion reached by DER. Of the 5 benefits listed, 2 pertain to the Site itself and 3 pertain to the proposed auto maintenance facility. In the former category are elimination of illegal dumping and elimination of erosion and sediment pollution. The evidence of dumping along Easton Road indicates that this is a minor matter that, if important enough, could be controlled by fencing or some other device. Similar comments can be made about erosion and sediment pollution. To the extent this is a problem, it can be corrected by extending the 36-inch reinforced concrete pipe to the creek bank - work authorized in 1986 by the General Permit issued by DER.

The benefits of the proposed auto maintenance facility - reduction of air pollution, creation of 20 to 30 jobs and fulfillment of a need for such facilities - would result no matter where the facility is placed. They are not site specific. Appellants have not shown that other sites suitable for this type of business do not exist in the Doylestown area and that the benefits will not occur if Appellants' Site is not used. Without such a showing, we cannot assign great weight to these 3 benefits. Even when all 5

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[6] "Compensate": to be equivalent to. Webster's Ninth New Collegiate Dictionary 1987.
"Compensation": giving an equivalent or substitute of equal value. Black's Law Dictionary, Revised Fourth Edition 1968.

are lumped together, they fail, in our judgment, to outweigh the environmental harm associated with the loss of wetlands in a rapidly urbanizing region of the Commonwealth.

Because the harm will outweigh the benefits, DER was prohibited by §105.16 and by §105.411(3) from issuing a permit. We find the denial to be lawful and an appropriate exercise of DER's discretion.

Before leaving this issue, however, we feel compelled to comment on DER's eleventh-hour attempt to characterize the wetlands on the Site as "important." Wetlands in this category are accorded greater protection by special criteria set forth in 25 Pa. Code §105.17. Part of this protection stems from the fact that mitigation measures (including replacement) are not considered. Appellants' Application was not reviewed under §105.17 because DER did not consider the wetlands to be "important." Shannon changed his thinking on that point sometime after his deposition on November 13, 1990 and near the end of his direct testimony at the hearing on July 9, 1991 (N.T. 188-189). There is no suggestion in DER's pre-hearing memorandum (filed April 18, 1991) or its filing in response to Pre-Hearing Order No. 2 (filed July 1, 1991) that the appeal would be defended, at least in part, on the ground that the wetlands are "important."

Appellants made no motion to strike this part of Shannon's testimony or to contest it in any other fashion, perhaps because they viewed it as enhancing their taking claim or perhaps because their cross-examination uncovered a rationale that can only be termed sophistry. We will not burden this Adjudication with a discussion of the rationale because DER has not convinced us that the wetlands are "important." The characteristics cited by Shannon, while vital to "important" wetlands, are typical of what can be found

in nearly all wetlands. Unless we are to treat all wetlands as "important," we fail to see how these characteristics should be accorded greater protection on the Site than they receive elsewhere.[7]

We now turn our attention to Appellants' claim that denial of the permit constitutes an unconstitutional taking of their property. DER asserts (for the first time in its post-hearing brief) that the Board has no jurisdiction to rule on this issue. Litigants often raise constitutional issues in proceedings before the Board and our authority to rule on them has not, to our knowledge, previously been questioned. Like all administrative agencies, we lack the power to declare a statute unconstitutional. But where a litigant concedes the constitutionality of the statute but claims that DER's manner of administering it impinges on constitutional rights or protections, we rule on such claims as a necessary part of determining whether DER acted in an unlawful manner or abused its discretion.[8] Such claims have included the unconstitutional taking of property on at least one occasion: *Willowbrook Mining Company v. DER*, 1984 EHB 333, in which our decision was affirmed by Commonwealth Court, 92 Pa. Cmwlth. 163, 499 A.2d 2 (1985) without any suggestion that we exceeded our jurisdiction.

DER argues, however, that the Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. §1-201 *et seq.*, provides the "complete and exclusive procedure and law" applicable to the taking of property for public purposes: 26 P.S. §1-303, including *de facto* takings referred to in 26 P.S. §1-502(e). With such a statute establishing an exclusive remedy and vesting exclusive jurisdiction in the Courts of Common Pleas, DER asserts, the Board is deprived of any jurisdiction it otherwise might have to rule on such an issue.

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[7] We note that the "important" classification has been abandoned in the revised Chapter 105 of the regulations in favor of what appears to be a more workable distinction between those wetlands too valuable to be affected and those that are not.

[8] For some representative cases, see *John R. Yenzi, Jr. v. DER*, 1988 EHB 643 (due process clause); *Chambers Development Company, Inc. et al. v. DER*, 1988 EHB 68 (commerce clause; contracts clause); and *Dale A. Torbert et al. v. DER*, 1989 EHB 834 (Fourth Amendment). Of course, the provisions of Article I, Section 27, of the Pennsylvania Constitution frequently are cited to us as they were by DER on page 54 of its post-hearing brief.

This argument is persuasive on its face, but ignores appellate court decisions construing the Eminent Domain Code. The seminal case, *Gaebel v. Thornbury Township, Delaware County*, 8 Pa. Cmwlth. 379, 303 A.2d 57 (1973), held that a claim for *de facto* taking cannot be filed under the Eminent Domain Code where the taking involves the exercise of the police power. The property owner must first challenge the constitutionality of that exercise by the means provided by the Legislature. In the case of a zoning ordinance, as was involved there, the challenge must be made through procedures contained in the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101 *et seq.*

The *Gaebel* decision was followed in a number of subsequent cases, including *Reilly v. Commonwealth, Dept. of Environmental Resources*, 37 Pa. Cmwlth. 608, 391 A.2d 56 (1978); *Kraiser v. Horsham Township*, 72 Pa. Cmwlth. 16, 455 A.2d 782 (1983); and *Merlin v. Commonwealth*, 72 Pa. Cmwlth. 45, 455 A.2d 789 (1983). Like the MPC, the DSEA represents an exercise of the Commonwealth's police power. Any claim that the exercise of that power by DER amounts to an unconstitutional taking of property must be pursued through the procedures contained in the statute -- appeal to this Board: 32 P.S. §693.24(a). We clearly have the jurisdiction to consider it.

The Fifth Amendment to the U.S. Constitution and Article I, Section 10, of the Pennsylvania Constitution both prohibit the taking of property for public use without the payment of just compensation. While these protections have been enforced with little difficulty where the taking consists of actual governmental appropriation and use of the property, enforcement has proved troublesome where the taking consists of governmental regulation of the use of the property. The courts have been unsuccessful in drawing a reliable line dividing regulations that do not constitute a taking and those that do. Such boundaries as are discernible have been influenced more by the facts of each particular case than by any application of legal dogma.

State regulation is based upon the police power. In order to pass constitutional muster at the federal level, the Commonwealth's exercise of the police power through the DSEA and Chapter 105 of 25 Pa. Code must satisfy the three-prong test articulated by the U.S. Supreme Court in *Lawton v. Steele*, 152 U.S. 133 (1894). Thus, (1) the interests of the public must require it, (2) the means chosen must be reasonably necessary for the accomplishment of the purpose, and (3) the means chosen must not be unduly oppressive upon individuals. Appellants concede that the first two prongs have been satisfied and maintain that only the third prong is in issue. They claim that their property is rendered valueless by the denial of their permit application, causing them a loss of at least $175,000, and placing upon them an unduly oppressive burden which they are being forced to bear alone for the public benefit.

To constitute a taking, a regulation must deprive the owner of *any* reasonable use of the property. If it does not go that far, the regulation is constitutional even though it prevents the most profitable use of the property: *Andrus v. Allard*, 444 U.S. 51 (1979), or results in a significant reduction in value: *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In considering Appellants' contention that DER's action has deprived them of any reasonable use of the Site, it is important to note that DER's action has not interfered in any manner with the present and historical use of the Site. That is significant: *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), because it focuses attention solely on Appellants' investment-backed expectations for prospective use.

There is no evidence of what Appellants' intentions were when they purchased the Site in 1963. Since they never put the place to any use, it is reasonable to assume that they intended from the start to develop it for some commercial, residential or other purpose. The nature of the Site should have made it apparent to them at the outset that development would necessitate

filling in some or all of the wetlands. Being able to do this was absolutely essential to realizing their investment expectations; and yet, they never possessed absolute freedom to go ahead with it.

The Site is riparian land -- the subject of regulation for centuries. Even at common law, the owner of such land could not place obstructions on it without regard to the interests of others: *White v. Pennsylvania R. Co.*, 354 Pa. 397, 47 A.2d 200 (1946). Statutory law has regulated it in Pennsylvania at least since 1913 when the predecessor to the DSEA was enacted (see Act of June 25, 1913, P.L. 555, now repealed). Appellants' investment-backed expectations had to take into account the possibility that land already subject to long-standing regulation might have additional restrictions imposed upon it: *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (U.S.C.A., 3d Cir., 1987). "One buys land as it is...," *Helms v. Zeitzeff*, 407 Pa. 482, 181 A.2d 277 at 278 (1962). They could not realistically be confident that they would be able to place fill on the Site -- especially in areas within the 100-year floodplain.[9]

To the extent Appellants' investment-backed expectation relied upon the placement of fill for commercial, residential or institutional development it was too speculative to be given the constitutional protection Appellants seek. It follows that even the complete destruction of that expectation by government regulation cannot be considered a taking. We are not convinced, however, that a complete destruction has been demonstrated.

DER's action was to deny permission for Appellants to proceed with a specific project design. It does not go beyond that point. A wide variety of uses are allowed in the C-2, Highway Commercial District (see Finding of Fact No. 52). Appellants' engineer concluded that none of these uses would have a lesser impact upon the wetlands. While this conclusion was not challenged by

---

[9] Our conclusion here remains despite Appellants' 1979 application for a permit to build a retaining wall and place fill behind it. Although Appellants assert some DER acceptance of the idea, no approval was given and no permits were issued.

DER, we are unwiling to accept it without knowing the details on which it is based. Common sense tells us that some of the other permitted uses do not require a 5,000 square foot building and may not require as many parking spaces. Any reduction in size would almost certainly involve a reduction in the amount of wetlands to be affected, perhaps inducing DER to issue a permit. Since Appellants did not seek approval for a smaller facility, we cannot conclude that they will be denied any use of the wetlands: *Penn Central Transportation Co. v. New York City*, *supra*.

We conclude that DER's action is not unduly oppressive upon Appellants and that, therefore, the third prong of the *Lawton v. Steele* test is fulfilled. This exercise of the police power is constitutional.

In reaching this conclusion, we have cited and relied primarily on cases construing the Fifth Amendment to the U.S. Constitution. We have done so because the Pennsylvania Appellate Court decisions construing Article I, Section 10, of the Pennsylvania Constitution have consistently followed the federal cases. We have reviewed the Pennsylvania Supreme Court's recent decision in *United Artists Theater Circuit v. City of Philadelphia*, _____ Pa. _____, 595 A.2d 6 (1991), which appeared to depart from this tradition. We are satisfied that it does not affect our holding. Accordingly, both the U.S. and Pennsylvania Constitutions support the action challenged in this appeal.

CONCLUSIONS OF LAW

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

s 2. Appellants have the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in denying Appellants' Application.

3. Appellants did not fully satisfy factor (i) in the definition of "mitigation" in 25 Pa. Code §105.1 by considering options to minimize or eliminate the impact of their proposed project on the wetlands.

4. Appellants' proposal for replacement wetlands did not satisfy factor (iv) in the definition of "mitigation" in 25 Pa. Code §105.1 because its size and quality did not compensate for the impact of their proposed project on the wetlands.

5. The public benefits cited by Appellants for their proposed project did not outweigh the environmental harm of destroying 0.87 acres of wetlands and eliminating their capacity to function as a fish and wildlife habitat and to provide water quality improvement and flood storage.

6. DER was prohibited by 25 Pa. Code §105.16 and §105.411(3) from approving Appellants' Application and issuing a permit.

7. The wetlands on the Site are not "important" wetlands as defined in 25 Pa. Code §105.17.

8. The Board has jurisdiction to rule on Appellants' claim that DER's denial of their Application amounts to an unconstitutional taking of their property.

9. DER's action was not an unconstitutional taking of Appellants' property.

10. DER's action was lawful and an appropriate exercise of discretion.

ORDER

AND NOW, this 1st day of May, 1992, it is ordered that the consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Terrance J. Fitzpatrick has a concurring opinion which is attached.

DATED: May 1, 1992

cc: **Bureau of Litigation**
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Harrisburg, PA
For the Commonwealth, DER:
Martha Blasberg, Esq.
Southeast Region
For the Appellant:
Jonathan E. Rinde, Esq.
Joseph M. Manko, Esq.
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

sb

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ENVIRONMENTAL HEARING BOARD
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HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MR. AND MRS. CONRAD MOCK	:	
	:	
v.	:	**EHB Docket No. 90-166-MR**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 1, 1992**

CONCURRING OPINION OF BOARD MEMBER
TERRANCE J. FITZPATRICK

I agree with the conclusions and the reasoning in the Board's Opinion. I file this Concurring Opinion only to add a comment of my own regarding the takings issue.

The U.S. Supreme Court has recognized that in deciding whether a taking has occurred, it is necessary to weigh the public and private interests involved. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 492 (1987). In cases such as the present one, where a landowner's use of his property has been restricted pursuant to laws designed to protect the environment, I believe it is necessary to remember that we are dealing with land. While land is a form of property, it differs from buildings, bank notes, and automobiles in that all forms of life are biologically dependent upon it. It does not bode well for the future if we insist on treating land as if it were nothing more than an economic commodity.[1]

In my view, when a person asserts that his land has been taken due to environmental restrictions, he should face a heavier burden than in other types of takings cases.

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[1] See the discussion of the "land ethic" in Aldo Leopold, "A Sand County Almanac" (Oxford Univ. Press, 1987) pp. 201-226.

EHB Docket No. 90-166-MR
(consolidated)

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: May 1, 1992

cc: **Bureau of Litigation**
Library, Brenda Houck
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Southeast Region
For Appellant:
Jonathan E. Rinde, Esq.
Joseph M. Manko, Esq.
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Bala Cynwyd, PA
jm

COMMONWEALTH OF PENNSYLVANIA
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

ELEANOR JEANE THOMAS	:	
	:	
v.	:	EHB Docket No. 91-526-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
RESOURCE CONSERVATION CORP., Permittee	:	Issued: May 1, 1992

OPINION AND ORDER
SUR ELEANOR JEANE THOMAS'
MOTION FOR RECONSIDERATION

By: Richard S. Ehmann, Member

Synopsis

Where a dismissal for untimeliness has occurred, a Motion for Reconsideration under 25 Pa. Code §21.122 must show compelling and persuasive reasons for reconsideration which address the untimeliness of the appeal rather than allegations as to the merits issues which movant seeks to raise by her appeal. Where the motion for reconsideration fails to make any such allegations and again admits the appeal was untimely, it must be denied.

OPINION

By an Opinion and Order dated March 19, 1992, we granted Resource Conservation Corp.'s ("RCC") Petition To Dismiss Appellant's Appeal As Untimely. RCC's petition had asserted that Thomas' Notice Of Appeal from DER's issuance of a permit to RCC for a municipal waste landfill was untimely

under 25 Pa. Code §21.52(a) and had to be dismissed for lack of jurisdiction. Our review of RCC's petition and Thomas' response thereto confirmed that RCC was correct and we issued an Opinion and Order dismissing this appeal.

On March 30, 1992, we issued an amended Opinion which drew the same conclusion and contained the same result. The only difference between the two Opinions is that the first Opinion mistakenly referred to RCC's proposed facility as "a hazardous waste treatment and disposal facility" and the amended Opinion corrected this error to refer to RCC's facility as "a municipal waste landfill".

On April 1, 1992, Thomas filed a Motion For Reconsideration of the March 19th Opinion. By letter of that date we notified the other parties of this filing and advised them that if they wished to respond they should do so by April 11, 1992. On April 8, 1992 RCC filed its response in the form of a Motion In Opposition To Appellant's Motion For Reconsideration. In turn, on April 10, 1992, Thomas filed a document captioned "Notion In Opposition To The Permittee Opposition Of Appellant's Motion For Reconsideration And Brief With In This Enclosed Information". DER has not filed any responses to these Motions. This Opinion addresses these Motions.[1]

Thomas' Motion For Reconsideration argues initially that the error in describing RCC's proposed municipal waste landfill as a hazardous waste treatment and disposal facility contained in the unamended opinion is a ground

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1 Prior to filing her Motion For Reconsideration and on March 24, 1992, Thomas also filed a five page document with 18 pages of attachments which are predominantly newspaper articles. The certificate of service attached thereto identifies this filing as Thomas' Opinion Of The Board's March 19, 1992 Opinion and Order. While we have docketed receipt of this filing, it is not a type of filing within our rules of procedure. Moreover, its purpose appears solely to criticize this Board and question its ability to decide this matter in light of the opinion and the aforesaid error therein. This filing is not addressed further herein.

to grant reconsideration under 25 Pa. Code §21.122.[2] Thomas' Motion also argues many issued relating to the merits of DER's decision to issue this permit and the character of the persons involved in RCC and a landfill in West Virginia, and argues there are too many things wrong with this permit to let a small thing like untimeliness bar review by this Board. Finally, because of the Board's mischaracterization of RCC's proposed facility, Thomas contends she has won her appeal "by default".

In response, RCC cites 25 Pa. Code §21.122(a) for the proposition that rehearing or reconsideration is only granted for compelling reasons and is limited to instances where the decision rests on legal grounds not considered by the parties or crucial facts set forth in the application are not as stated in the decision and would justify reversal. RCC contends the aforesaid mischaracterization does not meet this test, so Thomas' Motion should be denied.

Thomas' twelve page response to RCC's Motion In Opposition To Appellant's Motion For Reconsideration, though somewhat jumbled, alleges that RCC interfered with the appeals process, as evidenced in her Brief, and attachments, by paid advertising and by having its employees to tell the Shade Township supervisors that the employees would lose their jobs if the Township successfully challenged this appeal. It also repeats some of the arguments in her motion. Further, Thomas' response asserts the Board has not read her briefs or documents and that her husband told her that the Board would not read all of her filings and would ignore her. In addition, Thomas alleges her

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[2] The Motion says this is "a reason to comply with 2 [because] the crucial facts as set forth in the application are not as stated in the decision...." As there is no Section 21.122(2), we assume the reference is to Section 21.122(a)(2) which contains similar language.

Motion For Reconsideration was timely filed and that RCC's counter motion contains assumptions, not facts. Thomas also alleges the need to investigate the age and experience of the members of this Board and that RCC's counsel is being paid to keep this matter out of court. Additionally, Thomas raises certain new issues and reraises some of the merits issues initially set forth in her Motion which go to the merit or lack of merit in DER's decision to issue this permit.

We have opted to try to set forth these concerns voiced by Thomas both because Thomas does not believe that we read her filings and attachments and because it is important to show that for all her allegations in both her Motion and her response to RCC's Motion, Thomas fails to offer us any allegations that show her appeal was timely or that grounds for an appeal *nunc pro tunc* exist. Indeed, on the last page of her Motion, she again admits her appeal was filed late (but argues this is a minor infraction).

25 Pa. Code §21.122(a)(1) makes it clear that reconsideration will be granted for compelling and persuasive reasons only. Newlin Corporation et al. v. DER, 1989 EHB 1219; Global Hauling v. DER, 1990 EHB 877; NGK Metals Corporation v. DER, 1990 EHB 473; J. C. Brush v. DER et al., EHB Docket No. 87-492-MJ (Opinion issued February 21, 1991). Section 21.122(a)(2) make it clear that in the usual appeal "compelling and persuasive reasons" is interpreted so that reconsideration is proper if we decided the appeal on a legal theory not considered by any party or that the crucial facts are not as stated in our decision.

Our decision as to Thomas' appeal was based on RCC's Petition To Dismiss and 25 Pa. Code §21.52(a), which says where an appeal is not timely filed, this Board never acquires the jurisdiction to conduct hearings as to

the grounds asserted for appeal (the merits issues). Since we are a Board with only a limited jurisdiction according to the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, this inability to acquire jurisdiction is no minor or little thing, as Thomas suggests. Moreover, since we acted in response to RCC's Petition and Section 21.52(a) and since Thomas filed a response to RCC's Petition, she has been afforded ample opportunity to brief this legal issue. Accordingly, under Newlin Corporation et al., *supra*, she has failed to state grounds for reconsideration under Section 21.122(a)(1).

Since Thomas' Motion For Reconsideration admits her appeal is untimely, it fails to show the facts supporting our prior opinion are not as asserted therein. In other words, she fails to show grounds for reconsideration under Section 21.122(a)(2). "Crucial facts", as used in this section of our rules, means in this appeal the facts crucial to deciding the timeliness issue with regard to Thomas' appeal and our jurisdiction over it. "Crucial facts" does not go to superfund, wetlands questions, potential groundwater contamination, permit transference, liner suitability, the financial integrity of RCC or the other merits type issues raised in Thomas' Motion and her response. These issues are crucial to Thomas, as is evident from the earnestness with which she presses her case, but they are issues as to the merits of DER's permit issuance decision which we can only reach if we have jurisdiction over Thomas' appeal.

We have held in our Opinion of March 19, 1992 that we lack jurisdiction over this appeal. Thomas' Motion does not show us compelling and persuasive reasons why our conclusion that her appeal was untimely filed (and thus we lack jurisdiction) was factually or legally unsound. The admitted

error in characterization of RCC's proposed facility, for example, however unfortunate, does not go to this issue and is not a ground for reconsideration. The only issue Thomas raises which might rise to a ground for reconsideration under Section 21.122 is found in her response to RCC's Motion, where she alleges RCC interfered with the appeals process. This issue was covered at length in our Opinion, however, and Thomas offers us nothing new in regard to it. Accordingly, we enter the following Order.

ORDER

AND NOW, this 1st day of May, 1992, Thomas' Motion For Reconsideration is denied.

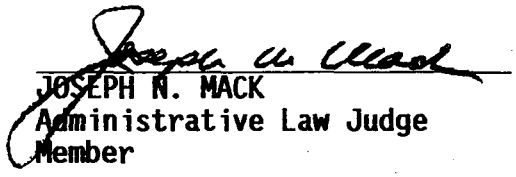
ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 1, 1992

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER CORPORATION	:	
	:	
v.	:	**EHB Docket No. 90-225-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NEW HANOVER TOWNSHIP, COUNTY OF MONTGOMERY, and PARADISE WATCH DOGS	:	**Issued:** May 5, 1992

OPINION AND ORDER SUR
NEW HANOVER CORPORATION'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Maxine Woelfling

Synopsis:

A permit applicant's motion for partial summary judgment regarding the Department of Environmental Resources' (Department) denial of its re-permitting application for a municipal waste disposal facility is denied. Because it is unclear whether appellant is precluded from contending that §507 of the Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.* (commonly referred to as Act 101) does not apply to its facility because of the host county's alleged failure to comply with §513 of the statute, summary judgment will be denied on that issue. Outstanding issues of material fact remain regarding whether the proposed facility will result in additional capacity, so summary judgment will be denied on the appellant's claim that §507 is inapplicable to its re-permitting application because it does not propose additional capacity.

Finally, summary judgment will be denied on appellant's claim that the Department of Environmental Resources' application of §507 of Act 101 was, in essence, the impermissible imposition of siting criteria.

OPINION

Presently before the Board for disposition is New Hanover Corporation's (Corporation) motion for partial summary judgment regarding its appeal of the Department's denial of its application to re-permit a municipal waste disposal facility in New Hanover Township, Montgomery County.[1] The Corporation seeks summary judgment in its favor regarding Paragraphs 2, 3, and 4 of the Department's denial letter. These paragraphs address the Corporation's alleged failure to demonstrate compliance with §507 of Act 101.[2] The Corporation asserts in its motion that the Department improperly applied §507 to its re-permitting application in that the provisions of §507 do not apply to existing facilities such as the Corporation's. It also contends that §507 was improperly applied because Montgomery County (County) had not complied with the requirements of §513 of Act 101. And, finally, it argues that the Department, in applying §507 to its re-permitting application, was attempting to impose siting criteria in contravention of those set forth in the municipal waste management regulations.

On July 31, 1991, the County, an intervenor herein, responded to the Corporation's motion, disputing the appropriateness of a grant of partial

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[1] The Department's issuance of Solid Waste Permit No. 101385 to the Corporation under the regulations in effect prior to the adoption of the comprehensive municipal waste management regulations in April, 1988, was challenged by New Hanover Township (Township) and the Paradise Watch Dogs in appeals consolidated at Docket No. 88-119-W which are still pending before the Board. It is the Corporation's attempt to re-permit this facility under the 1988 regulations which gave rise to the present appeal.

[2] The Corporation has also challenged the Department's approval of the Montgomery County Municipal Waste Management Plan (County Plan) at Docket No. 90-558-W.

summary judgment. The County contends, *inter alia*, that the Department properly applied §507 of Act 101 to the Corporation's re-permitting application in that the County had satisfied the requirements of §513 of Act 101 and the Corporation's facility was not an "existing facility" as defined in the municipal waste management regulations.

The Department's August 1, 1991, response to the Corporation's motion argues that the motion does not conform to the requirements of Pa.R.C.P. No. 1035. It joins the County in arguing that the requirements of §513 of Act 101 were satisfied by the County, but also asserts that the Corporation is precluded by the doctrine of administrative finality from challenging the County Plan. And, the Department contends that it properly interpreted §507 of Act 101.

The Township, which is also an intervenor herein, opposed the Corporation's motion on August 2, 1991, alleging procedural deficiencies in the Corporation's motion and asserting that a grant of partial summary judgment is precluded by outstanding issues of material fact. The Township similarly argued that the Department had properly applied §507 of Act 101 and had properly determined that the County had complied with §513 of Act 101.

The Corporation filed a reply on September 16, 1991, which, *inter alia*, attempted to cure the procedural deficiencies in its motion. This, in turn, prompted additional filings by the Department and the Township, which, in large part, reiterated their earlier arguments.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[3]

---

[3] The Corporation's motion did not conform with the requirements of Pa.R.C.P. No. 1035 in that it was not supported with anything but exhibits which were unverified. The facts on which the motion was based were neither clearly outlined nor supported by proper affidavits. Finally, the motion referenced documents which were not part of the record in this proceeding.

Robert L. Snyder *et al.* v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 588 A.2d 1001 (1991). The motion, of course, must be reviewed in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131. For the reasons which follow, we must deny the Corporation's motion.

The pertinent excerpts from the three paragraphs of the denial letter on which the Corporation is seeking partial summary judgment are:

> 2. The NHC application fails to demonstrate that the proposed facility would serve a need for additional municipal waste disposal capacity. Therefore, the Department has determined that the applicant has failed to demonstrate any social or economic benefits of the project to the public, pursuant to 25 Pa. Code Section 271.127.
>
> 3. The NHC application proposed to dispose of waste generated in Montgomery County, but neither the approved Montgomery County Municipal Waste Management Plan, submitted pursuant to Section 501(b) of Act 101-1988, nor the draft proposed Montgomery County Plan submitted pursuant to Section 501(a) of Act 101-1988, provides for the use of this facility for any part of the municipal waste generated in Montgomery County. Further, the applicant has failed to provide any evidence of contracts or bilateral negotiations with any Pennsylvania municipality. Therefore, the application must be denied because the proposed operation of the facility would be inconsistent with applicable planning, and the applicant has failed to demonstrate a need for the facility. The facility would thus violate 25 Pa. Code §271.127 and Section 1701 of Act 101-1988, 53 P.S. §4000.1701.
>
> 4. The application fails to comply with Section 507 of Act 101-1988, 53 P.S. §4000.507 in the following respects:
>
> a. Use of the proposed NHC Landfill for Host County waste is not provided for in the Host (Montgomery) County plan and thus would interfere with the approved and proposed Host County municipal waste management plan. ...

b. The applicantion [sic] fails to demonstrate that disposal of municipal waste streams identified pursuant to 25 Pa. Code §273.112 at the proposed landfill would be at least as suitable as disposal at alternative sites, giving consideration to environmental and economic factors. The applicant proposes to receive waste that has also been proposed to be disposed at a location that is more suitable for environmental and economic reasons. ...

c. The Host County, Montgomery County, has filed an objection to the facility with the Department pursuant to Section 507(a)(2)(iv), 53 P.S. §4000.507(a)(2)(iv), and further, has not provided for the use of this facility in the Montgomery County Municipal Waste Plan approved by the Department pursuant to Section 501(b), 53 P.S. §4000.501(b), for which Montgomery County submitted timely and sufficient implementing documents pursuant to Section 513, 53 P.S. §4000.513. ...

Summary judgment regarding any one of these reasons turns upon an application of §507 of Act 101 to the Corporation's permit application.

First, the Corporation contends that the limitations on permit issuance in §507 of Act 101 do not apply to its re-permitting application unless the County has submitted to the Department "all executed ordinances, contracts or other requirements to implement its approved plan and that will be used to ensure sufficient available capacity to properly dispose or process all municipal waste that is expected to be generated within the county for the next ten years" as required by §513(a) of Act 101. Because the County Plan only covers the eastern part of Montgomery County, the Corporation argues that the County did not comply with §513(a) since it could not ensure that there was sufficient capacity to process or dispose of all waste generated within the County in the next ten years.

In responding to the Corporation's argument, the Department contends that the Corporation is barred by the doctrine of administrative finality from

challenging the County's compliance with §513.[4] This is as a result of the Corporation's failure to file a notice of appeal within 30 days of an April 10, 1990, Department filing at No. 159 Misc. Dkt. 1989 (Ex. 22 to Corporation's motion) which allegedly advised the Corporation of the submission of the County's §513 documents.

Since the Corporation was not a party to the Department's §513 determination, it had 30 days from the date of publication of the Department's action[5] in the Pennsylvania Bulletin to file an appeal with the Board. Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), aff'd on reconsideration, ___ Pa. Cmwlth. ___, 546 A.2d 1330 (1988). Where the Department does not publish notice of its action in the Pennsylvania Bulletin, the appeal period would run from the date notice is otherwise received by the third party. New Hanover Township *et al.* v. DER and New Hanover Corporation, EHB Docket No. 88-119-W (Opinion issued July 30, 1991). The Department has provided us with no factual allegations or support concerning its handling of providing notice in the Pennsylvania Bulletin of its §513 determination, so we can hardly conclude, at this time, that the Corporation is precluded from challenging the County's compliance with §513 of Act 101. Despite this deficiency in the Department's argument, we will not grant summary judgment to the Corporation on the §513 issue, for its right to summary judgment must be clear and free from doubt.[6]

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[4] Incorporated within the Department's response to the Corporation's motion for partial summary judgment was a motion to dismiss portions of the Corporation's appeal because of its failure to challenge the Department's determination that the County had satisfied the §513 requirements. The Board will address the Department's motion in a separate opinion.

[5] At this point, we are unsure how to characterize what the Department does under §513 of Act 101.

[6] In addition, there are substantial issues relating to the relationship between county planning under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018:101 *et seq.* and county planning under Act 101.

Next, the Corporation argues that §507 does not apply to it because the language in §507(a) states, "...the department shall not issue...any permit that results in additional capacity,...unless the applicant demonstrates the proposed facility is provided for in the County plan or meets the listed requirements. The Corporation alleges that it did not request additional capacity in its re-permitting application.

In response to the motion, the Township provided the sworn affidavit of its consultant, Barbara Helbig, P.E., concluding that the application for permit modification results in an increase in landfill capacity (Ex. D to Township's answer to motion for partial summary judgment, at p.3). After reviewing this affidavit, it is evident that there are outstanding issues of material fact which preclude a grant of summary judgment here.

The Corporation next claims that it is an "existing facility" as that term is defined in §502(c) and, therefore, it is not subject to the requirements of §507 of Act 101. The Commonwealth Court has recently held in Borough of Glendon v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 603 A.2d 226 (1992), that an "existing facility" for purposes of §502(c) of Act 101 was not the same as an existing facility for purposes of applying the site limitations in §511, as §511 applied to permitting of waste disposal facilities, while §502 related to planning. The Commonwealth Court's reasoning is equally applicable to §507, since it relates to permitting.

The Corporation also contends that §507 cannot be applied to its re-permitting application because it constitutes impermissible siting criteria. It argues that as an existing facility being re-permitted under the April 9, 1988, municipal waste management regulations, it cannot be subjected to broad siting criteria.

Initially, we cannot agree with the Corporation's characterization of §507, particularly §507(a)(2), as constituting siting criteria.

Furthermore, even if the requirements of §507 of Act 101 are characterized as siting criteria, we can find no authority for the proposition that the municipal waste management regulations somehow prohibit the Department from applying the requirements of §507 to a re-permitting application. The General Assembly specifically directed that Act 101 be construed *in pari materia* with the Solid Waste Management Act, Borough of Dunmore v. DER, EHB Docket No. 90-402-B (Opinion issued December 13, 1991).

O R D E R

AND NOW, this 5th day of May, 1992, it is ordered that New Hanover Corporation's motion for partial summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 5, 1992

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M. DIANE SMITH
SECRETARY TO THE BC

NEW CASTLE JUNK COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-411-MJ**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 5, 1992

OPINION AND ORDER
SUR MOTION FOR
PARTIAL SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Where questions of material fact remain in dispute and New Castle Junk Company has not succeeded in clearly demonstrating that it is entitled to judgment as a matter of law on the issue of what corrective action DER may require it to take pursuant to the Solid Waste Management Act for contamination of soil and groundwater at its former battery processing site, summary judgment may not be granted to the Company.

OPINION

This matter was initiated with the filing of a notice of appeal on September 28, 1990 by New Castle Junk Company ("the Company") seeking review of an order issued by the Department of Environmental Resources ("DER") on August 28, 1990, received by the Company on August 30, 1990. The order alleges that soils and groundwater at the Company's site in New Castle, Lawrence County ("the site") are contaminated with sulfates, lead, cadmium, zinc, and elevated acidity caused by the continued leaking of solid waste

disposed at the site from the processing of lead acid batteries, in violation of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. ("SWMA"), and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. The order requires the Company to submit a site closure plan, groundwater monitoring assessment and abatement plan, closure and post-closure care maintenance cost estimates and a closure/post-closure bond, in accordance with the requirements of 25 Pa.Code §§75.38, 75.264(n), 75.265(o), and 75.265(v).[1] The Company's appeal avers that it was not engaged in any activities regulated by the SWMA at the time the statute went into effect, and argues that the SWMA has no retroactive application to the Company's activities prior to its effective date.[2]

The matter before the Board is a motion for Partial Summary Judgment filed by the Company on January 2, 1992. DER filed a memorandum in opposition thereto on January 29, 1992.

Background

The background of this matter may be obtained from the joint stipulation of facts entered into by the parties on December 31, 1991. The Company is engaged in the business of metals recycling and salvage operations at its

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[1]Sections 75.264(n), 75.265(o), and 75.265(v) have been recodified at 25 Pa.Code §§264.90-264.100, 265.110-265.119, and 265.300-265.315, respectively. 20 Pa. Bulletin 909 (February 10, 1990). Section 75.38 contains general standards for industrial and hazardous waste disposal sites. Sections 264.90-264.100 contain groundwater monitoring requirements for owners and operators of hazardous waste facilities. Sections 265.110-265.119 contain interim status closure and post-closure standards for owners and operators of hazardous waste management facilities. Finally, §§265.300-265.315 contain special requirements applicable to hazardous waste facilities during interim status.

[2]On January 29, 1992, the Company filed a second appeal at Docket No. 92-049-MJ. This appeal challenges DER's action of January 17, 1992 modifying the closure plan submitted by the Company. This appeal was consolidated with the first at Docket No. 90-411-MJ by order of March 12, 1992.

facility in New Castle, Pennsylvania ("facility"). (J.S. 4)[3] Beginning in 1961 until late 1979, the Company processed lead acid batteries in the southern end of its facility known as the "recovery area". (J.S. 5 and 6) Battery processing at the recovery area consisted of cutting the tops off batteries and removing the lead plates from inside. The plates were dumped into a pile and then transported to off-site smelters owned and operated by third parties. Battery casings were not transported off-site but, rather, were disposed at the facility. Sulfates and lead from battery processing were placed onto the ground at the recovery area. (J.S. 7) The Company stopped processing lead acid batteries at its facility by December 31, 1979. (J.S. 10) No lead acid batteries or components thereof were disposed at the facility on or after December 31, 1979. (J.S. 11) Between December 31, 1979 and May 1985, the Company collected intact lead acid batteries from its customers and held them for various periods at the facility before sending them off-site for reclamation. (J.S. 12) After May 1985, the Company accepted no more lead acid batteries at its facility and removed all accumulated lead acid batteries from its facility by December 1, 1986. (J.S. 13) Battery casings remain at the facility and cover an area of 8.8 acres, including the 1 acre recovery area. (J.S. 9)

On May 15, 1989, DER analyzed soil samples taken from the recovery area for the characteristic EP toxicity. The extract from some of the samples contained concentrations of lead and cadmium of greater than or equal to 5 mg/l and 1 mg/l, respectively. (J.S. 15) Soil and groundwater at the recovery area are contaminated with, inter alia, sulfates, lead, cadmium, zinc, and elevated acidity. (J.S. 16)

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[3]"J.S. ____" refers to a paragraph in the joint stipulation of facts.

The Company has never obtained from DER a permit for solid waste processing, storage, or disposal for the recovery area or the facility. (J.S.17)

Procedural History

In a conference call with the presiding Board Member on December 13, 1991, counsel for the parties agreed to file cross motions for partial summary judgment on the issue of whether DER has authority pursuant to the SWMA to order the Company to submit a site closure plan, groundwater monitoring assessment plan, and the other documentation required by DER's August 28, 1990 order where the Company had stopped processing lead acid batteries at its facility by December 31, 1979.

On January 2, 1992, the Company filed a motion for partial summary judgment and supporting memorandum, along with the joint stipulation of facts entered into by the parties on December 31, 1991. DER responded on January 27, 1992, stating that it had chosen not to file a cross-motion for partial summary judgment but, rather, was submitting a memorandum in opposition to the Company's motion, arguing that the motion should be denied because there remained genuine issues of material fact regarding the current migration of contaminants into the soil or groundwater.

On February 7, 1992, the Company filed a memorandum in reply to DER's opposition, contending that DER's memorandum in opposition could not defeat the motion for partial summary judgment because it contained unverified factual assertions regarding the alleged current migration of contaminants into the soil and groundwater and the nature of waste disposal at the site.

Thereafter, during a second conference call on February 18, 1992, counsel for DER requested permission to file a motion for summary judgment on the basis of the joint stipulation as well as the asserted facts set forth in its opposition to the Company's motion, with supporting documentation. Counsel for the Company stated his objection to the request and the presiding

Board Member granted the parties two weeks to submit briefs on the issue. The Company, on or about March 5, 1992, filed with the Board its brief in the form of a letter outlining the basis for its objection to DER's request. The Company's objection was twofold: first, that DER waived its right to raise the disputed facts by failing to raise them in its pre-hearing memorandum and in the joint stipulation, and secondly, that DER itself admitted in its memorandum in opposition that the facts are in dispute and, thus, could not form the basis for summary judgment.

DER did not respond to the Company's letter, nor has it submitted anything further on this matter. Therefore, the only matter before the Board for disposition is the Company's motion for partial summary judgment filed on January 2, 1992, and DER's opposition to the motion.

DISCUSSION

Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, 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(b); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). Motions for summary judgment must be viewed in a light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

The issue presented in the Company's motion is whether DER has authority pursuant to the SWMA, 35 P.S. §6018.101 et seq., to order the Company to submit a site closure plan, groundwater monitoring assessment and abatement plan, closure and post-closure care maintenance cost estimates, and a closure/post-closure bond pursuant to the SWMA and 25 Pa.Code §§75.38, 75.264(n),

75.265(o), and 75.265(v)[4] for contamination which may have resulted from conduct which occurred prior to enactment of the SWMA.

The Company asserts in its motion that the SWMA does not apply to the disposal of battery casings at its facility because such disposal took place prior to the enactment of the SWMA and there is no provision in the SWMA which would make it retroactive. The Company cites Township of Middle Paxton v. DER, 1981 EHB 315, as holding that the SWMA is to be applied prospectively. Thus, concludes the Company, DER had no authority to issue the order under the SWMA because the Act may not be interpreted to apply to acts of disposal which took place before it went into effect.

The SWMA was enacted on July 7, 1980, and by its own terms became effective on September 5, 1980 (with the exception of §402 dealing with the listing of hazardous waste which became effective immediately upon enactment.) 35 P.S. §6018.1003. Under the Pennsylvania Rules of Statutory Construction, 1 Pa. C.S.A. §1926, a statute is not to be construed as being retroactive unless clearly and manifestly intended so by the Legislature. See Bureau of Employment Security v. Pennsylvania Engineering Corporation, 54 Pa. Cmwlth. 376, 421 A.2d 521, 523 (1980). As the Company correctly notes, the SWMA contains no provision specifically making it retroactive.

In the Middle Paxton case,the Board, quoting Universal Cyclops S.D. v. Krawzynski, 9 Pa. Cmwlth. 176, 305 A.2d 757 (1975), stated, "Legislation which affects rights will not be construed to be retroactive unless it is declared so in the Act. But where it concerns merely the mode of procedure, it is applied as of course, to litigation existing at the time of its passage."

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[4]See footnote 1.

The Board ruled that the SWMA was not merely procedural in scope and was not intended to apply to solid waste management permits issued prior to September 5, 1980. Middle Paxton, supra at 331.

However, DER's order of August 28, 1990 does not deal with the permitting requirements of the SWMA. Rather, the order requires corrective action to address what DER sees to be "[t]he continued leaking of constituents of solid waste disposed at the site onto the land or into the waters of the Commonwealth [which] constitutes ongoing disposal of solid waste by New Castle Junk."

To this the Company counters that the SWMA does not apply to environmental conditions where the activity creating the conditions concluded before the effective date of the statute. The SWMA, the Company argues, applies to activity not environmental conditions. In support of this argument, the Company contends that the definition of "disposal" under the SWMA does not apply to the presence or movement of waste within the environment.

The SWMA defines "disposal" as follows:

> **"Disposal."** The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth.

35 P.S. §6018.103

DER, on the other hand, argues that because the definition of "disposa includes the concept of contaminants "leaking" into the environment, the on-going leakage from waste deposited prior to enactment of the SWMA constitutes disposal within the meaning of the Act.

Both DER and the Company look to federal case law interpreting the term "disposal", as it is used in the Resource Conservation and Recovery Act

("RCRA"), 42 U.S.C. §6901 et seq., and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERLCA"), 42 U.S.C. §9601 et seq. The term "disposal" as used in RCRA and CERCLA is defined virtually identical to that in the SWMA:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. §6903(3); 42 U.S.C. §9601(29)

The Company cites a number of cases which it asserts stand for the proposition that the term "disposal" does not encompass the presence or movement of waste constituents in the environment: McClellan Ecological Seepage Situation v. Cheney, 763 F. Supp. 431 (E.D. Cal. 1980); Ecodyne Corporation v. Shah, 718 F. Supp. 1454 (N.D. Cal. 1980); In re Diamond Reo Trucks, Inc., 115 B.R. 559 (Bkrtcy. W.D. Mich. 1990); Nurad, Inc. v. William E. Hooper & Sons Co., No. WN-90-661 (D. Md., August 15, 1991).

DER, on the other hand, directs us to cases which it contends have adopted a broader definition of "disposal", authorizing the restraint of further leakage from previously disposed of waste: U. S. v. Waste Industries, Inc., 34 F.2d 159 (4th Cir. 1984); U. S. v. Price, 577 F. Supp. 1103 (D. N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982); Emhart Industries, Inc. v. Duracell International, Inc., 665 F. Supp. 549 (M.D. Tenn. 1987); CPC International, Inc. v. Aeroject-General Corporation, 759 F. Supp. 1269 (W.D. Mich. 1991).

We agree that the above-cited cases provide varying interpretations of what constitutes disposal under RCRA and CERCLA. However, even the cases cited by the Company do not lead us to the position the Company would have

us adopt. The court in McClellan found that a RCRA permit was not required with respect to leaking associated with a disposal unit where no treatment, storage, or disposal had occurred prior to November 19, 1980 (the effective date under RCRA) unless the leaked material were itself actively handled in some way. The court noted, though, that the corrective action authority under RCRA was broader than the scope of its permitting responsibilities, and applied to releases of hazardous waste without regard to the date of any waste management activities. McClellan, supra at 435.

The Ecodyne case dealt with the issue of who would bear the cost of cleaning chromium-polluted groundwater and soil in a parcel of property which had been previously owned by Ecodyne. In scrutinizing what was meant by "disposal" under CERCLA, the court interpreted "leaking" as meaning something more than a general migration of chemicals and requiring an active "placing" of the hazardous substances into the environment. Ecodyne, supra at 1457. However, the court also held that prior owners or operators could be held liable for the cost of clean-up under CERCLA where they owned the site at the time the hazardous substances were introduced into the environment. Id.

The cases cited by DER provide broader readings of what is meant by "disposal" under RCRA and CERCLA. The Court of Appeals for the Fourth Circuit, in Waste Industries, supra, overturned the lower court's holding that "disposal" under RCRA requires "active human conduct". In reaching this ruling, the court stated as follows:

> The inclusion of "leaking" as one of the diverse definitional components of "disposal" demonstrates that Congress intended "disposal" to have a range of meanings, including conduct, a physical state, and an occurrence. Discharging, dumping, and injection (conduct), hazardous waste reposing (a physical state), and movement of the waste after it has been placed in a state of repose (an occurrence) are all encompassed in the broad definition of disposal.

Waste Industries, supra at 164

In United States v. Price, 688 F.2d 204 (3d Cir. 1982), the Court of Appeals for the Third Circuit held that §7003 of RCRA, 42 U.S.C. §6973, could be applied to a dormant site if it posed a current threat to the environment or public health. Id at 214.

Turning to the SWMA, §602(b) holds in relevant part:

> (b) If the department finds that the storage, collection, transportation, processing, treatment, beneficial use or disposal of solid waste is causing pollution of the air, water, land or other natural resources of the Commonwealth or is creating a public nuisance, the department may order the person or the municipality to alter the storage, collection, transportation, processing, treatment, beneficial use or disposal systems to provide such storage, collection, transportation, processing, treatment, beneficial use or disposal systems as will prevent pollution and public nuisances.

35 P.S. §6018.602(b).

DER asserts that §602(b), when read in conjunction with the Price and Waste Industries definitions of "disposal", expressly provides authority for DER's action in this matter. DER also relies on §401(b) of the SWMA:

> (b) The storage, transportation, treatment, and disposal of hazardous waste are hereby declared to be activities, which subject the person carrying on those activities to liability for harm although he has exercised utmost care to prevent harm, regardless whether such activities were conducted prior to the enactment hereof.

35 P.S. §6018.401(b) (Emphasis added in DER's Memorandum in Opposition.)

We also note that some of the Company's activity was conducted after enactment of the SWMA. The parties state in their joint stipulation that the Company stored lead acid batteries at its site until December 1, 1986 (J.S. 12, 13), six years after the SWMA had been in effect.

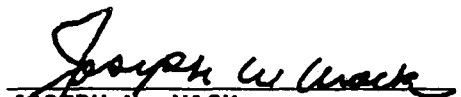
As noted at the outset of this discussion, summary judgment may be granted only where no material facts remain in dispute and the law on the issue is clearly in favor of the moving party. Summerhill Borough, supra. In addition, such motions must be viewed in a light most favorable to the non-moving party. Penoyer, supra.

After reviewing the above-cited cases and provisions of the SWMA, we cannot rule that the law is clearly in favor of the Company in this appeal. Moreover, questions of material fact remain in dispute with respect to the contamination of soil and groundwater at the site. Therefore, we cannot grant summary judgment to the Company on the issue of what corrective action DER may require it to take pursuant to the SWMA.

O R D E R

AND NOW, this 5th day of May, 1992, upon consideration of New Castle Junk Company's motion for summary judgment and DER's memorandum in opposition thereto, it is hereby ordered that the motion is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 5, 1992

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