Environmental Hearing Board

Adjudications and Opinions

2002 Volume II

COMMONWEALTH OF PENNSYLVANIA

George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2002

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2002.

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

ADJUDICATIONS

OPINIONS

2002 DECISIONS

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EAGLE ENVIRONMENTAL II, L.P. and CHEST TOWNSHIP	:	
v.	:	**EHB Docket No. 2001-198-MG (consolidated with 2001-201-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 4, 2002**

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board denies Appellant's motion for summary judgment which presents a challenge to the validity of 25 Pa. Code § 287.127(c), a Department regulation requiring the applicant for a residual waste landfill permit to identify the social and economic benefits created by the proposed landfill, and to demonstrate that those benefits clearly outweigh the known and potential environmental harms caused by the project. The Board upholds the validity and constitutionality of the challenged regulation. Chest Township's related cross-motion is denied because it turns on disputed issues of fact necessarily reserved for the hearing on the merits.

BACKGROUND

These appeals arise from issuance by the Department of Environmental Protection (DEP) to Eagle Environmental II, L.P. (Eagle) of a permit for the construction and operation of a residual waste landfill under 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 Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.101 *et seq.* (Act 101). The proposed landfill is to be located in Chest Township, Clearfield County, Pennsylvania.

Eagle's appeal, filed on September 4, 2001, objects to DEP's inclusion in the permit of Condition 22, which states as follows:

> The permittee, through submissions dated November 28, 2000, and January 21, 2001 . . . to the NCFO Waste Management Program, identified benefits as part of the harms and benefits analysis required by 25 Pa. Code § 287.127(c). The identified benefits of the project clearly outweigh the known and potential harms as referenced in the document prepared by the NCFO Waste Management Program entitled "Environmental Assessment: Identification and Evaluation of Known and Potential Harms Versus Known and Potential Benefits" January 23, 2001. The November 28, 2002, and January 21, 2001, submissions are incorporated as part of the permit application. Failure to provide for all benefits described in these submissions would invalidate the Harms/Benefits analysis and will be a violation of this permit.

See Eagle Motion for Summary Judgment, exhibit A, at 6. Third-party appellant Chest Township filed an appeal objecting on numerous grounds to DEP's issuance of the Eagle permit and, at the request of the parties, the two appeals were consolidated.

Eagle filed a motion for summary judgment on October 9, 2001, seeking a favorable judgment with respect to its objection to Condition 22 and with respect to certain objections raised by Chest Township's appeal. Eagle contends that Condition 22 is unlawful and unenforceable because the regulation upon which the permit condition is grounded—25 Pa. Code § 287.127(c)—is an invalid and unconstitutional exercise of the agency's executive power. The motion was duly opposed by DEP and Chest Township. In addition, Chest Township filed a cross-motion for summary judgment in which it argues that, if the Board holds § 287.127(c) invalid then the Board must revoke the Eagle permit because DEP's permit review process violated the strictures of the SWMA and the mandate of Article I, § 27 of the Pennsylvania

Constitution. An expedited briefing schedule was adopted, and the Board ordered oral argument on the motions. The Board also permitted the Pennsylvania Waste Industries Association to file an amicus brief and to participate in the oral argument held on December 12, 2001.

DISCUSSION

Eagle's motion presents a facial challenge to 25 Pa. Code § 287.127(c), which requires residual waste landfill applicants to provide information on the social and economic benefits purportedly created by the proposed landfill facility, and compels applicants to demonstrate that such benefits clearly outweigh environmental harms caused by the proposed facility before the applicant can receive a permit (the "harms/benefit test"). The harms/benefit test is contained in the regulations requiring the permit application for a residual waste disposal permit to prepare an environmental assessment. *See* 25 Pa. Code § 287.127(a). The applicant must first provide DEP with a detailed description of all environmental harms caused by the proposed project and a mitigation plan for each identified environmental harm:

> *Harms.* The environmental assessment shall describe the known and potential environmental harms of the proposed project. The applicant shall provide the Department with a written mitigation plan which explains how the applicant plans to mitigate each known or potential environmental harm identified and which describes any known and potential environmental harms not mitigated. The Department will review the assessment and mitigation plans to determine whether there are additional harms and whether all known and potential environmental harms will be mitigated. In conducting its review, the Department will evaluate each mitigation measure and will collectively review mitigation measures to ensure that individually and collectively they adequately protect the environment and the public health, safety and welfare.

25 Pa. Code § 287.127(b).

Eagle's challenge concerns § 287.127(c), which sets forth the harms/benefit test as follows:

> (c) *Noncaptive landfills, disposal impoundments and incinerators.* If the application is for the proposed operation of a noncaptive landfill, disposal

> impoundment or incinerator, the applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.

25 Pa. Code § 287.127(c).[1]

Eagle argues that § 287.127(c) is unlawful because: the requirements imposed by the regulation are not within the authority granted the Environmental Quality Board or DEP by the SWMA and Act 101; the regulation is not independently authorized by Article I, § 27 of the Pennsylvania Constitution; the regulation exceeds the Commonwealth's police power; and, the harms/benefit test is unconstitutionally vague and will necessarily result in arbitrary and capricious decisionmaking by the agency.

DEP's opposition first contends that Eagle lacks standing to make a facial challenge to the regulation because Eagle received a permit, is not harmed by insertion of Condition 22 into the permit, and has not been subjected to any enforcement action related to the permit condition. With respect to the substance of Eagle's challenge, DEP argues that § 287.127(c) is well within the implied authority granted by the underlying statutes, as discerned from the purposes and objectives explicitly stated in the SWMA and Act 101. In particular, DEP points to the statutory mandate to "implement Article I, Section 27 of the Pennsylvania Constitution," *see* 35 P.S. § 6018.102(10), and asserts that the challenged regulation constitutes a reasonable means of

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[1] Section 287.127(c) was published as a proposed rulemaking in 1998. *See* 28 Pa. Bull. 4073 (Aug. 15, 1998). According to the procedures established by the Regulatory Review Act, Act of June 25, 1982, P.L. 633, *as amended,* 71 P.S. §§ 745.1 *et seq.*, the proposed regulation was reviewed and approved by the Attorney General's Office, the Independent Regulatory Review Commission (IRRC), the Office of General Counsel, and the standing committees on energy and the environment in the General Assembly. Following public hearings and comment concerning the proposed regulation, DEP prepared written responses to comments, and then submitted the comment/response document and the final form regulations for another review by the IRRC and relevant committees in the House and Senate. The IRRC and the General Assembly standing committees approved the final form of § 287.127(c), and the regulation was published as a final rulemaking in January 2001. *See* 31 Pa. Bull. 235 (Jan. 13, 2001).

implementing the constitutional provision. DEP contests the movant's arguments on the scope of the Commonwealth's police power, and argues that the regulation is an appropriate and rational means of protecting the public health, safety and welfare. Finally, DEP asserts that the regulation provides fair notice of what is required, and is therefore not unconstitutionally vague on its face, and that the regulation can be applied by the agency in a consistent, predictable and fair manner.

I. Standard of Review

Pa. R. Civ. P. 1035.1-1035.5 govern the Board's consideration of motions for summary judgment. *See* 25 Pa. Code § 1021.73(b). The grant of summary judgment is proper when: (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after completion of discovery relevant to the motion, the party opposing the motion and bearing the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Jones v. SEPTA,* 772 A.2d 435 (Pa. 2001). The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts regarding existence of a genuine issue of material fact against the grant of summary judgment. *Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000).

II. Standing

At the outset, we address the issue of standing raised by DEP in opposition to Eagle's motion. "The purpose of the standing doctrine in the context of proceedings before the Board is to determine whether an appellant is the appropriate party to seek relief from an action of the Department." *Wurth v. DEP*, 2000 EHB 155, 170. In order to have standing to challenge an official order or action of an administrative agency, a party must be aggrieved. *Bankers Life and Casualty Company v. Unemployment Compensation Board of Review*, 750 A.2d 915, 917 (Pa.

Cmwlth. 2000). "In order to be 'aggrieved' a party must (a) have a substantial interest in the subject-matter of the litigation; (b) the interest must be direct; and, (c) the interest must be immediate and not a remote consequence." *Id.*; *see also William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 191-202 (1975); *City of Scranton v. DEP*, 1997 EHB 985, 990. The requirement of a "substantial interest" means that the individual's interest "must have substance—there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *William Penn Parking Garage, Inc.*, 464 Pa. at 195. Moreover, a party must show a "sufficiently close causal connection between the challenged action and the asserted injury" to qualify the interest as immediate rather than remote. *Bankers Life and Casualty Company*, 750 A.2d at 918.

DEP argues that Eagle has raised only a generalized grievance in challenging the validity of § 287.127(c) and has not demonstrated how it has been directly harmed by DEP's application of the challenged regulation. DEP points to the fact that during its permit review process DEP determined that Eagle had complied with the requirements of § 287.127(c) and Eagle was issued a permit. DEP also asserts that Eagle's fear of a possible future enforcement action and potential civil penalties if it fails to comply with Condition 22 is no more than a potential remote consequence and does not amount to a cognizable aggrievement sufficient to confer standing.

The posture of Eagle's appeal is somewhat awkward—an appeal of the denial of a permit application for failure to meet the harms/benefit test would certainly present a more clear-cut case. Eagle's motion adds confusion to the standing question by conflating the conveyance of benefits with the actual requirements imposed by § 287.127(c). The regulation requires only that the applicant identify the economic and social benefits which the proposed facility will provide, and then demonstrate that such benefits clearly outweigh the environmental harms caused by the

proposed facility. Unlike certain provisions in Act 101, the regulation does not require the applicant to confer benefits on anyone. *Cf.* 53 P.S. § 4000.1301-1305 (host municipality benefit fee); 53 P.S. §§ 4000.701-706 (charge per ton to subsidize Pennsylvania's recycling program). Thus far, DEP has applied the regulation to Eagle only during its permit review process by: (1) determining that Eagle's identification of the benefits was accurate and complete; (2) concluding that Eagle demonstrated that such benefits clearly outweighed the environmental harms; and (3) including Condition 22 in the Eagle permit. DEP concedes that Eagle has standing to file its appeal challenging a permit condition, but argues that Eagle does not have standing for the issue of the validity of § 287.127(c) because Eagle has not been harmed by DEP's application of the regulation to date. According to DEP, Eagle must await an enforcement action before it can legitimately claim to have been adversely affected, in a direct and immediate manner, by an application or enforcement of the challenged regulation.[2]

We believe that the imposition of Condition 22 into the permit adversely affects a substantial discernible interest of Eagle in a direct and immediate manner, and is sufficient to confer standing on the permittee for purposes of challenging the validity of the regulation upon which the permit condition is premised. Condition 22 describes the submissions made by Eagle to comply with § 287.127(c), incorporates the information in those submissions into the permit, and then explicitly states that a "[f]ailure to provide for all benefits described in these submissions would invalidate the Harms/Benefits analysis and will be a violation of this permit." The permittee is thus confronted with a quandary in light of the doctrine of administrative finality. Eagle must challenge the lawfulness of Condition 22 within 30 days of permit issuance

[2] The issue of the provision of benefits by Eagle would presumably arise in the context of an action to enforce the terms of Condition 22 in which DEP would allege that Eagle was, in fact, not providing the benefits described in its permit application materials and was thus violating the terms of its permit. DEP would then issue a compliance order, or perhaps suspend or revoke the permit, and Eagle would have the right to appeal such an enforcement action. *See* 35 P.S. § 7514; 25 Pa. Code § 1021.2(a).

or be barred from doing so in any subsequent proceeding related to a DEP enforcement action. *See, e.g., Lucchino v. DEP*, 1999 EHB 214, 220 (where a party is aggrieved by DEP administrative action and fails to pursue statutory appeal rights, neither the validity of DEP's action nor the regulation underlying it may be attacked in a subsequent administrative or judicial proceeding). Thus, while it is true that Eagle may never be subject to an enforcement action related to Condition 22, Eagle has a substantial, direct, and sufficiently immediate interest in the protection of its investment in the construction and operation of the landfill facility.

Condition 22 has effectively locked Eagle into the harms/benefit analysis conducted by DEP during the permit review process. In the event that unforeseen changes in circumstances cause a deviation in practice from the analysis submitted with the permit application, Eagle may be subjected to an enforcement action through no fault of its own. Eagle's only recourse to avoid potential loss of its permit, or suffer civil penalty assessments, was to challenge the agency's underlying authority to apply the harms/benefit test to its permit application. Eagle therefore had no choice but to immediately appeal the permit and object to inclusion of Condition 22. We do not believe that the standing doctrine would require Eagle to await an enforcement action and take the risk that a change in circumstances would excuse a deviation from the analysis submitted in its permit application. The permittee is not simply asserting the common interest of all citizens in procuring obedience to the law when it challenges the validity of § 287.127(c), *see William Penn Parking Garage, Inc.*, 464 Pa. at 192, but rather is asserting its right to a lawful permit review process in which it has a substantial interest at stake.[3]

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[3] We note that the *amicus* brief of the Pennsylvania Waste Industries Association shows that an early determination of the issue presented by Eagle's motion is important to the waste industry in Pennsylvania because of the impact on permit applications created by the harms/benefit test. Indeed, the Board has two other appeals before it where permits have been denied based on DEP's determination that the appellants failed to show that the benefits of their projects will clearly outweigh the environmental harms. *Alliance Sanitary Landfill v. DEP*, EHB Docket No. 2001-134-L; *Tri-County Industries, Inc. v. DEP*, EHB Docket No. 2001-252-R. Appellants in each of those cases have filed summary judgment motions claiming that the regulation challenged here is without legislative authority.

III. Section 287.127(c) is Within the Authority Granted by the SWMA and Act 101

Eagle argues that § 287.127(c) is void and unenforceable because the harms/benefit test is outside the scope of authority granted to the Environmental Quality Board (EQB) by the SWMA and Act 101. Our initial task is to determine whether § 287.127(c) was within the limits of the authority delegated to the agency by the legislature in these statutes.[4] We believe there is ample authority in the SWMA and Act 101 for the harms/benefit test.

The Pennsylvania Supreme Court has long recognized the distinction in administrative agency law between the authority of a rule adopted pursuant to an agency's legislative rule-making power and the authority of a rule adopted pursuant to an agency's interpretive rule-making power. *See Housing Authority of the County of Chester v. Pennsylvania State Civil Service Comm'n*, 556 Pa. 621, 634 (1999); *Girard School District v. Pittenger*, 481 Pa. 91, 94-95 (1978); *Uniontown Area School District v. Pennsylvania Human Relations Commission*, 455 Pa. 52, 75-77 (1973). The Court has explained the distinction and the standards of review pertinent to each type of regulation:

> The former type of rule is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body, and is valid and binding upon a court as a statute if it: (a) is within the granted power; (b) is issued pursuant to proper procedure; and (c) is reasonable. . . . A court, in reviewing such regulation, is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these powers have been exceeded in the field of action involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or lack of wisdom in exercising agency power is not equivalent to abuse. What has been ordered must appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment.

[4] Act 101 "shall be construed in pari materia with the Solid Waste Management Act," 53 P.S. § 4000.104(b), and "[s]tatutes in pari materia shall be construed together, if possible, as one statute." 1 Pa. C.S. § 1932(b).

Housing Authority of the County of Chester, 556 Pa. at 634-35 (citations omitted).[5]

Whether the challenged regulation is backed by legislative as distinguished from merely interpretative power is a question of whether or not it is issued pursuant to a grant of law-making power. *Uniontown Area School District*, 455 Pa. at 78. Here, the regulation at issue was adopted pursuant to the EQB's legislative rule-making power. Specifically, the SWMA provides, in pertinent part, that the EQB shall have the power to: "adopt the rules, regulations, criteria and standards of the department to accomplish the purposes and to carry out the provisions of this act, including but not limited to the establishment of rules and regulations relating to the protection of safety, health, welfare and property of the public and the air, water and other natural resources of the Commonwealth." 35 P.S. § 6018.105(a); *see also* 53 P.S. § 4000.302 (the EQB "shall have the power and its duty shall be to adopt the regulations of the department to accomplish the purposes and to carry out the provisions of this act").

Because § 287.127(c) is legislative in character, the regulation will be considered valid and binding if it: (a) is within the granted power; (b) was issued pursuant to proper procedure; and, (c) is reasonable. *Housing Authority of the County of Chester*, 556 Pa. at 635; *see also, e.g., Pennsylvania Medical Society v. Commonwealth*, 546 A.2d 720, 721-22 (Pa. Cmwlth. 1988); *Chambers Development Company, Inc. v. DER*, 545 A.2d 404, 407-08 (Pa. Cmwlth. 1988). Eagle does not assert any procedural irregularity, but contends only that the regulation at issue

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[5] An interpretive rule, on the other hand:

> depends for its validity not upon a *law*-making grant of power, but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets. While courts traditionally accord the interpretation of the agency charged with administration of the act some deference, the meaning of a statute is essentially a question of law for the court, and, when convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation.

Girard School District, 481 Pa. at 95 (footnote and citations omitted); *see also Borough of Pottstown and Pottstown Police Pension Fund v. Pennsylvania Municipal Retirement Board*, 551 Pa. 605, 610-11 (1998); *Jay R. Reynolds, Inc. v. Department of Labor & Industry*, 661 A.2d 494, 497 (Pa. Cmwlth. 1995).

was not within the power granted to the agency by the SWMA and Act 101. However, the legislature vested the EQB with broad rule-making authority to "accomplish the purposes" and "carry out the provisions" of the Acts.[6] Thus, we look to the purposes of the two statutes.

A. The Regulation is a Reasonable Means of Implementing Purposes of the SWMA and Act 101 Concerning Protection of the Public Health Safety and Welfare and Establishment of a Comprehensive Solid Waste Management Program

Essentially, the question is whether the harms/benefit test constitutes a reasonable means of implementing the purposes and provisions of the SWMA and Act 101 in the context of a landfill permit review process. Both the SWMA and Act 101 include an explicit statement of relevant legislative findings and the purposes and objectives of the acts. The SWMA provides in pertinent part:

> The Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and *economic loss*, and *cause irreparable harm to the public health, safety and welfare*, it is the purpose of this act to . . .
>
> (4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes; . . .
>
> (10) implement Article I, § 27 of the Pennsylvania Constitution;
>
> (11) utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective, comprehensive solid waste management program.

35 P.S. §§ 6018.102(4), (10), (11) (emphases added).

> Act 101 reiterates and augments the findings and purposes of the SWMA:
>
> The Legislature hereby determines, declares and finds that: . . .

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[6] Moreover, the SWMA provides that DEP shall have the power to: "regulate the storage, collection, transportation, processing, treatment and disposal of solid waste;" "issue permits, licenses and orders, and specify the terms and conditions thereof . . . to implement the purposes and provisions of this act and the rules, regulations and standards adopted pursuant to this act; and, "do any and all things not inconsistent with any provisions of this act, which it may deem necessary or proper for the effective enforcement of this act and the rules or regulations which may be promulgated hereunder . . . ." 35 P.S. §§ 6018.104(6), (7), (13); *see also* 53 P.S. § 4000.301(15).

> (7) It is appropriate to provide those living near municipal waste processing and disposal facilities with additional guarantees of the proper operation of such facilities and *to provide incentives for municipalities to host such facilities*. . . .
>
> (B) PURPOSE—It is the purpose of this act to: . . .
>
> (7) Establish a host municipality benefit fee for municipal waste landfills and resource recovery facilities that are permitted on or after the effective date of this act and *to provide benefits to host municipalities for the presence of such facilities*. . . .

53 P.S. §§ 4000.102(a)(7), 4000.102(b)(7) (emphases added); *see also* 53 P.S. §§ 4000.102(a)(1), (19); §§ 4000.102(b)(3), (5), (13).

It is clear from these provisions that the legislature has authorized the agency to specifically take economic and social considerations into account when implementing the desired objective of an effective, comprehensive solid waste management program. The acts explicitly recognize "economic loss" and "irreparable harm to the public health, safety and welfare" as effects of inadequate solid waste disposal practices. The legislature also directs the agency to "utilize, wherever feasible, the capabilities of private enterprise" in accomplishing the desired objectives, thus expressing a preference that the agency consider not only environmental harms, but also the promotion of economic interests when implementing the solid waste management program. *See also* 53 P.S. § 4000.507(a)(2)(iii) (when evaluating proposed location of municipal waste landfill facility consideration must be given to "environmental and economic factors").[7]

The agency is charged by the legislature with promulgating regulations to effectuate the purposes of the acts, among which is protection of the public health, safety and welfare from the

[7] Compare *Housing Authority of the County of Chester*, 556 Pa. at 635-37, where the Court upheld the validity of a State Civil Service Commission Management Directive requiring mandatory appointment preference for military veterans under certain circumstances as a means of effectuating a purpose of the Civil Service Act to establish conditions by which qualified persons of character and ability will be appointed on the basis of merit and fitness. According to the Court, through the provisions of the Military Affairs Act, the legislature had evidenced its belief that the unique experience acquired by veterans should be taken into account in determining the character and ability of applicants for civil service positions; the Management Directive consequently "reflected the will of the legislature that veterans be given mandatory preference in appointment when their names appear together with those of non-veterans on a list of eligibles." *Id.* at 636.

adverse effects of waste disposal practices. The "public health, safety and welfare" is broader in scope than prevention of environmental pollution or protection of the esthetic, natural, scenic and historic values of the environment. *See* 35 P.S. § 6018.302(b)(3) (unlawful for any person to design, construct, operate and maintain residual waste facilities in manner that adversely affects "public health, safety and welfare *or the environment*" or causes a public nuisance). It can hardly be disputed that the "public welfare" encompasses the social and economic impacts of proposed landfill facilities. *See, e.g.*, BLACK'S LAW DICTIONARY 1588 (7th ed. 1999) (defining "public welfare" as: "A society's well-being in matters of health, safety, order, morality, economics, and politics."). We believe that, in the context of a landfill permit review process, the harms/benefit test is a reasonable means of protecting the Commonwealth's citizens from the negative impact on a community—the "economic loss" and "irreparable harm" to the public welfare—caused by the construction and operation of a landfill facility. The harms/benefit test does nothing more than assure that a proposed facility will ultimately benefit the public, thereby providing a means for accomplishing the acts' purpose of protecting the public welfare from the adverse effects of solid waste disposal practices.[8]

Further, an express purpose of Act 101 is to "provide benefits to host municipalities" for the presence of landfill facilities, and the act finds it appropriate to "provide incentives for

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[8] The permittee and amicus argue that the harms/benefit test is not a proper form of "protection" of the public health, safety and welfare, and thus is not authorized by 35 P.S. § 6018.102(4) and 53 P.S. § § 4000.102(b)(3). We note that the terms and provisions of the SWMA and Act 101 "are to be liberally construed, so as to best achieve and effectuate the goals and purposes" of those statutes. 35 P.S. § 6018.901; 53 P.S. § 4000.104(a). We also fail to see the distinction sought to be drawn. The public good is protected in a myriad of ways, not all of which are negative prohibitions on conduct. Zoning law, for example, routinely imposes conditions on the use of property so as to preserve or protect the public health, safety and welfare. *See, e.g.*, *Anstine v. Zoning Bd. of Adjustment*, 411 Pa. 33, 37 (1963) (all property in this Commonwealth is held in subordination to the right of its reasonable regulation by the government, which regulation is clearly necessary to preserve the health, safety, morals or general welfare of the people). In any event, to show that the agency's power has been exceeded, "it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another." *Housing Authority of the County of Chester*, 556 Pa. at 635. While the harms/benefit test may not be the best means of protecting the public welfare from the adverse economic and social effects of solid waste disposal practices, it is a reasonably effective, and not unduly burdensome, means of accomplishing that statutory purpose.

municipalities to host such facilities." The question then is whether the harms/benefit test is a reasonable means of assuring that "benefits" are provided to municipalities hosting a residual waste landfill facility. We find that, by promulgating § 287.127(c), the agency reflected the will of the legislature that host municipalities obtain benefits, both social and economic, when a landfill facility is placed within the community. The regulation enables the agency to efficiently ascertain the types of benefits that a proposed facility will provide to the host community and to determine whether the facility will ultimately have a positive effect on the host municipality. Section 287.127(c) accordingly comes within the scope of Act 101's purpose of providing benefits to municipalities hosting landfill facilities. *Cf. Girard School District*, 481 Pa. at 93-99 (upholding validity of State Board of Education regulations pertaining to student conduct and discipline because Board was empowered to make rules establishing standards governing educational programs and matters of student conduct and discipline are embraced within concept of an educational program).

B. Section 287.127(c) Implements Article I, § 27 of the Pennsylvania Constitution as Mandated by the SWMA and Act 101

Further authority for § 287.127(c) is found in the express purpose of the SWMA and Act 101 "to implement Article I, § 27 of the Pennsylvania Constitution." 35 P.S. §§ 6018.102(10); 53 P.S. § 4000.102(b)(13). Article I, § 27 of the Pennsylvania Constitution (the "Environmental Amendment") states as follows:

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

PA. CONST. Art. I, § 27. We believe that, by including implementation of the Environmental Amendment as an express purpose of the acts, the legislature intended, in part, to direct the

agency to balance social and economic considerations with environmental protection when establishing a comprehensive solid waste management program and regulating solid waste disposal practices.[9]

In *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 468 Pa. 226 (1976), the Commonwealth Court was confronted with a challenge by private citizens to the proposed widening of a city street that passed through one side of River Common, a portion of the city dedicated as a public common by the state legislature in the nineteenth century. Among other grounds, the plaintiffs contended that their rights under the Environmental Amendment were violated by the proposed project. *Payne*, 312 A.2d at 93-96. In rejecting the plaintiffs' argument that Article I, § 27 should be read in absolute terms, the Commonwealth Court stated the following principle:

> We hold that [Article I,] Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.
>
> We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of *weighing conflicting environmental and social concerns* in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historic resources.
>
> Judicial review of the endless decisions that will result from such a *balancing of environmental and social concerns* must be realistic and not merely legalistic.

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[9] Faced with the broad mandates and substantive principles expressed by this constitutional provision, it is not readily apparent what particular, limited, ways the legislature intended for the agency to "implement" the Environmental Amendment within the context of regulating solid waste disposal practices. *See generally* John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693 (1999) (explicating the two separate parts of Article I, § 27, the first creating a public right in a decent environment, the second creating a separate public right in the conservation and protection of "public natural resources"). However, we reject the assertion that the legislature contemplated no rule-making or enforcement role for the agency as part of the implementation of the Environmental Amendment, but was rather merely stating that the SWMA itself was the complete implementation of a broad substantive amendment to the Pennsylvania Constitution.

Payne, 312 A.2d at 94 (emphases added); *see also Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 895 (Pa. Cmwlth.), *aff'd*, 454 Pa. 193 (1973). In affirming the Commonwealth Court's decision, the Pennsylvania Supreme Court reiterated that the Environmental Amendment must be read, not in absolute terms, but as involving a balancing of the values and obligations set forth in the Environmental Amendment with other, potentially conflicting, public benefits:

> The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people. . . . *It is manifest that a balancing must take place* . . . .

Payne, 468 Pa. at 273 (citation omitted) (emphasis added).

Subsequent caselaw refined the balancing principle into a requirement that the agency balance the environmental harms with the social and economic benefits of a proposed project as part of the agency's review process. *See, e.g., Concerned Citizens for Orderly Progress v. DER*, 387 A.2d 989, 993-94 (Pa. Cmwlth. 1978) (where the "required balancing of social and economic benefits against environmental harm" was not conducted by DER, Commonwealth Court conducted its own examination of the record and determined that the environmental impact of the project would be negligible while the "social and economic benefits appear to be significant," and thus refrained from remanding the case); *Swartwood v. DER*, 424 A.2d 993, 996 (Pa. Cmwlth. 1981) (EHB found that DER "failed to perform the required balancing of social and economic benefits against environmental harm"; EHB properly conducted its own examination of the record and rightfully concluded that "the environmental impact of the proposed projects would be negligible, while the social and economic benefits appeared to be significant"); *Pennsylvania Environmental Management Services, Inc. v. DER*, 503 A.2d 477, 480 (Pa. Cmwlth. 1986) (stating that the Environmental Amendment "*mandates a balancing* of

environmental and social concerns" and holding that "DER must *balance* the regionwide benefits which would result from operation of the urgently needed landfill against the environmental harm it threatens").

Thus, in order to effectuate the legislature's intention to "implement Article I, Section 27" in the context of the landfill facility permit review process, the agency must balance the economic and social effects resulting from the proposed facility with any environmental harms caused by the proposed land use. A regulation requiring residual waste landfill permit applicants to demonstrate that the social and economic benefits of the proposed facility clearly outweigh the environmental harms created by such facility is a reasonable means of effectuating this purpose of the SWMA and Act 101.[10]

C. The Regulation Does Not Constitute a Basic Policy Decision

Eagle argues that if the Board interprets SWMA and Act 101 in a manner that authorizes the harms/benefit test of § 287.127(c), such an interpretation would place the constitutionality of those statutes in doubt because, they assert, the regulation embodies a "substantive enactment," or a "basic policy decision." *See Ruch v. Wilhelm*, 352 Pa. 586, 592-93. The Legislature may delegate policy making authority to an administrative agency, "so long as the Legislature makes the 'basic policy choices' and establishes 'adequate standards which will guide and restrain the

[10] Amicus argues that § 287.127(c) is outside the scope of the acts, with respect to implementation of the Environmental Amendment, because the form of the regulation does not fit the precise formulation of a three-part test enunciated by the Commonwealth Court in *Payne*. *See Payne*, 312 A.2d at 94. We reject this argument for several reasons. First, the statutory mandate of the SWMA and Act 101 is to implement the principles and obligations of Article I, § 27, not the three-part test set forth in *Payne*. In other words, the implementation of a constitutional provision is not coterminous with the three-part *Payne* test. Indeed, the Supreme Court did not adopt the test, but merely noted that "the Commonwealth Court, in fashioning a threepart test to determine whether Article I, § 27 has or has not been observed, requires nothing more in this case than does normal appellate review of Penn DOT's actions under Act 120." *Payne*, 468 Pa. at 273 n.22. Second, the three-part test expresses only a standard for judicial review of agency decision-making; the question here involves an *ultra vires* challenge to a regulation imposing a substantive requirement on landfill permit applicants. Finally, the Commonwealth Court actually held in *Payne* that "the environmental harm and adverse effect of the River Street project on public natural resources are clearly outweighed by the public benefits to be derived from the project" and consequently concluded that the project was not constitutionally impermissible. *Payne*, 312 A.2d at 96. This formulation of the balancing principle is mirrored by the regulation challenged here.

exercise of the delegated administrative functions.'" *Sullivan v. Department of Transportation*, 550 Pa. 639, 646 (1998) (quoting *Gilligan v. Pennsylvania Horse Racing Comm'n*, 492 Pa. 92, 96 (1980)). According to Eagle, the harms/benefit test is a basic policy choice which cannot be delegated by the Legislature to an administrative agency without conflicting with the separation of powers mandated by the Pennsylvania Constitution.[11] Eagle asserts that, if the Board adopts a statutory construction which authorizes §287.127(c), the Board thereby necessarily calls into question the constitutionality of the underlying statutes. The question thus arises whether the harms/benefit test is the kind of decision that has been considered a "basic policy decision" (or "substantive enactment") by the Pennsylvania courts.

In *Ruch*, the Court considered an interpretation of a regulation which would effectively place members of the State Police force under civil service protection by requiring a hearing and filing of charges as a prerequisite to dismissal by the Commissioner. In the absence of express statutory language in the statute, the Court rejected an interpretation which would allow a regulation placing fundamental restrictions on the at-will employment status of state police officers. *Ruch*, 352 Pa. at 588-92. According to the Court, "[e]stablishing restrictions on the common law right to discharge employes is a matter of substantive enactment, and the legislature cannot delegate to the Commissioner the power to make what amounts to such an enactment through the medium of 'rules and regulations.'" *Id.* at 592. Thus, a legislative incursion on the at-will employment status of a selected group of workers—the principle of at-will employment being a fundamental tenet of Commonwealth employment law and an integral aspect of our economic system—was considered a substantive enactment reserved for the Legislature.

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[11] Article II, § 1 of the Pennsylvania Constitution provides that "the legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives." Article III, § 1 states that "no law shall be passed except by bill . . . ." In light of these provisions, "it is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority." *Gilligan*, 492 Pa. at 95.

In the *Sullivan* case, the Court examined the Commonwealth's entry into the Drivers License Compact of 1961, a "contractual agreement among states intended to promote compliance with each party state's driving laws and regulations." *Sullivan*, 550 Pa. at 642. The Court held that the Legislature could not delegate to the Department of Transportation Secretary the power to bind the Commonwealth to the interstate compact. *Id.* at 648. The basic policy decision reserved for the Legislature in *Sullivan* involved fundamental principles of state sovereignty and comity among the States. Similar issues were involved in *Chartiers Valley Joint Schools v. Allegheny Cty. Bd. of School Directors*, 418 Pa. 520 (1965). There, the basic policy choices were a decision to expeditiously reorganize the administrative units of the Commonwealth's public school system in the direction of fewer and larger administrative units, and to provide a means for accomplishing such reorganization. *Id.* at 527-33.[12]

It is apparent from our review of the relevant caselaw that the harms/benefit test does not rise to the level of a "basic policy choice." In the SWMA, the Legislature's decision to permit the use of private land for landfill facilities—subject to restrictions necessary to protect the public health, safety and welfare and the environment from the adverse effects of waste disposal—was a basic policy choice. That decision harmonized and reconciled constitutional provisions regarding private property with Article I, § 27, and significantly augmented the Commonwealth's law of public nuisance. *See* 35 P.S. § 6018.607 (act provides legal remedies to control solid waste handling additional and cumulative to those currently existing). The Legislature also decided that a comprehensive waste management program should be established

[12] *See also Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 9-10 (1975) (basic policy was to assist nursing homes throughout Pennsylvania that do not comply with Life Safety Code, and are unable to achieve compliance through private funding sources, by means of loans made by agency for repair and reconstruction while exercising prudence for protection of loan fund); *Pennsylvania Medical Society*, 546 A.2d at 723 (basic policy decision was to provide for the proper licensing of medical practitioners by duly constituted Boards which could, by administrative regulation, establish standards of care and conduct by practitioners).

and expressed its preference that the program should encourage private enterprise and the development of resource recovery as a means of managing solid waste, conserving resources, and supplying energy. *See* 35 P.S. §§ 6018.102(2), (11). Simply requiring a landfill permit applicant to demonstrate that the social and economic benefits of its proposed facility will clearly outweigh the unmitigated environmental harms as a prerequisite to obtaining a permit, in our view, does not involve the kinds of fundamental principles at issue in basic policy choices reserved for the legislature.

IV. The Commonwealth Police Power

Eagle also makes a rather convoluted argument with respect to the Commonwealth's general police power. The permittee appears to be arguing that, if the Board construes the SWMA as authorizing § 287.127(c), then the statute would exceed the Legislature's police power, because it would be permitting an unconstitutional taking of property without just compensation. DEP controverts Eagle's assertion, and, without clearly stating that an administrative agency may promulgate regulations solely pursuant to the state's police power, argues that the regulation is a reasonable means of implementing the police power.

We fail to see the relevance of Eagle's police power argument in the context of an *ultra vires* challenge to an administrative agency regulation. A legislative regulation is valid if it is within the confines of the statute being implemented, issued pursuant to proper procedure, and reasonable, *Housing Authority of the County of Chester*, 556 Pa. at 634-35, and we have determined that the regulation meets this test. The *Legislature* acted pursuant to the police power when enacting the SWMA and Act 101, *see* 53 P.S. § 4000.104(a)(18) (Act 101 was enacted pursuant to the "police power to protect the health, safety and welfare of the citizens" of the Commonwealth). Thus Eagle's police power argument is more properly made in the context of a challenge to the constitutionality of those statutes. *See Adams Sanitation Company, Inc. v.*

DEP, 552 Pa. 304 (1998). Eagle has not challenged the Legislature's authority under the police power to assess a host benefit fee on landfill operators in Act 101, *see* 53 P.S. § 4000.1301-1305, or to similarly require landfill operators to pay a per-ton charge to subsidize Pennsylvania's recycling program, *see* 53 P.S. §§ 4000.701-706; nor has Eagle challenged any action by DEP to enforce those statutory provisions in the context of the motion presently before the Board.

Eagle's argument also blurs the distinction between the requirement of the regulation—demonstrate that the social and economic benefits of the facility clearly outweigh the unmitigated environmental harms—and a requirement that a landfill applicant convey economic benefits to a third party as a condition of using its real property for a landfill facility. This distinction is critical. Section 287.127(c) merely requires landfill applicants to identify the social and economic benefits that the proposed facility will provide as a result of its operation (e.g., supplying needed waste disposal capacity, providing additional tax revenue and good jobs, the host municipality benefit fee), and then demonstrate that such benefits will outweigh the environmental harms remaining after mitigation measures have been implemented. The regulation does not impose a tax, force the landowner to provide a public easement as a condition for developing its property, or prevent the landowner from making any beneficial use of his property. Thus, Eagle's arguments concerning an alleged unconstitutional taking of property by the harms/benefits regulation are misplaced.

In any event, the broad scope of the police power supports the Board's interpretation of the SWMA's mandate to protect the "public health, safety and welfare" from the adverse effects of solid waste handling as authorizing the harms/benefit test. *See, e.g., Adams Sanitation Company, Inc.*, 552 Pa. at 313 (a state's police power allows it to "promote the public health, morals or safety and the general well-being of the community"); *Commonwealth v. Barnes &*

Tucker Company, 472 Pa. 115, 123 (1977) ("The police power is the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare. It has long been recognized that property rights are not absolute and that persons hold their property subject to valid police regulation, made, and to be made, for the health and comfort of the people"); *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 93 (1973) ("A State in the exercise of its police power may, within constitutional limitations, not only suppress what is offensive, disorderly or unsanitary, but enact regulations to promote the public health, morals or safety and the general well-being of the community."); *White's Appeal*, 287 Pa. 259, 264 (1926) (police power "controls the use of property by the owner, for the public good, its use otherwise being harmful").

V. The Regulation is Not Unconstitutionally Vague

Eagle argues that the requirement in § 287.127(c) that applicants demonstrate that the social and economic benefits of a proposed landfill facility clearly outweigh the potential and known environmental harms is unconstitutionally vague and therefore violates Eagle's right to due process of law. More specifically, Eagle contends that the terms of the regulation are so vague and ambiguous that a regulated entity is not provided with reasonable notice of what is expected in order to comply with the regulatory requirement. The permittee also argues that the regulation is inherently arbitrary, standardless, and vests virtually unlimited discretion in the agency reviewer, thus guaranteeing arbitrary and discriminatory enforcement.

A vagueness challenge is in reality a due process challenge under the Fifth Amendment. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982); *Commonwealth v. Stenhach*, 514 A.2d 114, 124 (Pa. Super. 1986). "Whether a statute (or, as here, an administrative regulation) is vague or ambiguous is a matter of law to be determined from the face of the statute or regulation itself." *Commonwealth v. Stein*, 519 Pa. 137, 144

(1988); *see also Keeffe v. Library of Congress*, 588 F. Supp. 778, 789 (D.D.C.), *aff'd in part, rev'd in part*, 777 F.2d 1573 (D.C. Cir. 1984) (vagueness inquiry "applies with equal force to regulations as it does to statutes"). Vague regulations deny due process in two ways: "they do not give fair notice to people of ordinary intelligence that their contemplated activity may be unlawful, and they do not set reasonably clear guidelines for law enforcement officials and courts, thus inviting arbitrary and discriminatory enforcement." *Park Home v. City of Williamsport*, 545 Pa. 94, 101 (1996).[13]

In reviewing a void for vagueness challenge, the Board must consider both the essential fairness of the law and the impracticability of drafting legislation with greater specificity. *Fabio v. Civil Service Commission*, 489 Pa. 309, 314-15 (1980). Moreover, the standards for evaluating vagueness should not be mechanically applied. As the Supreme Court has previously explained:

> The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Village of Hoffman Estates, 455 U.S. at 498 (footnotes omitted). Finally, although initially a law may appear vague on its face and those subject to it without fair notice, the law may nevertheless withstand constitutional challenge "if it has been narrowed by judicial interpretation, custom and

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[13] In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Supreme Court enunciated the standards for evaluating vagueness:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Id. at 108-09.

usage." *Fabio*, 489 Pa. at 315. After careful review, we conclude that the regulation possesses the requisite degree of specificity such that it is not unconstitutionally vague.

A. The Terms of the Regulation Provide Regulated Entities With Sufficient Notice

Despite Eagle's objections to the contrary, the terms of the regulation provide the regulated business community with reasonable notice of what is required to meet the harms/benefit test. Eagle specifically takes issue with the terms "social and economic benefits," and "potential" as opposed to "known" environmental harms.

We do not find the term "social and economic benefits" to be a nebulous or novel concept. In *Fabio*, the Pennsylvania Supreme Court held that the term "conduct unbecoming an officer"—the offense for which the appellant was dismissed from his job—was not unconstitutionally vague because of the longstanding, continuous and pervasive use of that term. *Fabio*, 489 Pa. at 314-17. Similarly, the content of the terms "social and economic benefits" has been filled out by longstanding custom and usage. Indeed, the economic costs and benefits of particular activities are the constant subject of discussion in our pluralistic society in numerous forums, and cost/benefit analysis pervades our democratic and economic institutions. The operation of a solid waste landfill facility is undoubtedly a socially controversial business; individual participants in the waste industry are necessarily aware of the various economic and social costs and benefits associated with their particular business enterprise.

Moreover, the regulated enterprise has the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. DEP has issued a guidance document which provides specific examples of social and economic benefits. *See* DEPARTMENT OF ENVIRONMENTAL PROTECTION, ENVIRONMENTAL ASSESSMENT PROCESS, PHASE I REVIEW (Guidance Policy Doc. No. 254-2100-101, Feb. 7. 1997). The landfill permit application process is a technically complex process which involves ample consultation between applicant and

agency. In the event that a landfill permit applicant has questions concerning the precise scope of the term, the regulated entity has available avenues for obtaining clarification so that it may conform its conduct accordingly.

Nor do we consider the term "potential" environmental harm to be problematic. Common usage sufficiently defines the term. *See, e.g., Andrejco v. Pennsylvania Public Utility Commission*, 531 A.2d 115, 118 (Pa. Cmwlth. 1987) (examining common usage of term "incompatible" as found in dictionary definition and concluding that term was sufficiently precise in context of conflict of interest provision); *Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997) (concluding that term "maintained" in context of regulation requiring mine structures to be "maintained in good repair to prevent accidents and injuries to employees" was sufficiently specific based on common dictionary usage). "Potential" means "existing in possibility: having the capacity or a strong possibility for development into a state of actuality." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1775 (1986). It is apparent that the term is being used as a means of encompassing all of the identifiable environmental harms that may result from the construction and operation of the proposed landfill facility. Moreover, § 287.127(a) specifies the types of environmental impacts which must be considered in the applicant's environmental assessment. *See* 25 Pa. Code § 287.127(a). The solid waste industry has been subject to strict environmental regulation for decades, and surely understands the types of environmental harms that may result from landfill facilities.

B. The Regulation is Not, as a Matter of Law, Incapable of Rational Application

To satisfy constitutional principles of due process, the regulation must set reasonably clear guidelines or standards for those agency officials charged with applying and enforcing the law at issue, thus preventing arbitrary and discriminatory enforcement. The permittee claims

that § 287.127(c) provides insufficient standards for enforcement, is incapable of objective application, and will effectively guarantee subjective, *ad hoc*, decisionmaking by the agency.

The motion effectively challenges the regulation as unduly vague *on its face*; no evidence has been introduced to indicate whether the regulation has been enforced in an arbitrary manner. To succeed on this claim, the permittee "must demonstrate that the law is impermissibly vague *in all of its applications*." *Village of Hoffman Estates*, 455 U.S. at 497 (emphasis added). Moreover, in reviewing a business regulation for facial vagueness, the principal inquiry is whether the law affords fair warning of what is required or proscribed. *Id.* at 503. In our view, the language of the regulation is sufficiently clear that the speculative danger of arbitrary enforcement does not render the regulation void for vagueness.

The risk of arbitrary enforcement of § 287.127(c) by the agency is not insignificant. The rule imposed by § 287.127(c)—demonstrate that the social and economic benefits of its proposed facility "clearly outweigh" the environmental harms—is complex and its application in a uniform, consistent and predictable manner presents a challenge for DEP. *Cf. Jefferson County Commissioners v. DEP*, EHB Dkt. No. 95-097, slip op. at 95-99 (Adjudication issued Feb. 28, 2002) (discussing difficulties in rationally applying need/harms test required by 25 Pa. Code § 271.201(a)(3) (1995) to municipal waste landfill permit application). Characterizing a particular activity as an economic benefit or an environmental harm poses difficulties. Whether an activity is considered an economic benefit or an environmental harm often depends upon the perspective and interests of the stakeholder; for example, the equipment operator employed by the facility may well have a different view on harms/benefits than a landowner adjacent to the facility. Simply deciding whether an activity constitutes an economic benefit or an economic cost can present its own set of complicated judgments.

Valuation of harms and benefits raises similar questions. There is a legitimate concern that a permit reviewer may have a tendency to lessen the gravity of the social and economic benefits created by the proposed landfill facility, or, conversely to weigh the environmental harms more heavily—thus ratcheting up the level of benefits necessary to "clearly outweigh" environmental harms—in those host communities where substantial opposition to the proposed landfill has been expressed to the agency through the local municipal involvement process.

Nevertheless, we are not prepared to conclude, as a matter of law, that the harms/benefit regulation is incapable of being applied in a rational manner, or that the risk of arbitrary and capricious decisionmaking by the agency renders the regulation unconstitutional on its face. "Where an agency, acting pursuant to delegated legislative authority, seeks to establish a substantive rule creating a controlling standard of conduct, it must comply with the provisions of the Commonwealth Documents Law. . . . Such substantive regulations, sometimes known as legislative rules, when properly enacted under the Commonwealth Documents Law, have the force of law . . . and enjoy a general presumption of reasonableness." *Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, 551 Pa. 605, 609-10 (1998) (citation omitted); *see also DER v. Locust Point Quarries, Inc.*, 483 Pa. 350, 360 (1979).

It would be impracticable for the agency to write the regulation with further specificity. The agency has previously adopted a guidance policy pertinent to the harms/benefit test, and we do not assume that the agency will take no further steps to minimize the dangers of arbitrary enforcement by clarifying its interpretation of "clearly outweigh" and its manner of ascribing weight to particular harms and benefits. *Cf. Village of Hoffman Estates*, 455 U.S. at 504 ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative

regulations will often suffice to clarify a standard with an otherwise uncertain scope."). In addition, judicial applications of harms/benefit balancing help to define the standard. *See, e.g.*, *PEMS*, 503 A.2d at 480 (discussing factors to be considered when balancing harms and benefits); *cf. Fabio*, 489 Pa. at 317 (courts' continuing construction of the phrase 'conduct unbecoming an officer' has resulted in refining the offense to a clearly discernible standard). Finally, the concept of weighing benefits against harms, pros and cons, is a common normative standard. A business person of ordinary intelligence, accustomed to performing cost/benefit analyses in varied circumstances, will be fairly apprised of the standard governing the agency's decisionmaking.[14]

We are not persuaded that Eagle has shown that the harms/benefit regulation, on its face, is constitutionally infirm. Rather, we believe that DEP's application of this regulation should be examined by the Board on a case-by-case basis. *See Village of Hoffman Estates*, 455 U.S. at 504 (although it is possible that specific future applications "may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise"). In the light of the evidence presented at a merits hearing, the Board can thoroughly examine whether the agency's application of § 287.127(c) to the specific facts and circumstances of the appeal under review was reasonable, appropriate and not otherwise contrary to law. *See Smedley v. DEP*, EHB Dkt. No. 97-253-K, slip. op. at 30 (Adjudication issued Feb. 8, 2001) (the Board reviews DEP final actions to determine, based on the evidence presented to the Board, whether those actions conformed with applicable law and were reasonable and appropriate).

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[14] See *Park Home*, 545 Pa. at 837-39, where the Court examined a vagueness challenge to a statute governing the demolition of structures. The statute provided that a governing body deciding whether to certify a structure for demolition "shall consider the effect which the proposed change will have upon the general historic and architectural nature of the district." *Id.* at 838. The Court rejected the claim that the statute did not contain sufficiently definite standards and invited arbitrary enforcement. According to the Court, the statute set forth reasonably defined limits because matters not pertinent to the preservation of the historic aspect and nature of the district, and modifications which could not be seen from a public street, could not be considered. The Court concluded that such considerations as "general design, arrangement, texture, material and color of the building or structure and the relation of such factors to similar features of buildings and structures in the district" provided sufficient notice to property owners as to what would guide a governing body's decisionmaking process. *Id.* at 838-39.

Accordingly, we conclude that § 287.127(c) is a valid and constitutional exercise of the authority granted to the agency pursuant to the SWMA and Act 101. The regulation is within the confines of the statutes, was promulgated in accordance with proper procedures, and is a reasonable means of implementing the purposes and objectives of Act 101 and the SWMA. Consequently, we will deny Eagle's motion for summary judgment.

We also deny Chest Township's cross-motion for summary judgment. The cross-motion was conditioned on our holding the regulation invalid. Moreover, the cross-motion in part asserted that DEP's application of the harms/benefit test allowed levels of environmental pollution that do not adequately protect the environment and, in the absence of balancing harms and benefits, the proposed facility was not mitigating environmental harms to a point required by law. These contentions raise material issues of fact regarding the application of § 287.127(c) during the permitting process which must be reserved for a hearing on the merits.

For the reasons set forth above, we issue the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL II, L.P. and CHEST TOWNSHIP	:	
v.	:	**EHB Docket No. 2001-198-MG (consolidated with 2001-201-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

And now this 4th day of April, 2002, it is hereby ORDERED as follows:

1. The motion for summary judgment of Eagle II is **DENIED**.

2. The motion for summary judgment of Chest Township is **DENIED**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

The concurring opinion of Administrative Law Judge George J. Miller, and the dissenting opinion of Administrative Law Judge Bernard A. Labuskes, Jr., are attached.

EHB Docket No. 2001-198-MG
(consolidated with 2001-201-MG)

Dated: April 4, 2002

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL II, L.P. and CHEST TOWNSHIP	:	
v.	:	**EHB Docket No. 2001-198-MG (consolidated with 2001-201-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF ADMINISTRATIVE LAW JUDGE GEORGE J. MILLER

While I concur in the Board's Opinion, I want to express separately the reasons for my opinion that the General Assembly has made the basic policy choice to authorize the Environmental Quality Board to adopt, and the Department to apply, the "benefit" portion of the regulation challenged in this case. I believe this question must be considered in the context of the historical chronology of the development of environmental law in Pennsylvania prior to the enactment of the SWMA. At the very beginning of the "environmental revolution", on May 18, 1971, the Commonwealth's Constitution was amended to grant "environmental rights" as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[1]

This constitutional amendment created competing duties for the Commonwealth in the conservation and maintenance of the Commonwealth's public natural resources for the benefit of all the people. In 1973, the Commonwealth Court, recognizing these

[1] PA. CONST. Art. I, § 27.

competing duties, interpreted this Constitutional provision to allow controlled development even though that would permit some environmental harm. In that case, the project was a proposed road widening that would encroach upon a public common of historical significance. The court recognized that giving effect to a concept of controlled development of public resources while at the same time giving effect to a public trust concept to the management of natural resources in Pennsylvania would require careful balancing. The Court said:

> We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.[2]

As a guide as to how compliance with this Constitutional provision is to be measured, the Court adopted a three part rule requiring a determination:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which would result from the challenged decision or action so clearly outweigh the benefits to be derived there from that to proceed further would be an abuse of discretion?[3]

Five years before the enactment of the SWMA the Commonwealth Court upheld the propriety of the Department making decisions based on a balancing of harms and benefits, but limited the type of harms that may be considered to direct environmental harms not including more remote land planning considerations in the province of municipal authorities. In *Community College of*

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[2] *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973).

[3] *Payne*, 312 A.2d at 94. While the Supreme Court affirmed this decision based on compliance with the requirements of the Transportation Department's enabling legislation requiring consideration of alternatives, *Payne*, 361 A.2d 273 (1976), the Commonwealth Court continued to approve the Department's balancing of harms and benefits in its permitting activities until well after the enactment of SWMA.

Delaware County v. Fox,[4] the Department had issued a sewage construction permit to the appellants. This Board vacated the permit based on the theory that the issuance of the permit would result in the loss of the opportunity to retain some or all of the area as open space. The Court reversed because the Clean Streams Law had been complied with and the immediate environmental incursion which would result from construction would be kept to a minimum as was necessary under the second of the *Payne* standards. In addition, the Court said that its own review of the record indicated that the benefits of the proposed sewer expansion are substantial when viewed from the almost negligible direct environmental harm which will result from the sewer construction, a test required under the third of the *Payne* standards.[5]

Among the SWMA's legislative findings and declarations of policy when it was enacted in 1980 are the following:

> The legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:
>
> (3) require permits for the operation of municipal and residual waste processing and disposal systems...;
>
> (4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes;
>
> (5) provide a flexible and effective means to implement and enforce the provisions of this act;
>
> (10) implement Article I, section 27 of the Pennsylvania Constitution.[6]

[4] 342 A.2d 468 (Pa. Cmwlth. 1975).
[5] *Fox*, 342 A.2d at 482.
[6] 35 P.S. §6018.102.

This history of the application of Article 1, Section 27 of the Constitution combined with this legislative statement of purpose means that the legislature intended to continue to authorize the Department and other relevant agencies of the Commonwealth to adopt or apply a rule of balancing direct environmental harms and benefits.

Subsequent decisions of the Commonwealth Court also support the conclusion that the Department had the duty to balance harms and benefits, including economic considerations in its permit actions under the SWMA. In *Pennsylvania Environmental Management, Inc. v. Department of Environmental Resources,*[7] the Commonwealth Court held that the Department erred in denying a permit to the appellant because it failed to consider the benefit of the proposed landfill to the area in which the landfill was to be located and remanded the case for further fact finding proceedings properly balancing environmental and social concerns. The Court further defined the meaning of the Constitutional provision by directing that a number of economic considerations relating to nearby landowners and the adequacy of public highways be considered on remand.[8]

Nothing in the Commonwealth Court's opinion in *National Solid Waste Management Association v. Casey*[9] leads me to believe that either the EQB or the Department are now barred from promulgating a regulation or applying a harms/benefit test as they have proceeded to do in adopting and applying the regulation challenged here. In *Casey* the Governor issued an Executive Order that required the Department of Environmental Resources to stop reviewing applications or issuing permits for new municipal waste facilities, except in certain limited situations, until the Governor established a Municipal Waste Management Plan for the

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[7] 503 A.2d 477 (Pa. Cmwlth. 1986).

[8] *Pennsylvania Environmental Management Services, Inc. v. Department of Environmental Resources,* 503 A.2d 477, 480 (Pa. Cmwlth. 1986).

[9] 600 A.2d 260 (Pa. Cmwlth. 1991).

Commonwealth. The Court held the executive order to be invalid because it conflicted with the provisions of the SWMA and Act 101 and the regulations promulgated under those Acts. The Court firmly rejected the claim that the Governor's action was justified by a balancing of harms and benefits under Article I, Section 27. The Court said:

> The balancing of environmental and societal concerns, which the Commonwealth argues is mandated by Article I, Section 27 of the Constitution, was achieved through the legislative process which enacted Acts 97 and 101 and which promulgated the applicable regulations. Article I, Section 27 does not give the Governor the authority to disturb that legislative scheme. Neither does it give him the authority to alter DER's responsibilities pursuant to that scheme.[10] (emphasis supplied)

Significantly, the Court cited its decision in *Community College of Delaware County v. Fox*[11] as authority with respect to DER's responsibilities. As noted above, that decision required the Department to balance direct environmental harms and benefits in its permitting decisions, but held that it could not consider remote land planning benefits in the primary jurisdiction of municipal authorities.

Nothing in the *Casey* decision indicates that the regulatory program mandated by the SWMA was to be limited to the precise terms of the SWMA or to only the then-existing regulations promulgated under the authority of the SWMA. Indeed, the Court's language in *Casey* describes the SWMA as the General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of solid waste.[12] The Court's language joining the statute and the regulations promulgated thereunder must also be taken to mean that further regulations adopted as part of the intent to regulate every aspect of the disposal of solid waste must be a part of the continuing regulation of solid waste.

I also see nothing in the general principles of delegation of powers to indicate that the

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[10] *Casey*, 600 A.2d at 265.
[11] *Id.* at 265, *citing Community College of Delaware County v. Fox,* 342 A.2d 468 (1975).
[12] *Casey*, 600 A.2d at 265 (Pa. Cmwlth. 1991).

General Assembly's delegation of broad powers to regulate every aspect of solid waste disposal is improper. It is unquestionably true that basic policy choices must be made by the General Assembly. However, it may delegate the power and authority to execute or administer a law by imposing primary standards and imposing on others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation.[13]

I also find no support for the Permittee's argument that the SWMA does not provide an adequate delegation of power to adopt and apply the contested regulation requiring a balancing of harms and benefits. The SWMA's legislative findings and policy refer to economic loss caused by waste practices and specifically state that a purpose of the SWMA is to protect the public health, safety and welfare from the short and long term dangers of transportation processing, treatment, storage and disposal of all wastes.[14] It also states that another purpose of the SWMA is to implement Article I, Section 27 of the Pennsylvania Constitution and to provide a flexible and effective means to implement and enforce the provisions of the Act.[15] The challenged regulation may be viewed as providing such a means to implement further the "balancing" requirement of Article I, Section 27 of the Constitution. Since economic loss is clearly a harm to be considered, a provision for offsetting economic benefits is a reasonable part of the balancing approach to implementing the Act and the Constitution.

The Permittee claims that these statements of purpose are not enough because a power to require a permit applicant to confer "benefits" must be contained in a specific statutory standard as distinguished from general statements of the purpose of the legislation so that the Department will have sufficient guidance to enable it to implement the policy adopted by the General

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[13] *Blackwell v. State Ethics Commission*, 567 A.2d 630, 636-638 (1989), *reh'g granted*, 573 A.2d 536 (1990), 589 A.2d 1094 (Pa. 1991); *Casey*, 600 A.2d at 264 (Pa. Cmwlth. 1991).

[14] 35 P.S. § 6018.102(4).

[15] 35 P.S. § 6018.102(5), (10).

Assembly. Neither the Permittee's brief nor those filed by *amicus* contain square authority for the necessity of such a specific standard, and our research indicates that very general standards will suffice. In *Depaul v. Kauffman*,[16] the Pennsylvania Supreme Court upheld the constitutionality of the Rent Withholding Act authorizing action where a rental property was "unfit for human habitation". The court relied on previous decisions of other courts upholding a delegation based on general standards such as "excessive profits", "'unfairly or inequitably' distributes corporate voting power", "public convenience and necessity" and "public interest". In the *Tate Liquor License Case*,[17] the Superior Court upheld a delegation under the Liquor Code based on a standard of "detrimental to the welfare, health, peace and morals of inhabitants of the neighborhood." To be sure, when the legislative delegation provides no delegation at all, the delegation will be declared invalid.

Where the legislature has expressed intent to authorize an administrative agency to regulate all aspects of an industry and provides general guidance through the statement of the purposes of the legislation, no further specific provisions are required. In *Gilligan v. Pennsylvania Horse Racing Commission,*[18] the Horse Racing Commission promulgated a rule setting fees to be paid to jockeys. The Commonwealth Court found this to be beyond the Commission's power because nothing in the Horse Racing Act specifically provided express authority to establish rates of jockey compensation.

The Supreme Court reversed saying that the broad statement of legislative purpose to regulate all aspects of this previously illegal activity was sufficient to give the Commission the power to regulate jockey fees. In addition, the Supreme Court said that the latitude of the standards controlling exercise of the rulemaking powers expressly conferred on the Commission must be

[16] 272 A.2d 500 (1971).
[17] 173 A.2d 657 (Pa. Super. 1961).
[18] 422 A.2d 487 (Pa. 1980).

viewed in light of the broad supervisory task necessary to accomplish the express legislative purpose. The Supreme Court also relied on the Commission's long-standing interpretation of the statute to permit this regulation. Indeed the Court said that the legislature's acquiescence in the Commission's exercise of its rule-making power to set jockey fees manifests approval thereof. I believe the same rule applies to this case. The Commonwealth Court and the Department prior to the enactment of SWMA pointedly required as a matter of Pennsylvania constitutional law that waste permitting decisions be made in the context in the balancing of harms and benefits of the proposed facility. In the enactment of SWMA the legislature undoubtedly intended that this authority continue after the enactment of SWMA.

The Permittee's claim that Article I, Section 27 of the Constitution cannot expand the powers of the EQB so as to authorize it to issue the challenged regulation has no merit. Under the Commonwealth Court's decision in the *Fox* case, many agencies of the Commonwealth have a duty to implement this Constitutional provision and this necessarily includes the EQB. The *Fox* case only limited the harms and benefits to be considered to those directly arising from the project. The General Assembly is well aware of the broad power that the EQB has in rulemaking. In the enactment of the Air Pollution Control Act,[19] the General Assembly found it necessary to restrict those powers so as to be sure that the EQB did not promulgate any regulation invading the municipal power of land planning under the Municipalities Planning Code.[20] This is a statutory enactment of the holding in *Fox*. In *Commonwealth v. Parker White Metal Co.,* the Pennsylvania Supreme Court said that the courts also serve as trustees of Pennsylvania's natural resources along with the executive and legislative branches of the government.[21] It follows that the EQB's exercise of its rule making authority to prescribe the standards to be used by the

[19] Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001 - 4106.
[20] 35 P.S § 4005(b).
[21] 515 A.2d at 1370 (Pa. 1986).

Department to give effect to those purposes in a regulation is fully authorized by the SWMA and the Constitution. We note that three of the express purposes of the SWMA were to require permits for waste activities to "provide a flexible and effective means to implement and enforce the provisions of this act," and to implement Article I, Section 27 of the Constitution. The challenged regulation and permit condition appear to serve all of those purposes.

I also see no basis for the contention that the challenged regulation improperly turns Article I, Section 27 on its head. The argument is that the third prong of the *Payne v. Kassab* standard states only that the Department would abuse its discretion if the environmental harm resulting from the challenged decision clearly outweighs the benefits to be derived from the project. However, nothing in that standard implies that the EQB and the Department may not in the permissible exercise of their discretion require that an approval of a permit be based on a determination that both environmental and social/economic benefits markedly exceed harms. At least this sets a known standard for Department action.[22]

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Dated: April 4, 2002

[22] While the Commonwealth Court in *Concerned Citizens for Orderly Progress v. Department of Environmental Resources*, 387 A.2d 989 (Pa. Cmwlth. 1978) said that neither the Department nor the Environmental Hearing Board had the authority to require a developer to prove benefits, in *Department of Environmental Resources v. Precision Tube, Inc.*, 358 A.2d 137 (Pa. Cmwlth. 1976), the Court said that the Department of Transportation had the burden to prove compliance with the *Payne* harms/benefit test. In any event, there was no regulation in place at the time of either of these decisions that set a standard for how the Department was to balance harms and benefits. The challenged regulation sets that standard.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL II, L.P. and CHEST TOWNSHIP	:	
v.	:	**EHB Docket No. 2001-198-MG (consolidated with 2001-201-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION OF BOARD MEMBER BERNARD A. LABUSKES, JR.

By Bernard A. Labuskes, Jr.

I respectfully dissent. It is my view that the Environmental Quality Board (the "EQB") in promulgating 25 Pa. Code § 287.127(c) and the Department of Environmental Protection (the "Department") in implementing that section have exceeded their statutory authority. I would, therefore, have granted Eagle Environment II, L.P.'s ("Eagle's") motion for summary judgment and proceeded to a hearing on the merits to address whether its permit should have been issued in the absence of the harms/benefits test set forth in Section 287.127(c).

A regulatory agency must act within the authority granted by statute. *Pennsylvania Medical Society v. Com., State Bd. Of Medicine,* 546 A.2d 720, 722 (Pa. Cmwlth. 1988). The first place to look when assessing whether an agency is acting within its statutory authority is the statute itself. In this case, that statute is the Solid Waste Management Act, 35 P.S. §§ 6018.101-6018.1003 (the "SWMA").

An agency's power to promulgate regulations "must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extra judicial. They should act within the strict and exact limits defined." *Sullivan v. Com., Pennsylvania*

Department of Transportation, 708 A.2d 481, 485 (Pa. 1998). *See also Com., Pennsylvania Department of Transportation v. Beam,* Docket No. 18 MAP 2001, slip op. at 4 (Pa. January 25, 2002).

Can any party in this litigation seriously contend that the EQB's authority to promulgate a harms/benefit test is based on legislative language that is "clear and unmistakable?" Or that the EQB has acted within "strict and exact limits defined?" I do not think so. To the contrary, I believe that the compelling arguments on both sides of the question, and the splintered opinions of this Board, if nothing else, demonstrate that the EQB's authority is, at best, "doubtful." Giving due respect to the Legislature's authority to resolve this policy question in the first instance, our analysis should have ended right there.

Another reality that cannot be seriously disputed in this appeal is that the harms/benefits test is having a profound effect. The litigation pending before this Board suggests that the test often becomes *the* dispositive basis for determining whether a solid waste facility will be permitted. It is a very important new standard of law. Given the importance of the new standard, we need to be particularly circumspect in resolving any doubts regarding whether the EQB has acted within "strict and exact limits defined." If we find ourselves struggling to identify statutory authority in support of a critical new legal standard, then we have in the fact of the struggle alone answered the question.

Yet another point about which there can be no disagreement is that the SWMA does not specify that a balancing test is to be performed. If the statute expressed such authority, we would not be engaged in this controversy. This simple but important fact should not be overlooked. Indeed, in light of our duty to discern legislative language clear and unmistakable in every case, let alone a case involving an important new standard such as the harms/benefits test, the absence

of specific language in the SWMA should have been dispositive.

Where the Legislature has chosen to authorize a regulatory agency to consider economic and social factors in making site-specific decisions, it has shown that it is willing to specify that authority in an enabling statute. *See, e.g.,* Section 4.1 of the Coal Refuse Disposal Act, 53 P.S. § 30.54a (preferred sites to be used for coal refuse disposal unless applicant demonstrates to Department that another site is more suitable due to, *inter alia*, "economics" and "social factors"). *See also* 53 P.S. § 4000.1301 (legislative requirement that waste facilities pay host municipality benefit fees). It would be inappropriate to view the lack of specific authority in the SWMA as an oversight.[1]

The majority points to instances where words such as "benefit," "incentives," "public welfare," and "economic loss" appear in the statutes, but the words are isolated and taken somewhat out of context and do not under any circumstance amount to a clear and unmistakable expression of legislative intent that benefits must clearly outweigh harms on a site-by-site basis in order to justify a permit. For example, the SWMA finds that *improper and inadequate* solid waste practices result in economic loss. 35 P.S. § 6018.102. The only meaning I take from this language is that *improper and inadequate* solid waste practices must be prevented. It is inaccurate and unfair to stretch the language to mean that, so long as economic losses are outweighed by benefits, landfills should be permitted. Without going through each and every disengaged use of language relied upon by the majority, suffice it to say that it is not credible to suggest that the statute clearly and unmistakably authorizes a social and economic balancing test for individual site decisions.

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[1] The parties did not refer us to, and my research did not disclose, a Pennsylvania statutory balancing test that resembles 25 Pa. Code § 287.127(c). *But see* 42 U.S.C. § 7503(a)(5)(*Federal* Clean Air Act)(deciding whether to issue new source review permits to include analysis of whether proposed source significantly outweighs environmental and social costs). Whether it would be appropriate for the Legislature to enact the first such test in the context of permitting municipal solid waste facilities is not our call.

In the absence of specific authority, this appeal by necessity has devolved into a debate regarding one question: Is it possible to divine authority for the balancing test from the generic provisions in the SWMA regarding (1) the EQB's rulemaking powers, and (2) the statement of the Legislature's purpose in enacting the statute? As discussed above, I do not believe that it is necessary or appropriate to engage in that approach. The absence of clear and unmistakable authority should have settled the matter. But even when I resort to such an approach, there is nothing in the provisions cited by the majority, or anywhere in the statute for that matter, that gives me the slightest confidence that the Legislature could have possibly anticipated, intended, or authorized a harms/benefits balancing test.

The majority primarily relies on two provisions. The EQB's authority to promulgate regulations under the Act is defined in Section 105(a) as follows:

> The Environmental Quality Board shall have the power and its duty shall be to adopt the rules, regulations, criteria and standards of the department to accomplish the purposes and to carry out the provisions of this act, including but not limited to the establishment of rules and regulations relating to the protection of safety, health, welfare and property of the public and the air, water and other natural resources of the Commonwealth.

35 P.S. § 6018.105(a). The Legislature described its purpose in enacting the Act in the pertinent part as follows:

> The legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:
>
> (3) require permits for the operation of municipal...waste processing and disposal systems;
>
> (4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes....

35 P.S. § 6018.102.

My first difficulty in relying on these generic provisions (to find what is, in effect, implied authority) is that they are so general that they are not particularly helpful in resolving the question before us. Any argument based on such generic provisions is almost necessarily tautological. Perhaps the most extreme example of this problem is demonstrated by the Department's additional reliance upon Section 1920-A(b) of the Administrative Code, 71 P.S. § 510-20(b), which authorizes the EQB to adopt such regulation as "may be determined by the [EQB] for the proper performance of the work of the [Department]...." Such provisions and others like it are simply not helpful. The provisions are so general that they do not provide any guidance one way or the other on whether an evaluation of social and economic benefits is necessary for the "proper performance" of the work of the Department. Similarly, it is difficult to draw much pertinent guidance from a defined power to adopt rules that "carry out the provisions of this Act." 35 P.S. § 6018.105(a).

To the limited extent that I am able to draw guidance from the general provisions, it is clear that the entire tenor of the SWMA is directed at environmental and public *protection*. Although I agree that the Legislature has the police power to pass a statute that mandates the provision of social and economic benefits, the SWMA is not such a statute. Rather, the SWMA speaks to *protection* of the environment and the safety, health, welfare, and property of the public. *See Com. v. Parker White Metal Co.*, 515 A.2d 1358, 1370 (Pa. 1986) (the SWMA is designed to *protect* the people and the environment from *improper and inadequate* solid waste practices; it empowers the executive branch to battle the tide of *pollution* and *environmental catastrophe*).

Thus, Section 105(a) specifically references the goal of the "protection of safety, health, welfare and property of the public and the air, water and other natural resources of the

Commonwealth." 35 P.S. § 6018.105(a). Section 102 also speaks of "improper and inadequate solid waste practices" creating "public health hazards, environmental pollution, and economic loss" and causing "harm to the public health, safety and welfare." 35 P.S. § 6018.102. It specifically states that the purpose of the act is to "protect" the public. *Id.* Along the same lines, the Department has the authority to suspend permits if a facility is violating the law, causing a public nuisance, adversely affecting the environment, or creating a potential hazard to the public, 35 P.S. § 6018.502(e), not because a landfill is failing to provide enough benefits. There are myriad other examples. Suffice it say that the letter, scheme, spirit, purpose, and intent of the SWMA is unmistakably directed at the protection of the public and the environment.

Thus, the EQB's rulemaking authority is defined and limited by the statutory goal of environmental and public protection. If a regulation goes beyond or diverges from that goal, or worse, is contrary to that goal, it is not authorized. In other words, I disagree with Judge Miller's conclusion that any regulation relating to "all aspects of the waste industry" is authorized. Instead, only regulations designed to protect the environment and the public from the potentially harmful effects of the solid waste practices are authorized.

Gilligan v. Pa. Horse Racing Commission, 422 A.2d 487 (Pa. 1980), in no way bolsters the Department's position. In *Gilligan*, the court found that the Commission could set jockey fees because the legislature expressed its intent that the Commission was authorized to regulate *all aspects* of the previously illegal activity. 422 A.2d at 489-90. In contrast, the Legislature in the SWMA only endowed the authority to protect the environment and the public. It most assuredly did not authorize the Department to regulate all aspects of the solid waste industry. Thus, unlike the situation in *Gilligan*, the EQB and DEP do not have the authority to set, e.g., the gate fees that may be charged by landfills.

Judge Miller cites *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986), but that case stands for the proposition that, as its name implies, the Department of *Environmental Protection* has broad enforcement powers to ensure the *protection of the environment.* It does not say that the Department has the authority to regulate every aspect of the solid waste industry. If anything, the case stands for the opposite proposition--that powers under the SWMA are limited to protecting the public and the environment. So long as the goal and subject area are statutorily defined, it is not difficult, and entirely appropriate, to find implied authority for an agency's choice of enforcement remedies even if they are not specified. *Accord, Com., Department of Transportation v. Beam*, Docket No. 18 MAP 2001 slip op. at 8 (Pa. January 25, 2002) (PaDOT may pursue injunctive relief to enforce its regulations even though statute does not list such an enforcement mechanism; "We also observe that pursuit of injunctive relief in a judicial forum represents a restrained and supervised form of administrative action, as compared, for example, to the issuance of some form of direct agency mandate, restraint, or sanction.") The situation presented in this appeal goes well beyond that. None of the cases cited by the majority or Judge Miller stand for the proposition that the EQB has the regulatory authority to change the standard or the goal and extend them beyond protection of the environment and the public.

If the SWMA authorizes any regulation concerning "all aspects of the waste industry," I am having trouble imagining any regulation relating to solid waste facilities that would exceed the authority granted in the SWMA. If the EQB has the authority to require that landfills demonstrate that they will provide social and economic benefits before receiving a permit, it certainly has the authority to require specific benefits. Just as the authority to protect the environment authorizes the EQB to require that landfill liners be of a certain thickness, its

authority to require social and economic benefits should authorize it to regulate the prices to be charged by a landfill. Putting aside the reasonableness question, which is a different issue, the EQB has the *authority* to require that all landfills show that they will donate a certain percentage of receipts to charity. The Department can require a landfill to make road improvements in part of a township that is not located on the haul routes to the facility. In short, there is no logical limit to the EQB's *authority* to require specific social and economic requirements as the price for the right to operate a landfill in the Commonwealth.

If, as is my view, the operative question is whether a challenged regulation is geared toward protection of the public and the environment, the next step in the analysis is to determine whether the harms/benefits test is geared toward such protection. In fact, the harms/benefits test does not necessarily have anything to do with protection of the environment.

Requiring benefits to outweigh harms expresses a legislative judgment that landfills are a necessary evil. They inevitably have at least some adverse effects. If we are to grant a party the privilege of running such a business, it should be required to give something back. This may be a perfectly acceptable legislative goal, *see, e.g.*, 53 P.S. § 4000.1013 (host municipality fees), but it is a goal that is separate and distinct from the statutory goal of ensuring the protection of the public and the environment.

That the harms/benefits test is not geared toward environmental protection is most tellingly demonstrated by the fact that it provides the Department with the latitude to make permitting decisions that are wholly divorced from the protection of the environment. It allows the Department to permit facilities that are harmful to the environment, but it also allows it to deny permits to facilities that present no threat of significant harm to the environment. There can be no more convincing proof that the test goes beyond what the Legislature authorized.

Giordano v. DEP, EHB Docket No. 99-204-L (Adjudication issued August 22, 2001), involved a proposed increase in the permitted daily volume of a state-of-the-art landfill. There was no showing in that case that the facility could have done anything to be more protective of the environment than it was already doing. Nevertheless, the increased volume resulted in some unmitigated, localized, unavoidable, environmental harm. Although the volume increase only resulted in a minimal amount of harm, it also was not shown to create much in the way of benefits. Therefore, the increase could not be allowed because the incidental benefits did not "clearly outweigh" the incidental harms. Thus, the test required a result that had little to do with the SWMA goal of protecting the environment.

The application of the test can have precisely the opposite effect as well. The test, after all, does not come into play unless a project causes some harm to the environment. There is obviously no need to balance "harms" and "benefits" if the project will not pose any "harms." Section 287.127(c) provides that, so long as the benefits clearly outweigh those harms, the project can go forward. In other words, the regulation enables the Department to compromise protection of the environment based upon what it perceives to be the economic, social, and environmental benefits of a project. The SWMA, however, was never intended to authorize projects that do not adequately protect the environment, regardless of what benefits may flow from the project.

Thus, the test provides a mechanism for using the environment as cover for making social and economic policy. The agency may use the environment to trump adequately protective and perfectly legitimate business projects, or it may "balance" the environment away in order to promote otherwise welcome economic development. In either case, the test does not "accomplish the purposes" or in any way "carry out the provisions" of the SWMA. The test is,

at best, capable of distorting, and at its potential worst, subverting the SWMA in its current form.[2] Accordingly, it is safe to assume it was not authorized unless the Legislature clearly states otherwise. 35 P.S. § 6018.105.

If the EQB is permitted to rely on the general purpose and rulemaking provisions in the SWMA as the source of its authority to enact a balancing test, there is no reason why it cannot rely on similar provisions contained in virtually every environmental statute. If those types of provisions confer authority upon the EQB to in turn confer authority upon the Department to issue permits based upon social and economic harms and benefits, there is no reason why the EQB cannot promulgate a regulation requiring coal companies to prove that the social and economic benefits of a proposed mine clearly outweigh its potential harms. Although the Department argues strenuously that landfills inevitably cause some harm, so do mines. Indeed, every human activity causes some environmental incursion. Thus, the EQB on its own may promulgate a rule that every manufacturing facility is required to prove to the Department that the social and economic benefits of a proposed factory clearly outweigh potential harms caused by, e.g., stack emissions in order to obtain an emissions permit. In my view, regulatory authority for imposing such an overarching test upon any industry should be clearly and unmistakably set forth in the enabling statute. There is no justification for singling out regulations related to the solid waste industry and applying a looser standard for divining a legislative grant of authority.

The majority correctly notes that legislation often sets forth a very general standard and regulations are properly used to fill out the day-to-day application of that standard. *See Depaul*

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[2] *Cf.* Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment, Parts I and II,* 103 Dick. L. Rev. 693, 733, 104 Dick. L. Rev. 97, 138-139 (1999). Although Professor Dernbach's articles are not directly on point because they relate to Article I, Section 27 instead of the SWMA, his discussion regarding the use of a balancing test is apposite and I have borrowed from it here to illustrate the material difference between a harms/benefits balancing test and a test focused on adequate protection of the environment.

v. Kauffman, 272 A.2d 500 (Pa. 1971). What the EQB has done here, however, is **change the standard.** The Legislature made a basic policy choice in the SWMA that solid waste facilities would not be allowed in the Commonwealth unless they are adequately protective of the public and the environment. 35 P.S. §§ 6018.104, 6018.105. The Legislature has already performed a balancing test by providing that solid waste facilities are allowed in the Commonwealth so long as they are adequately protective of the environment. The EQB has taken it upon itself to change that policy choice and the operative standard by implementing a different policy choice that, regardless of whether a facility protects the environment, it will not be approved unless its benefits clearly outweigh its harms. In a very real sense, the EQB not only went beyond the SWMA, it effectively altered and amended it.

To say that the EQB has substituted one standard for another may actually be overly generous. A standard is "an established measure." Funk & Wagnalls, *STANDARD DICTIONARY*. It is difficult to view a test that requires a decision maker to determine whether undefined "benefits" "clearly outweigh" undefined "harms" as an established measure. Determining whether a project will "adequately" protect the environment and the public is also somewhat subjective, but at least there is a standard in the sense of a clear objective: protection of the environment and the public. It is impossible to articulate exactly what the objective of the harms/benefits test is. (There is no record to support the allegation in some of the briefing that the objective of the test is to, *inter alia*, provide a mechanism to prevent the importation of out-of-state waste.)

The EQB has promulgated hundreds of technical standards and siting requirements which themselves define adequate protection of the environment. To pick a random example, the EQB has promulgated a detailed regulation regarding the characteristics of the final cover (i.e. cap)

that a permittee must install when it closes a landfill. 25 Pa. Code § 288.234. The cap is intended to safeguard the environment and the public by, among other things, minimizing infiltration of water into the waste, thereby resulting in the production of less leachate. (*See* 25 Pa. Code § 288.234(b).) If specifications different than those provided for in the regulation can be shown to be just as protective, the Department may approve them. See §§ 288.234(b),(c),(f), and (h). The goal, as it should be, is to protect the environment. It would be superfluous and inconsistent with the statutory scheme to add a provision to the regulation stating that a cap may be more or less impermeable based upon social and economic concerns associated with a given project. For example, the Department should not be authorized to allow a thin, inadequate cap because a proposed landfill will create jobs in an area with severe unemployment.

It is true that the EQB must inevitably consider at least economic (if not social) factors in formulating technical standards of general applicability. After all, if cost were no object, municipal waste could be disposed of in lead-lined, impregnable vaults. This rulemaking is the proper context for balancing. See, e.g., Section 5(b)(4) of the Dam Safety and Encroachment Act, 35 P.S. § 693.5(b)(4) (EQB to consider economic impact in promulgating regulations applicable to dams and obstructions). Although the EQB is weighing economic factors, it is still acting within its statutory mandate of designing rules that are adequately--not absolutely--protective of the public and the environment. It is performing the balancing test mandated by the legislation: adequate protection of the environment. For the EQB to promulgate an additional rule that gives the Department the authority to add another level of balancing for individual permits goes beyond the goal of environmental protection. As discussed above, it may even be used to contradict it. Absent clear and unmistakable legislative authority to perform a new, supplemental level of balancing, I must conclude that the EQB went too far.

To paraphrase 25 Pa. Code § 287.127(b), an applicant for a landfill permit must identify the known and potential environmental harms of its proposed project and describe how those harms will be mitigated. The Department may not issue a permit for the project unless the mitigation measures will "adequately protect the environment and the public health, safety and welfare." 25 Pa. Code § 287.127(b). This is precisely the standard that is authorized by statute, and it is precisely where the analysis should end. If a project is not designed to adequately protect the environment and the public health, safety, and welfare, the Department is not statutorily authorized to allow it to go forward. If the project is designed to adequately protect the environment and the public, the Department is not statutorily authorized to stop it.

The Department argues that the regulatory review process is an acceptable substitute for the legislative process. It argues that the regulatory process is acceptable because, among other things, proposed regulations are subject to review by standing committees in the Legislature under the Regulatory Review Act, 71 P.S. § 745.1 *et seq*. If this argument is correct, then no public policy choice ever needs to be embodied in a statute. Until our courts reverse the long line of precedents directly to contrary of that position, the argument has no merit.

In finding implied authority, the majority relies rather heavily on the fact that one of the stated purposes of the SWMA is "to implement Article I, Section 27 of the Pennsylvania Constitution." The majority then makes a leap of logic by stating that the Act's stated goal of implementing Article I, Section 27 equates to legislative intent "to direct the agency to balance social and economic considerations with environmental protection." The only foundation apparent for the leap of logic is caselaw defining how *courts* are to evaluate whether an *agency's* actions have violated the constitutional amendment. I have several difficulties with the majority's reasoning.

First and foremost, none of the cases relied upon the majority addressed the issue that has been squarely presented here; namely, whether the SWMA authorizes the EQB to pass a new harms/benefits test. Cases such as *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth 1973), *aff'd*, 361 A.2d 273 (Pa. 1976), defined the standard to be employed by *courts* in reviewing whether an *executive agency's* decision complies with *Article I, Section 27.* They do not create, or more to the point, authorize, a new standard to be employed by the executive agency to be employed in the first instance in reviewing a permit application. Indeed, the notion that Article I Section 27 can in any way independently authorize a regulatory test was put to rest in *Casey, supra*, 600 A.2d at 265, wherein the Court held that the executive branch cannot use Article I Section 27 as the basis for disturbing or supplementing the legislative scheme embodied in the SWMA.[3] In short, in light of *Casey*, the EQB must find its authority in the SWMA, not Article I Section 27 or case law implementing and interpreting Article I, Section 27.

The majority gets it right in my opinion in footnote 9, where it acknowledges that "[f]aced with the broad mandates and substantive principles expressed by [Article I, Section 27], it is not readily apparent what particular, limited, ways the legislature intended for the agency to 'implement' the Environmental Amendment within the context of regulating solid waste disposal practices." I could not agree more. The majority goes on to "reject the assertion that the legislature contemplated no rule-making or enforcement role for the agency." Of course such an assertion must be rejected. No party has contended otherwise. The EQB unquestionably has a "rule-making role." But the question presented here is whether that role includes the "particular, limited" harms/benefits test. The majority is entirely correct in apparently acknowledging that

[3] *Casey* should not be used to support circular reasoning. *Casey* held that the SWMA and regulations promulgated thereunder preemptively define the application of Article I, Section 27 principles to solid waste decisions. *Casey* did not overrule the three prerequisites for a valid regulation (proper promulgation, authority, reasonableness). It is not convincing to contend that the EQB has authority to promulgate a harms/benefits test because it did promulgate such a test and it had the authority to promulgate such tests.

neither Article I, Section 27 nor the cases interpreting that provision can be relied upon to answer that question.

Furthermore, I have difficulty understanding how the majority is at once using the *Payne* cases to support its leap of logic that the harms/benefits test is statutory authorized because Article I, Section 27 requires balancing, while at the same time discounting the applicability of *Payne* in footnote 10:

> First, the statutory mandate of the SWMA and Act 101 is to implement the principles and obligations of Article I, § 27, not the three-part test set forth in *Payne*. In other words, the implementation of a constitutional provision is not coterminous with the three-part *Payne* test. Indeed, the Supreme Court did not adopt the test....Second, the three-part test expresses only a standard for judicial review of agency decision-making; the question here involves an *ultra vires* challenge to a regulation imposing a substantive requirement on landfill permit applicants.

Once again, I find myself in agreement with the majority, but if *Payne* is not on point, then I am unable to discern a reasoned basis for the majority's conclusion that the EQB's harms/benefits test "implements the principles and obligations of Article I, § 27."

Thus, the majority's citation to the statutory purpose of implementing Article I, Section 27 begs the question. More troubling, however, is that such an analysis inevitably means, in effect, that there is no need to find clear, express statutory authority for regulatory activity. Any regulation that "implements Article I, Section 27" is authorized. This is no different in practical effect than saying that Article I, Section 27 can directly authorize a regulation. The SWMA has been taken out of the equation. This approach is directly contrary to the black letter principle that an agency must find its authority in a *statute*. It is also inconsistent with the letter and spirit of *Casey*, which also directs our attention to the SWMA, not Article I, Section 27.

Yet another problem with the majority's approach is that the caselaw interpreting Article I, Section 27 is not only beside the point, it fails to define the standard to be used. Under the

majority's approach, *any* balancing would appear to be authorized. The regulation does not, in fact, track the standard of judicial review announced in *Payne*.

To the extent that the majority is asserting that a balancing test is hardly a radical concept and that it is consistent with Article I, Section 27, I will not argue that point here. The assertion is not relevant. An agency must act consistently with Article I, Section 27, but it also must have the authority to act in the first place. The most that the majority's analysis arguably proves is that the EQB's new balancing test is consistent with Article I, Section 27. It does not support a finding of authority.

The majority repeatedly inserts an element of "reasonableness" into the analysis of whether the EQB had implied authority to promulgate the challenged regulation. (See, *e.g.*: "Essentially, the question is whether the harms/benefit test constitutes a reasonable means of implementing the purposes and provisions of the SWMA and Act 101 in the context of a landfill permit review process.") The majority has asked itself the wrong question. It has mixed two entirely different inquiries: (1) whether a regulation is within granted power, and (2) whether a regulation is reasonable. *See Housing Authority of the County of Chester v. Pa. State Civil Service Comm'n,* 730 A.2d 935, 942 (Pa. 1999). Eagle has not even challenged the reasonableness of the regulation.

There is no case law to support the majority's new test. To the contrary, when searching for legislative *authority*, the authority must be clear and unmistakable. *Sullivan, supra.* Adding an element of "reasonableness" is an inappropriate fudge factor that makes the finding of authority in a doubtful case more palatable than it otherwise should be. If a party ever challenges the reasonableness of Section 287.127(c), then and only then will we be appropriately called upon to assess whether "the harms/benefit test constitutes a reasonable means of implementing

the purpose and provisions of the SWMA...."

Judge Miller finds no authority for the harms/benefits permitting standard in the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), 53 P.S. 4000.101 *et seq.*, and neither do I. Whereas the SWMA is a plenary statute with pervasive effect, *Casey*, Act 101 is a very specific statute with certain defined objectives. Using it to bolster a permitting regulation is not warranted. Furthermore, my discussion concerning the SWMA applies with equal or greater force to Act 101. For example, there is no express authority for the balancing test in Act 101. The majority's search for words such as "benefits" in the statute does not express the necessary authority. The harms/benefits test does not otherwise accomplish the purposes or carry out the provisions of Act 101. As discussed above, it is divorced from environmental protection. It does not necessarily promote "needed additional municipal waste processing and disposal facilities." 53 P.S. 4000.102(4). It can easily be used for the opposite purpose. In fact, it takes all of the predictability out of solid waste planning. Finally, Act 101 is heavily oriented toward municipal waste, whereas the challenged regulation relates to residual waste. If we are careful in searching for a clear and unmistakable grant of legislative authority, Act 101 in no way bolsters the Department's position.

If anything, Act 101 stands for the proposition that, where the Legislature intends to require benefits be conferred, it is obviously capable of expressing that intent. *See, e.g.*, 53 P.S. §§ 4000.1013 (host fees), 4000.1111 (capacity protection). Here, the EQB has impermissibly extended its authority to promulgate regulations concerning a few express, defined, and limited benefits as a springboard for requiring *any* kind of social, economic, and environmental benefits as an offset to social, economic, and environmental harms.

Fundamentally, the search for implied authority is an exercise in statutory interpretation.

We are called upon to divine legislative intent because that intent was not clearly expressed. When engaged in statutory interpretation, we must, if at all possible, interpret the statute in such a way that it will survive constitutional challenge. *See* Pa.C.S.A. § 1922(3); *Ramsey v. Zoning Hearing Board, Borough of Dormont*, 466 A.2d 267, 269 (Pa. Cmwlth. 1983).

Here, if the SWMA is interpreted to have delegated the authority found by the majority, it is likely that the statute will be found to unconstitutional because it enabled the EQB, part of the Executive Branch, to enact a basic policy choice that should have been retained by the Legislature. *See Sullivan, supra,* 708 A.2d at 484. The majority has paved the way for the statute to be attacked, when we could have blocked that way by correctly interpreting the statute to not have delegated away the legislative prerogative.

The majority concludes that the harms/benefits test is not a substantive enactment. I, however, agree with Judge Miller's conclusion to the contrary that the test does, in fact, constitute a basic policy choice.[4] Indeed, I am hard pressed to imagine a policy choice more basic than the decision that individual facilities should be permitted based upon a case-by-case balancing of social, economic, and environmental harms and benefits rather than environmental harms alone. Whether one agrees or disagrees with the radically different approach to implementing environmental law embodied in the challenged regulation, it is beyond reasonable dispute in my mind that the approach is a basic policy choice. The test is as substantive and as fundamental as a test can be. It has completely taken over the solid waste permitting process in the Commonwealth, drawing attention away from the proper focus: environmental protection. If this is the future of environmental law, it should be because the Legislature said this is the way it should be. Given the current absence of legislative expression, I would interpret the SWMA in

[4] Of course, I part company with Judge Miller in his conclusion that the Legislature in fact made this basic policy choice in the statute.

the way that will support its constitutionality.

If there is to be a harms/benefits test for making individual permitting decisions, it needs to be set forth in a statute. Whether such a statutory test would be void for vagueness would be for a court to decide. It could very well be that a statutory provision, if detailed and explained by implementing regulations, would survive a constitutional challenge. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 504 (1982) (implementing regulations can save an otherwise vague ordinance). But as the situation now stands, the only *law* to which the public, local communities, Department employees, the regulated community, and this Board can refer is Section 287.127(c) itself. There is no statutory guidance on how social and economic harms and benefits are to be considered. I cannot agree that nonbinding policy statements and guidance documents and court cases interpreting Article I, Section 27 put enough meat on the bones of the mysterious balancing test to enable it to survive a void-for-vagueness review. Nor is this a case where longstanding custom or usage can explain the vague regulatory requirement. The test is essentially brand new.

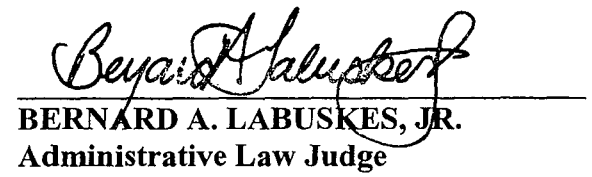
The balancing test fails to provide fair notice to people of ordinary intelligence--both landfill proponents and opponents--about whether a particular project will be permittable. The test invites arbitrary and discriminatory applications based upon, among other things, the current political climate. The simple truth of the matter is that no one knows what the test really means. Departmental employees who must implement the test on a day-to-day basis appear to have difficulty applying the test. *Cf., e.g., Jefferson County Commissioners v. DEP*, EHB Docket No. 95-097, slip op. at 95-99 (Adjudication issued February 28, 2002) (discussing difficulties in rationally applying needs/harms test). Consultants who advise the waste industry, local communities, and the public can only guess what constitutes a "harm" or a "benefit."

A harm or a benefit to whom? The harms of a landfill will almost always clearly outweigh its benefits when viewed from the front porch of the landfill's immediate neighbors. What does it mean to "outweigh," let alone "clearly outweigh?" How do you compare "apples and oranges?" *See, Jefferson County, supra.* The list of unanswered questions is endless under the current state of the law. In the end, the test is so vague that it allows the Department (and this Board) to make whatever choice is expedient for whatever reasons it chooses. To bring my analysis full circle, the test enables permitting decisions that are entirely divorced from considerations of environmental protection. For the same reasons that the test could not have been legislatively authorized, it is, standing alone, too vague to guarantee fair treatment and substantive due process.

The majority all but acknowledges that the test is impossibly vague, but it expresses the hope that the Department "will take [] further steps to minimize the dangers of arbitrary enforcement by clarifying its interpretation of 'clearly outweigh' and its manner of ascribing weight to particular harms and benefits." The majority expresses a commitment that this Board will examine the application of the regulation "on a case-by-case basis." With regard to the first statement, I do not accept that an otherwise unconstitutionally vague regulation should pass muster based upon an assumption that the implementing agency will create future, nonbinding guidance documents. The second statement either misses the point entirely or suggests that *future* Board case law will explain what the harms/benefits test means. Obviously, in my view, it would have been better to make the tough decision now, rather than making a similar result evident through a series of Board decisions expressing significant frustration in applying a test that by its very nature is virtually impossible to understand. *See, e.g., Giordano, supra;*

Jefferson County, supra.[5]

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: April 4, 2002

[5] Unfortunately, I disagree with most of the majority's analysis and its conclusion. For the record, however, I note my concurrence with the majority's conclusions that Eagle has standing, that this matter is ripe for review, and that Eagle's argument regarding police power is without merit. I agree with Judge Miller's conclusion that the harms/benefits test constitutes a basic policy choice.

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MOOSIC LAKES CLUB	:	
	:	
v.	:	**EHB Docket No. 2000-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP BOARD OF SUPERVISORS	:	**Issued: April 9, 2002**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from the Department's approval of an update to a township sewage facilities plan by residents of an area designated for public sewers. The plan update did not change the configuration of the sewer collection system which had been approved in an earlier plan, but designated a different treatment facility to which the sewage would be transmitted. Because the appellant failed to challenge the designation for public sewers in the earlier plan, its current objection is barred by the doctrine of administrative finality.

The appellant also claimed that the approval of the plan update was in error because the Department did not require an in-depth hydrogeological study and did not adequately consider a study which had been included with the earlier plan update. However, the appellant failed to adduce any evidence to support its claim.

Finally, the appellant's claim that the Department failed to consider whether the treatment plant designated in the plan update could accommodate flows from the municipality is waived because it was not raised in the notice of appeal.

INTRODUCTION

The Moosic Lakes Club has appealed the Department's approval of a sewage facilities plan update for Jefferson Township, Lackawanna County. This plan, referred to as the "2000 Plan," is the latest of several plan updates that have been approved in the last decade for the Township in an effort to resolve its considerable sewage problems. The 2000 Plan was approved by the Department by letter dated July 3, 2000. The Moosic Lakes Club filed its appeal on August 21, 2000.

A hearing on the merits was held before Administrative Law Judge George J. Miller, on July 31 and August 1, 2001. All of the parties have filed proposed findings of fact, conclusions of law and legal memoranda.[1] The record consists of a transcript of 385 pages and 25 exhibits. After a full and complete review of the record, we therefore make the following:

FINDINGS OF FACT [2]

1. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act,[3] the Clean Streams Law[4] and the rules and regulations promulgated thereunder.

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[1] The Appellant secured a different attorney after the hearing but before the post-hearing briefs were originally due. Accordingly the Board granted an extension to accommodate the new counsel. The last brief was received by the Board on January 24, 2002. No reply brief was filed by the Appellant.

[2] The transcript is designated as "N.T. __"; the Appellant's exhibits as "Ex. A-__" and the Department's as "Ex. C-__." Although the Township presented the testimony of witnesses, it did not introduce its own exhibits into the record.

2. The Appellant is Moosic Lakes Club, a non-profit corporation whose members are property owners at the Moosic Lakes Community. (See Ex. A-2; Kurtz, N.T. 54)

3. Jefferson Township is a legally incorporated township of the second class in Lackawanna County, Commonwealth of Pennsylvania.

Witnesses

4. David Kurtz is a resident of the Moosic Lakes community. In the past he has served as the Moosic Lakes Club president and on the Club's Board of Directors. (Kurtz, N.T. 53)

5. Kate Crowley is the water Program Manager for the Department's Northeast Regional Office. Her responsibilities include the oversight of staff in various water programs including, among others, Act 537 sewage planning, permitting under the Clean Streams Law and Dam Safety and Encroachments Act[5] and inspection and enforcement actions pursuant to those statutes. (N.T. 160)

6. Michael Brunamonti is a Chief of Technical Services for the Department's Northeast Regional Office. He has held that position since 1994. Among his responsibilities is the supervision of staff who review Act 537 sewage plans and revisions. He is a licensed professional engineer. (N.T. 294, 317)

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[3] Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act or Act 537).

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

[5] Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27 (Dam Safety and Encroachments Act).

7. Harleth "Harley" Davis is a sanitary sewage specialist in the Department's Northeast Regional Office. His responsibilities include reviewing and approving Act 537 sewage plans and revisions. He has held his position since 1980. (N.T. 342-43)

8. Homer Butler serves as a sewage enforcement officer for Jefferson Township. In that role he is responsible for inspecting lots for the suitability for sewerage, the inspection of sewage systems and the maintenance of records for the sewer applications and permits for the cases that he handles. He is one of two sewage enforcement officers in the Township. (N.T. 229)

The Moosic Lake Community

9. The Moosic Lake Community consists of approximately 170 dwellings on two lakes in the Pocono Mountains. (Kurtz, N.T. 54-55)

10. One lake is approximately 100 acres in size, and the smaller lake is approximately 32 acres. (Kurtz, N.T. 55)

11. Full-time residents occupy 59 of the houses in the community. The remaining are summer cottages that are only occupied for part of the year. (Kurtz, N.T. 55)

12. Currently, residences at Moosic Lakes utilize on-lot systems as their method of sewage disposal. (Kurtz, N.T. 55)

13. The Moosic Lakes area is unsuitable for on-lot sewage disposal under current standards because of all the shallow springs and the high water table. Additionally, there is not enough suitable soil. (Butler, N.T. 238, 259)

14. Therefore it would not be appropriate to designate Moosic Lakes for on-lot management in a sewage facilities plan. (Davis, N.T. 357)

Prior Act 537 Plans in Jefferson Township

15. Before the 2000 Plan, the Department has approved at least three updates to the Jefferson Township Act 537 Plan in 1992, 1996 and 1997.[6] (Davis, N.T. 350; Exs. C-3; C-14)

16. In 1987, the Township commissioned a needs analysis to assess the sewage needs throughout the Township. That report documented obvious and suspected sewer system malfunctions. Certain areas of the study, including Moosic Lakes, had a particularly high percentage of malfunctions. (Ex. C-1; Brunamonti, N.T. 317)

17. The Department approved an Act 537 Plan for the Township in 1992. That plan called for a tertiary package plant to serve Moosic Lakes. (Davis, N.T. 350: Kurtz, N.T. 144-45)

18. The 1992 Plan was not appealed by the Moosic Lakes Club. (Kurtz, N.T. 128)

19. By letter dated March 29, 1994, the Moosic Lakes Club, through its President, requested Jefferson Township to provide public sewers to the Moosic Lakes Community. (Ex. C-2)

20. In June 1995, the Township submitted a further update to its Act 537 Plan. (Ex. C-3)

21. The Department directed comments to the Township concerning the proposed update, to which the Township responded on October 19, 1995. (Exs. C-4, C-5)

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[6] Testimony during the hearing and the post-hearing briefs concerning the various plans became rather confusing inasmuch as some witnesses referenced the plans by the dates they were submitted to the Department and others referenced them by the dates they were approved by the Department. In this adjudication we will reference the plans by the date they were approved by the Department in order to be consistent.

22. The Moosic Lakes Club directed comments to the Township and the Department by letter dated October 27, 1995. In that letter the Club indicated that it had voted to hire a hydrogeologist to study, among other things, the hydrogeological impact associated with the Township's planned sewage collection system. (Ex. A-2; Kurtz, N.T. 65-67)

23. The Department reviewed the Club's October 1995 letter and considered the letter when reviewing the new plan. (Davis, N.T. 367)

24. In February 1996 the Department approved Jefferson Township's 1995 submission. (See Ex. C-16 at p. 2)

25. The 1996 Plan indicated that there was a high incidence of malfunctioning on-lot sewage treatment systems in Jefferson Township, including Moosic Lakes. Accordingly, the Township committed to the construction of a sewage collection and conveyance system and a sewage treatment plant which would serve large portions of the Township. (Ex. C-3)

26. Moosic Lakes was designated to be provided with a public sewage collection system. Sewage from Moosic Lakes would ultimately be treated at the Lackawanna River Basin Sewer Authority's sewage treatment plant. (Ex. C-3)

27. The Moosic Lakes Club did not appeal the 1996 Plan to the Environmental Hearing Board, but instead filed a federal law suit. (Kurtz, N.T. 128)

28. However, the Moosic Lakes Club was unhappy with the 1996 Plan because it provided for public sewers without also providing for public water. By letter dated July 22, 1996, the club demanded that the Township perform a hydrogeological study. (Ex. A-3; Kurtz, N.T. 69-71)

29. In April 1997, the Township drafted a further update to its Act 537 Plan. This proposal was submitted to the Department in June 1997. (Ex. C-8)

30. The proposed plan did not modify the sewage collection system planned for Moosic Lakes, as approved in the 1996 Plan. (Davis, N.T. 368)

31. By letter dated May 12, 1997, the Moosic Lakes Club submitted comments to the proposed plan and again demanded a hydrogeological study. (Ex. A-6; Kurtz, N.T. 86-91)

32. The Department received the May 1997 letter and requested the Township to address the concerns that were expressed by the letter, including the issue of the hydrogeological study. (Crowley, N.T. 160-61; Ex. C-10)

33. The Department solicited a hydrogeological study because of concerns raised by the comments submitted by the Moosic Lakes Club, and not because the Department believed such a study was required by the sewage regulations. (Brunamonti, N.T. 309; Davis, N.T. 360)

34. The Township commissioned a hydrogeological study, which it submitted to the Department in September 1997. (Crowley, N.T. 161, 189; Ex. C-13)

35. The study was performed by a consultant, Hydro-Geo Services, Inc. Their report, referred to as the "Hydro-Geo Report", stated that the lakes at Moosic Lakes were "recharged primarily through direct precipitation, surface water flow and shallow groundwater discharge into the lakes." (Ex. C-13)

36. This study was reviewed by a Department hydrogeologist and was also considered by Misters Brunamonti and Davis. (Crowley, N.T. 189; Brunamonti, N.T. 304)

37. This evaluation answered the Department's concerns which were raised in its July 1997 letter. (Crowley, N.T. 190-91; Brunamonti, N.T. 329)

38. The Department considered the Hydro-Geo Report in its review of the Township's proposed plan. (Crowley, N.T. 160-61; 189; Brunamonti, N.T. 304; Davis, N.T. 357)

39. The Department also considered other reports and field investigations which evaluated on-lot sewage failures throughout the Township including Moosic Lakes. (Davis, N.T. 345, 375; Brunamonti, N.T. 315, 325-26; Ex. C-12)

40. The information which was presented by the Department indicated that Moosic Lakes needed another means of sewage disposal, other than the on-lot method. In the Department's view, a central sewer system was a "wise and correct choice." (Davis, N.T. 357)

41. In October 1997 the Department approved the Township's proposed plan update. (Ex. C-14)

42. The Moosic Lakes Club did not appeal the 1997 Plan. (Kurtz, N.T. 117)

43. In January 2000 the Township submitted a further proposed plan update to the Department. This update calls for the elimination of the planned sewage treatment plant located in the Township and the transmission of sewage from the Jefferson Township collection system as described in the 1996 Plan to the Scranton Sewer Authority's treatment plant. The proposed update did not modify the configuration of the collection system planned for Moosic Lakes as authorized in both the 1996 Plan and the 1997 Plan. (Ex. C-16)

44. The Department directed two comment letters to the Township, to which the Township responded. (Exs. C-17; C-18; C-19; C-20)

45. The Department approved the proposed plan revision in July 2000. It is the 2000 Plan that is the subject of this appeal. (Ex. C-22)

46. Given the difference in elevation between Moosic Lakes and the other communities through which the conveyance system will run, Ms. Crowley testified that she did not see how Moosic Lakes could be adversely affected by the Scranton Sewer Authority's treatment plant. For example, an overflow at the Scranton plant is unlikely to affect Moosic Lakes. (Crowley, N.T. 176)

DISCUSSION

In an appeal from the approval of an update to a municipality's Act 537 plan, it is the appellant who bears the burden of proof.[7] In this case the Appellant must prove by a preponderance of the evidence that the Department's approval of the Township's 2000 Plan was inappropriate or otherwise not in conformance with the law.[8] Our review of the Department's decision is *de novo*.[9] Therefore the Board will base its decision on the evidence adduced at the hearing, and not solely upon the facts which were considered by the Department.[10]

The Moosic Lakes Club (Appellant) raises several objections to the Department's approval of the 2000 Plan. It contends that: (1) the Department failed to determine whether or not the Scranton Sewer Authority is able to accommodate flows from Jefferson Township; (2) the Department failed to undertake its own independent review of the Hydro-Geo Report; (3) the Department should have required a more detailed hydrogeological analysis of groundwater supplies and the drinking water wells at Moosic Lakes; and (4) the Department

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[7] 25 Pa. Code § 1021.101(c)(2).

[8] *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001).

[9] *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

[10] *Smedley*.

should not have approved the Plan because deed restrictions on properties at Moosic Lakes preclude the installation of public sewers. The Department counters that these claims are either (1) barred by administrative finality; (2) not raised in the notice of appeal; or (3) are unsupported by the evidence. We agree with the Department that the Appellant's claims are not supported by any evidence or were not properly raised within the context of an appeal of the 2000 Plan.

The Appellant's first objection, that the plan approval was in error because the Department failed to determine whether or not the Scranton Sewer Authority is able to accommodate flows from Jefferson Township, is clearly not raised in any way in the Appellant's notice of appeal. The Appellant's notice of appeal consists of seven paragraphs. The first four identify the parties and note the existence of a related appeal on the Board's docket. The remaining three paragraphs raise only three objections. Paragraph 5 contends that the Department improperly approved the 2000 Plan without a proper hydrogeological study, and cites 25 Pa. Code § 71.21(a)(1)(vi). The objection in Paragraph 6 objects to the designation of Moosic Lakes as an area which will be connected to a central collection wastewater system and notes that homes in Moosic Lakes can not be compelled to connect to the system because no home or private road was within 300 feet of a public right-of-way. Finally Paragraph 7 objects to the 2000 Plan because it reserves "EDUs" for a commercial developer.[11] The ability of the Scranton Sewer Authority to accommodate flows is not in any

[11] The Appellant presented no evidence on this point nor did it discuss it in its post-hearing brief. Therefore it is waived. *See Riddle v. DEP*, EHB Docket No. 98-142-MG (Adjudication issued March 25, 2002).

way within even the broadest reading of the listed objections. Therefore that objection has been waived.[12]

We also find that the Appellant's objection to the plan on the basis that Moosic Lakes is slated to be connected to public sewers in spite of a deed restriction is effectively waived by the Appellant's failure to raise it in an appeal of the 1996 Plan. That is, the doctrine of administrative finality precludes the Appellant from raising the issue.[13]

The purpose of the doctrine of administrative finality is to preclude a collateral attack where a party could have appealed an administrative action, but chose not to do so.[14] The Commonwealth Court in *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, explained the policy underlying the doctrine:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operations of administrative law.[15]

Clearly the Appellant was aware of the provisions of the 1996 Plan and had objections to it.[16] However, for reasons not elucidated upon, the Appellant did not pursue

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[12] *See Fuller v. Department of Environmental Resources*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Pennsylvania Game Commission v. Department of Environmental Resources,* 509 A.2d 877 (Pa. Cmwlth. 1986), *affirmed*, 555 A.2d 812 (Pa. 1989). We also note that the Appellant made no attempts to amend their notice of appeal at any time before the hearing.

[13] It is also questionable whether the issue is preserved in the notice of appeal.

[14] *Department of Environmental Protection v. Peters Township Sanitary Authority,* 767 A.2d 601 (Pa. Cmwlth. 2001).

[15] 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *affirmed,* 375 A.2d 320 (Pa. 1977), *cert. denied,* 434 U.S. 969 (1977).

[16] See generally testimony of David Kurtz.

relief at the Board but instead filed a federal lawsuit.[17] It can not now attempt to attack the provisions of that plan.[18] There is nothing about the configuration of the central collection system that has changed between the 1996 Plan and the 2000 Plan, except for the ultimate destination of the sewage.[19]

The collection system design for Moosic Lakes is analogous to a permit condition that remains in continuous effect between the original issuance and a permit modification. We have held that a permit condition that has remained in continuous effect can not be attacked in a permit modification if it was not challenged in the original permit.[20] Similarly, the Appellant should have appealed the inclusion of Moosic Lakes in the central sewage system and the effect of the deed provision, if any, when the system was originally planned in the 1996 Plan.[21] The only objections which may be raised by the Appellant in this appeal are those related to the delivery of the sewage to the Scranton Sewer Authority instead of a treatment plant located in Jefferson Township.

The only issues remaining for our consideration are those related to the necessity of a hydrogeological study for the 2000 Plan. First, the Appellant argues that the Department did not independently consider a hydrogeological study performed by Hydro-Geo Services, Inc., which was submitted by the Township in September 1997, known as the Hydro-Geo

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[17] Kurtz, N.T. 128.

[18] Moosic Lakes was also designated for public sewers in the 1997 Plan.

[19] There are a few minor additions in the 2000 Plan that are not at issue here such as the addition of 45 homes in another location to the public sewer system. (Ex. C-16)

[20] *Tri-State River Products, Inc. v. DEP*, 1997 EHB 1061; *Empire Sanitary Landfill, Inc. v. DEP*, 1996 EHB 345.

[21] We note that there is significant evidence in the record that on-lot treatment was no longer an acceptable means of sewage disposal for Moosic Lakes and that public sewers were a "wise and correct" choice. See generally testimony of Homer Butler and Harley Davis.

Report. Second, the Appellant argues that the Department erred in approving the 2000 Plan without an in-depth hydrogeological study. Neither of these claims are at all supported by the evidence.

Although not entirely clear whether the Hydro-Geo Report, completed in September 1997, was considered by the Department in the context of the 1997 Plan or the 2000 Plan or both, there is no evidence that it was not adequately considered by the Department. The study was required by the Department as a result of comments received by the Appellant and others.[22] Kate Crowley, Mike Brunamonti and Harley Davis each testified that the report was reviewed by a Department hydrogeologist whose opinion was considered by them in their review.[23] Although the report suggested further study for a more detailed characterization of the area, for the purposes of the sewage plan update, it answered the Department's concerns.[24] There is no evidence that the acquisition of information which the report recommended was in any way related or necessary to the Township's proposed sewage planning. Similarly, there is no evidence that the Department's hydrogeologist merely "rubber-stamped" the report without exercising his independent, professional judgment in evaluating the information in the report. The Appellant failed to prove that the Department did not properly review and consider the Hydro-Geo Report.

Similarly, the Appellant failed to prove that a more detailed hydrogeological report was necessary in order for the Department to properly approve the 2000 Plan in terms of the transmission of sewage to the Scranton Sewer Authority plant rather than a treatment plant located in Jefferson Township. First, there is no regulation which mandates a detailed

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[22] Brunamonti, N.T. 309; Davis, N.T. 360.
[23] Crowley, N.T. 189; Brunamonti, N.T. 304.
[24] Crowley, N.T. 190-91; Brunamonti, N.T. 329.

hydrogeological study for every sewage plan update. The regulation relating to the content of official sewage plans contains a lengthy list of items which should be included in an official plan, "*[i]f applicable* to the specific planning needs of the municipality, *as determined by the Department* . . ."[25] One item which *may* be required by the Department is the "[i]dentification of the source of the potable water supply including the available capacity of public supplies and aquifer yield for groundwater supplies."[26] In this case, the Appellant presented no evidence that a hydrogeological study should have been required by the Department as part of the 2000 Plan.

Second, the Appellant presented no evidence that the transmission of sewage to the Scranton treatment plant as described in the 2000 Plan created any threat to the hydrogeology of Moosic Lakes or any other area of the Township. Nor is there any evidence that the 2000 Plan creates a threat of pollution, causing a violation of the Clean Streams Law, that might require further study.

In this regard, this case is quite different from the situation presented in *Oley Township v. DEP*.[27] In that case there was substantial evidence on the record that the pumping of a well which was permitted under the Safe Drinking Water program may cause pollution in the form of diminution of an exceptional value wetland which was very close to the proposed well. Therefore the Board held that the Department erred by not considering this threat of pollution which may have resulted in a violation of the Clean Streams Law, thereby contravening the drinking water regulations. There is no similar evidence on the record here. In fact the only testimony solicited which has any bearing on this point was from

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[25] 25 Pa. Code § 71.21 (emphasis added).
[26] 25 Pa. Code § 71.21(a)(1)(vi).
[27] 1996 EHB 1098.

Program Manager Kate Crowley who stated that any problems at the Scranton treatment plant, such as an overflow, were very unlikely to cause any problems at Moosic Lakes because of the significant difference in elevation.[28]

In sum, we find that there is a complete lack of evidence to support any argument that the Department should have required further hydrogeological study of Moosic Lakes before approving the 2000 Plan.

We therefore make the following:

CONCLUSIONS OF LAW

1.The Appellant bears the burden of proof.

2. The Appellant waived the objection to the 2000 Plan that the Department failed to consider whether the Scranton Sewer Authority treatment plant could accommodate flows from the Township by failing to raise it in its notice of appeal.

3. The objection to the 2000 Plan that Moosic Lakes could not be connected to public sewers is barred by the doctrine of administrative finality.

4. There is no evidence that the Department did not appropriately consider the Hydro-Geo Report.

5. There is no evidence that the Department should have required further hydrogeologic study of Moosic Lakes.

Accordingly:

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[28] Crowley, N.T. 176.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MOOSIC LAKES CLUB	:	
	:	
v.	:	**EHB Docket No. 2000-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP BOARD OF SUPERVISORS	:	

ORDER

AND NOW, this 9th day of April 2002, the appeal of the Moosic Lakes Club in the above-captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: April 9, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

JOHN O. DRUMMOND	:	
	:	
v.	:	**EHB Docket No. 2001-074-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MC RESOURCE DEVELOPMENT INC.	:	

Issued: April 10, 2002

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants the Permittee partial summary judgment in an appeal of the Department's issuance of a water supply facilities construction permit under the Safe Drinking Water Act. The Appellant, a neighbor who leases property contiguous to at least part of the prospective operation on which he resides, challenges the issuance of the permit alleging that its issuance was in violation of the Clean Streams Law, the federal Clean Water Act, the anti-degradation regulations, the Dam Safety and Encroachment Act, the Municipalities Planning Code Acts 67, 68 and 127 of 2000, and Article I Section 27 of the Pennsylvania Constitution. Further, the Appellant contends that the erosion and sedimentation control plan was inadequate, and alleges that the Permittee committed fraud and misrepresentation in the permit application. The Department had issued a minor amendment to the permit which the Appellant did not appeal. The Appellant's contention that the appeal of the original permit automatically covers

the amended permit is rejected and Permittee is granted summary judgment on that issue on the basis that the Amended Permit is final. The summary judgment entered, however, is only partial summary judgment because the record is not clear on whether and to what extent certain aspects of the original permit being challenged, or the review process associated therewith, may have been unaffected by the amended permit. Also, there are other disputed issues of fact or mixed questions of law and fact. Included among the matters that there remain disputed issues of fact are whether Appellant has standing. The Permittee's motion to strike the summary judgment motion of Appellant, which Appellant filed as part of its response to Permittee's motion for summary judgment and after the dispositive motion deadline had passed, is denied as moot because a review of the record in its entirety shows that Appellant would not be entitled to summary judgment in any event.

Introduction

This case involves the question of the propriety of the Department's issuance to MC Resource Development Inc. (MC Resource) of a Public Water Supply Permit, dated January 9, 2001, for construction of water withdrawal facilities which permit was issued under the Authority of the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§ 721.1- 721.17 (Safe Drinking Water Act or SDWA). Appellant, John Drummond (Drummond), appealed the issuance of that permit and this case is that appeal. The Department of Environmental Protection (Department or DEP) subsequently issued what it labeled as a "Minor Amendment" to the January 9, 2001 permit which is dated July 5, 2001. That Minor Amendment was not appealed. We will call the January 9, 2001 construction permit the Original Permit and the July 5, 2001 Minor Amendment the Amended Permit.

Before us now is permittee MC Resource's Motion for Summary Judgment. Appellant

Drummond answered MC Resource's Motion for Summary Judgment in a document which also included a section entitled "Contra Motion for Summary Judgment". MC Resources promptly moved to strike the "Contra Motion for Summary Judgment" as being out of time. The relevant factual and procedural background is set forth below and is derived from the notice of appeal, the amended notice of appeal, and the summary judgment filings with their respective exhibits. [1]

Factual and Procedural Background

On January 9, 2001 the Department issued MC Resource a Public Water Supply Construction Permit (Original Permit) for its proposed Pine Valley Farms, Spring No. 1 facility. MCRM Ex. 1A, Original Permit with Cover Letter. The Department's issuance of the Original Permit was noticed in the *Pennsylvania Bulletin* on February 24, 2001. 31 Pa. Bull. 1175. The Original Permit authorized the pumping of water from two well-heads located in East Brunswick Township, through 6-inch piping to a loadout facility also to be located in East Brunswick Township. The extraction wells are situated near Pine Valley Farms Spring No. 1 which feeds an unnamed tributary of Indian Run. *Id.*; MCRM ¶ 6. Indian Run is a tributary of the Little Schuylkill River. *Id.*; MCRB p.1. Once at the loadout facility, the water would be treated by microfiltration and a UV ozonation system, and then stored in a 20,000 gal. tank. The treated water would then be loaded onto tanker trucks which would transport the water to an offsite bottling facility. MCRM Ex. 1A, Original Permit with Cover Letter; MCRM Ex. 4, Original

[1] The "record" for purposes of motions for summary judgment, consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, if any. Pa. R.C.P. 1035.01. Thus, the record for summary judgment review in this case is derived entirely from Drummond's NOA, and the parties' various filings regarding each other's dispositive motions. Citation form will be as follows: "MCRM" is the MC Resource's motion for summary judgment, "MCRB" is MC Resource's brief in support of its motion for summary judgment; "MCRRB" is MC Resource's reply brief; "DR" is Drummond's Response to MC Resource's motion for summary judgment; "DB" is Drummond's brief in opposition to MC Resource's motion for summary judgment.

Permit Site Plan. The Original Permit's lone special condition required MC Resource to submit a certificate of construction to the Department upon completion of the project's construction in accordance with the approved construction plans and specifications. Under 25 Pa. Code § 109.504, the Department reviews the certificate of construction, and if satisfied, issues an operating permit.[2]

On March 26, 2001, Drummond filed a timely *pro se* notice of appeal challenging the issuance of the Original Permit. On April 13, 2001, through counsel, Drummond filed an Amended Notice of Appeal (collectively "NOA"). The NOA alleges 11 deficiencies with the Department's approval of the Original Permit covering the Clean Water Act, Clean Streams Law, Dam Safety and Encroachments Act, the NPDES permitting process, the Pennsylvania Municipalities Planning Code Acts 67, 68 and 127 of 2000 and the Pennsylvania Constitution. The NOA also alleges that the applicant committed fraud and misrepresentation in its application. Drummond spells out his challenges to the Original Permit in the third paragraph of his NOA as follows:

> 1. DEP failed to consider the regulations implementing the Clean Water Act, 40 CFR, Section 131.12(a)(1),
>
> 2. DEP permit is in violation of the Clean Water Act, including but not limited to the Anti-Degredation Policy,
>
> 3. DEP Permit requires a National Pollution Discharge Elimination System (aka NPDES) permit prior to or in conjunction with the issuance of the DEP Permit. MC Resource Development did not have this permit,
>
> 4. MC Resource Development Company's development pursuant

[2] The operating permit is required before a permit may commence operations. In fact, the Operating Permit was issued on January 16, 2002. That action has been appealed to the Board by Notice of Appeal filed on March 11, 2002 and is pending under caption *Sarah Curran Smith v. DEP and MC Resource Development, Inc., Permittee,* Environmental Hearing Board Docket No. 2002-067-K.

to the DEP permit violates the Dam Safety and Encroachment Act, aka DSEA,

5. DEP failed to fully consider the Clean Streams Law,

6. Indian Run has been designated as a Class B High Quality Cold Water Fishery by the Pennsylvania Fish and Boat Commission and DEP failed to recognize Indian Run as a stream which has excellent quality waters and environmental or other features that require special water quality protection,

7. DEP failed to consider the Pennsylvania Municipalities Planning Code Acts 67, 68, and 127 of 2000,

8. DEP failed to conduct adequate studies of Indian Run for non-point source pollution,

9. Upon information and belief, MC Resource Development supplies false and/or erroneous information to DEP, and DEP relied on this information in the consideration of the permit application, and

10. MC Resource Development Company recently received permission to construct the load-out facility in West Penn Township. This is not what was approved by DEP in the permit. MC Resource Development has substantially altered their plan, which is the subject matter of the permit, without DEP approval.

11. DEP Permit is in violation of the Pennsylvania Constitution.

On July 5, 2001 the Department, upon application of MC Resources, issued what it labeled as a "Minor Amendment" to the Original Permit (Amended Permit). Notice of the issuance of the Amended Permit was published in the *Pennsylvania Bulletin* on July 28, 2001. 31 Pa. Bull. 4120; MCRM Ex. 1B, Permit Amendment with Cover Letter. *Drummond did not appeal the Amended Permit.*

The Amended Permit altered the basic mechanics and logistics by which the proposed project would operate and added two Special Conditions which were not present in the Original Permit. As best as we can piece it together now on this record, the contemplated operation under

the Amended Permit differs from what was outlined in the Original Permit by, among other things, eliminating the 20,000 gallon storage tank and the microfiltration system, resizing and rerouting the transmission line, changing the location of the loadout facility from East Brunswick Township to West Penn Township, and by adding additional erosion and sedimentation controls. MCRM Ex. 6, Cover Letter to Amended Permit Application, MCRM Ex. 1, Affidavit of Richard Stepanski, Chief, Technical Services Section, Water Supply Management Program, DEP Northeast Region. Under the Amended Permit, extraction of ground water would be from the same two wells as the Original Permit, the water would be pumped underground in 12-inch PVC piping initially and then *via* 6-inch piping to a different loadout facility. This loadout facility is located in West Penn Township. MCRM Ex. 19, Amended Permit Application—Site Plan. The pipeline carrying the water from the wellheads travels under Indian Run to reach the loadout facility. The pipeline travels through both East Brunswick and West Penn Townships. *Id.*

Extraction Well No. 1 is 300 feet deep, six inches in diameter, and has a proposed yield of 110 gpm (gallons per minute). Extraction Well No. 2 is 300 feet deep, eight inches in diameter, and has a proposed yield of 90 gpm. MCRM Ex. 3, DEP Internal Review and Recommendations. At the loadout facility, the water would be treated by a UV ozonation system and then pumped into tanker trucks for bottling offsite. MCRM Ex. 6, Cover Letter to Amended Permit Application. To reach the loadout facility, the trucks must turn off of Kepner's Road and follow a gravel driveway/road[3] to the loadout facility. MCRM Ex. 19; MCRM Ex. 7, Affidavit

[3] The term "road" or "road cross section" has a specific legal meaning which has definitional significance with respect to Drummond's allegation that an individual NPDES permit was required for this project. For reasons we will discuss later, MC Resource characterizes this gravel route to the loadout facility as a "road" whereas Drummond characterizes it as not a road. As explained later, there are unresolved questions of fact which preclude our dispositive pronouncement whether this real estate is or is not a road. Therefore, we will refer to it as a driveway/road.

of Neil Minnig; DR Ex. C, Affidavit of John Drummond. The entire driveway/road is made up of part of an existing unpaved path that runs through fields to the wellheads and a driveway/road MC Resource created by clearing underbrush from an existing railway bed and laying gravel over its surface. MCRM ¶ 54; MCRRB p.2; DR Ex. C, Affidavit of John Drummond; DR Ex. L, Affidavit of Sarah Curran Smith.

In addition to the operational changes, the Amended Permit adds two Special Conditions that were not in the Original Permit. Condition No. 2 limits the loadout flow to no greater than 332 gpm (gallons per minute). Condition No. 3 provides that, during operation, a passby flow of 56.1 gpm, which is otherwise stated as 0.123 cfs (cubic feet per second), shall be maintained immediately downstream from the spring while water is being extracted from the wells. This passby flow rate is to be measured at least daily and when the passby stream flow is less than 56.1 gpm (0.123 cfs) no water may be withdrawn from the wells. MCRM Ex. 1B, Permit Amendment with Cover Letter. Passby flow is the flow by which no more withdrawals of water can be made from the stream without negatively affecting its aquatic life or other downstream uses of the water. MCRM Ex. 14, Deposition of Leroy M. Young p. 17 lines 11-21.

Since 1997, Mr. Drummond has leased a 33-acre residence from Ed and Rose Marie Hamm on which he resides (Drummond Leasehold). MCRM Ex. 9, Deposition of John Drummond p. 20. The Drummond Leasehold is contiguous to a large part of the East Brunswick and West Penn Township portions of MC Resource's permitted activity. Also, for 800 feet, Indian Run serves as one of the boarders to the Drummond Leasehold. DR Ex. C, Affidavit of John Drummond. Mr. Drummond and his family use and enjoy Indian Run for recreation. MCRM Ex. 9, Deposition of John Drummond p. 20; DR Ex. C, Affidavit of John Drummond. It appears that at least some portion of the contemplated operations of MC Resource will occur on

property adjacent to the Drummond Leasehold which MC Resource holds *via* lease from Larry and Barbara Hower (MC Resource Leasehold). MCRB p. 7; DR Ex. 1, *Smith v. MC Resource Development*, filed in the Court of Common Pleas of Schuylkill County; DR Ex. J, Deposition of John Drummond p. 22.[4]

MC Resource had completed the construction of the wells, pipeline, loadout facility and driveway/road under the Amended Permit when on October 4 or 5, 2001 a fire damaged the loadout facility's ozonator and the ultra-violet light water purifier and their associated electrical wiring. MCRM ¶ 14; MCRM Ex. 7, Affidavit of Neil Minnig. On November 13, 2001, the Department issued MC Resource an Emergency Permit which authorizes MC Resource to operate the facility for six months while it effectuates repairs to the disinfection equipment. MCRM ¶ 16, Ex. 8, Emergency Permit. The Emergency Permit, by its terms, expires on May 13, 2002[5]. Also, the Emergency Permit contains the same Special Conditions Nos. 2 and 3, as did the Amended Permit regarding loadout flow and passby flow.

The dispositive motion deadline for this appeal expired on January 23, 2002 pursuant to the Board's Second Order Extending Pretrial Deadlines entered August 23, 2001. MC Resource filed its motion for summary judgment and accompanying brief in a timely fashion on January 23, 2002. On February 19, 2002 Drummond filed what is labeled "Answer To Permittee's Motion For Summary Judgment And Contra Motion For Summary Judgment" along with

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[4] Neil and Sarah Curran Smith own property which boarders the MC Resource Property. The Smiths filed an Action for Declaratory Judgment in the Court of Common Pleas of Schuylkill County seeking declaratory judgment regarding their exclusive water rights to the waters in this area, barring MC Resources from engaging in commercial use of the water. DR Ex. 1, *Smith v. MC Resource Development*, filed in the Court of Common Pleas of Schuylkill County. That litigation is still pending.

[5] As noted in footnote 2 above, the superceding final operating permit was issued on January 16, 2002, and that permit is currently under appeal.

supporting exhibits and a brief. The "Contra Motion" states that it is timely "considering that until Permittee filed its Motion for Summary Judgment with attendant Admissions, Appellant's Motion was not ripe. DR ¶ 2. MC Resource promptly responded to the Drummond's "Contra Motion" on February 25, 2002 by filing a motion to strike it as being untimely. MC Resource filed a reply memorandum with respect to its motion for summary judgment on March 8, 2002. On March 15, 2002, Drummond filed an answer to the motion to strike which defended the untimely filing of its "Contra Motion" for summary judgment by repeating what was stated in its "Contra Motion" about timelines. The Department has filed nothing.

Summary Judgment Standard

As we recently set forth in *SECCRA v. DEP*, EHB Docket No. 2001-032-K, slip op. at 8-9 (Opinion and Order issued February 6, 2002):

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

Discussion

The Board set forth the guiding standard in an appeal of the issuance of a permit under the SDWA in *Oley Township v. DEP*, 1996 EHB 1098 when it stated as follows:

> Section 721.7(j) of the Safe Drinking Water Act, defines the Department's authority to issue permits under that Act:

> The department shall have the power to grant a permit *if it determines* that the proposed water system is not prejudicial to the public health and complies with the provisions of this act, the regulations adopted hereunder, and all other applicable laws administered by the department
>
> 35 P.S. § 721.7(j)(emphasis added). The language of the statute is clear that the Department has authority to issue a permit under the Safe Drinking Water Act only if it does three things: it must determine (1) that the proposed water system is not prejudicial to the public health, *and* (2) complies with the Safe Drinking Water Act and its regulations, *and* (3) complies with other laws within the Department's jurisdiction.

Oley Township v. DER, 1996 EHB 1098, 1114. The applicable permitting regulations under the SDWA are found at 25 Pa. Code §§ 109.501 – 109.510. Drummond's appeal of the Original Permit is focused much more on compliance, or non-compliance as Drummond contends, with other laws within the Department's jurisdiction, such as the Clean Water Act, the Clean Streams Law, the anti-degradation regulations, the Dam Safety and Encroachment Act, and Acts 67, 68 and 127, than it does on either the public health issue or compliance with the SDWA and its regulations.

MC Resource's Motion To Strike Drummond's
Contra Motion For Summary Judgment

Before we get into the legal substance of this matter, we will deal with the fact that Drummond's "Contra Motion" for summary judgment was late and MC Resource's consequent motion to strike it. There is no question that the "Contra Motion" is late and it could be stricken on that basis. Also, we were provided with no authority which would support the conclusion that the record for summary judgment purposes includes the moving party's summary judgment papers. *See* n.1 *supra*. However, in reviewing MC Resource's motion, we have reviewed the record in its entirety and we have concluded, as will be detailed in our discussion, that MC Resources is entitled to partial summary judgment on one issue and that no other summary

judgment for either party would be appropriate. Therefore, we conclude that the Motion to Strike is moot and we will deny it on that basis.

Standing

MC Resources argues that Drummond lacks standing to appeal because he does not have an interest in this appeal discernable from that of the abstract interest of all citizens in having others comply with the law. Drummond alleges that he has standing by virtue of the proximity of his residence, *i.e.*, the Drummond Leasehold, to the permitted activity and the alleged adverse effect the permitted activity will have on Indian Run. Drummond contends that MC Resource's permitted activity will harm him by reducing his air quality, damaging his water quality, and disturbing his use and enjoyment of Indian Run. DB p.7.

Under the *William Penn Parking Garage* analysis, a party is "aggrieved" so as to have standing to appeal if the appellant's interest is impacted in a substantial, direct, and immediate manner. *William Penn Parking Garage*, 346 A.2d 269, 280 (Pa. Cmwlth. 1975). "[T]he requirement of a 'substantial' interest simply means that the individual's interest must have substance – there must be some discernable adverse effect to some interest other than the abstract interest of all citizens, in having others comply with the law." *Id.* at 282. Further, a direct interest "simply means 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, "[a]n immediate interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue." *Belitskus v. DEP*, 1998 EHB 846, 859 *citing William Penn Parking Garage*, 346 A.2d at 283.

For purposes of standing questions raised in dispositive motions, the burden is on the moving party to show that an opposing party lacks standing; the opposing party does not have a

duty to show that it has standing in the first instance. *Seder v. DEP,* 1999 EHB 782, 785 *citing City of Scranton v. DEP*, 1997 EHB 985, 990-91. However, the non-movant also has a burden; it must "file a response clearly identifying one or more issues of fact arising from evidence in the record which [raises] . . . a genuine issue of material fact." *Wruth v. DEP*, 2000 EHB 155, 157 (citations omitted).

Here, at the summary judgment stage, with disputed facts and an incomplete record, we will not conclude that Drummond has no standing. Under repeated Board precedent, "an aesthetic appreciation for or recreational enjoyment of an environmental resource can confer standing." *Tri State River Products* Inc., *v DEP*, Docket No. 2001-019-R, slip op. at 3 (opinion issued June 1, 2001); *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944 n.5; *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951. Drummond's allegations, taken in the light most favorable to him, include his aesthetic appreciation for and use of Indian Run. Moreover, he has expressed an objectively reasonable concern that the permitted activities may adversely impact Indian Run. *See Wurth v. DEP*, 2000 EHB 155, 181-82 (Labuskes, J., concurring). Also, he alleges that the Drummond Leasehold is adjacent to at least some part of the contemplated activities of MC Resource and that these activities will adversely affect him and/or his Leasehold. *See Birdsboro v. DEP,* EHB Docket No. 99-071-K (Adjudication issued April 30, 2001) slip op. at 19; *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001) slip op. at 30-32. These allegations, taken together, create material issues of fact regarding standing which preclude dismissal of Drummond's appeal now. At trial, however, Drummond must establish through testimony and evidence that he has standing.

Drummond's Failure to Appeal the Permit Amendment

MC Resource contends that three results flow from Drummond's failure to appeal the

Permit Amendment: (1) the Board lacks jurisdiction over the Amended Permit; (2) the Amended Permit is administratively final; and (3) the Amended Permit renders the Original Permit moot. MC Resource asserts that we lack "jurisdiction to hear an appeal of the construction of the Permittee's facility which was constructed in conformity with the permit amendment" and "to hear a challenge to the redesign of the facility, and the permit conditions which were added in the permit amendment". MCRB p. 5-6. MC Resource maintains that administrative finality bars any appeal of the Amended Permit. MCRB p. 6. Because Drummond did not appeal the Amended Permit, MC Resource claims that it "had the right to rely upon the permit amendment [and its] . . . administrative finality. *Id.* Finally, MC Resource argues that the unappealed Amended Permit renders Drummond's appeal moot based on Board precedent holding that an appeal becomes moot when an event occurs during the pendancy of the appeal before the Board that deprives it of the ability to provide effective relief. *Valley Forge Chapter of Trout Unlimited v. DEP* 1997 EHB 1160, 1163. Otherwise, MC Resource argues that if the Board denies it summary judgment, "the Board will be confronted with the task of deciding [Drummond's] appeal challenging the design, location, and conditions as the project was originally proposed and not as the facility is presently constructed and operating. Thus, the only relief the Board can grant Drummond is to block the construction of a facility that is no longer designed as originally permitted." MCRB p. 7.

Drummond counters by arguing that the timely appeal of the Original Permit covers any amendment thereto. DR ¶ 13. Drummond also asserts that, to a large extent, the challenges to the Original Permit raised in the NOA were not affected or rendered moot by the changes contained in the Amended Permit. For example, while Drummond admits that the Amended Permit moots the challenges to the specific location of the loadout facility, he claims that the

NOA does not attack the specific design aspects of the loadout facility, but rather the process by which permission was granted and the impacts on the environment which the construction and proposed operation of the facility will create. Such impacts, he contends, will occur regardless of the location of the loadout facility. DB pp. 5-6. Amended NOA ¶ 3 part 10; MCRM and DR ¶ 87.

Both Drummond's and MC Resource's points have some merit. Drummond is clearly incorrect that an appeal of the Original Permit automatically covers any permit amendment. Drummond cites no case law for this sweeping assertion and we have found none either. MC Resource is correct that Drummond's failure to appeal the Amended Permit renders that permit administratively final. There being no appeal of the Amended Permit before us, the Amended Permit is beyond the reach of Drummond's pending appeal. *DER v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765,767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). Drummond cannot challenge in this appeal the changes in logistics and mechanics or the new Special Conditions outlined in the Amended Permit. To the extent that Drummond purports to be challenging issuance of the Amended Permit, MC Resource is entitled to summary judgment in its favor.

However, the finality and unappealability of the Amended Permit does not operate here to smother the entirety of Drummond's challenges of the Original Permit. We have held that a permit condition that has remained in continuous effect cannot be attacked in a permit modification if it was not challenged in the original permit. *Tri-State River Products, Inc. v. DEP*, 1997 EHB 1061; *Empire Sanitary Landfill, Inc. v. DEP*, 1996 EHB 345. By the same token, in this case, a permit condition or provision associated with the Original Permit which remains in continuous effect not being changed by the Amended Permit, or part of the review

process for the Original Permit which was not revisited for the Amended Permit, *is* proper subject matter for this appeal of the Original Permit. The problem here is that in many instances, the record is not yet clear on exactly what conditions or provisions, or part or parts of the review process associated with the Original Permit, do remain in continuous effect now in light of the Amended Permit. We sort out what we can on this now and leave the rest for trial.

We start with the proposition that the finality of the Amended Permit bars Drummond from challenging obvious changes effectuated by the Amended Permit such as the location of the loadout facility and the two added Special Conditions regarding loadout flow and passby flow. However, beyond that, it is not clear on this record what particular other matters may be in the same category. For example, even though the Amended Permit addresses E & S controls it is not clear to us nor does MC Resource explain why or how this issue is administratively final. Thus, triable issues remain as to precisely what aspects of the Original Permit are still intact and what aspects of the Department's review process as to the Original Permit are still pertinent.

For much the same reason that the finality of the Amended Permit does not operate to defeat the entirety of Drummond's appeal, neither does the doctrine of mootness. We disagree with MC Resource that *Valley Forge Chapter of Trout Unlimited*, 1997 EHB 1160, cited by MC Resource in support of its argument on mootness, calls for complete dismissal of Drummond's appeal. In that case the appellant challenged the Department's reissuance of an NPDES permit claiming that the permit failed to require the Permitee to dechlorinate the effluent from its treatment plant as required by the law. *Valley Forge Chapter of Trout Unlimited*, 1997 EHB at 1161. Recognizing its error, the Department issued an amended permit with the dechlorination requirement and explicitly revoked the erroneous part of the original permit. The Board granted the Permitee's unopposed motion to dismiss for mootness. *Id.* at 1162-63. Drummond's NOA

in this case, however, alleges general deficiencies with the process of granting the Original Permit and the conclusion that the Department reached regarding the impacts this project would have on the environment. Unlike the specific permit amendment in *Valley Forge Chapter of Trout Unlimited* that fixed the specific issue raised in the notice of appeal, here the NOA is much broader and alleges more systemic and generic deficiencies. Therefore, the Permit Amendment does not moot Drummond's appeal in full.

NPDES Permit

Drummond alleges that DEP erred in issuing the Original Permit without requiring an accompanying NPDES permit. MC Resource alleges that no NPDES permit was required for this project and that all that is required is its preparation of an erosion and sedimentation control plan (E & S Plan) aimed at controlling stormwater runoff associated with the construction.

The essence of this dispute is whether the total area of earth disturbance activities is more or less than five acres. The parties concur that the law requires a general or individual NPDES permit for stormwater discharges associated with construction activities where earth disturbance activity involves five acres or more of disturbance, excluding road maintenance activity. 25 Pa. Code § 102.5(a). They agree that earth disturbance activity is defined as construction which disturbs the surface of the land, including clearing, grading, excavations, embankments, land development, road maintenance activities, and the moving depositing, stockpiling, or storing of soil, rock or earth materials. 25 Pa. Code §102.1. Further, they agree that road maintenance activity is defined as earth disturbance activity within the existing road cross-section, such as grading and repairing existing unpaved road surfaces, cutting road banks, cleaning or clearing drainage ditches and other similar activates. *Id.*; MCRM and DR ¶¶ 50-53. Also, the parties do not dispute that MC Resource conducted earth disturbance activities on the road/driveway at

least by laying gravel on the existing railway bed and possibly through clearing underbrush from the railway and by grading and repaving done to the road. MCRM¶ 54; DR¶ 54; MCRRB p. 13, DB p. 8; MCRRB p. 2.

There are a myriad of disputed issues of law and fact however with respect to the ultimate question of whether more or less than five acres of earth disturbance is taking place. A major unresolved question which cannot be decided on this record is whether the driveway/road is or was a "road" or not and whether MC Resource's activities with respect thereto constitute "road maintenance" so as to be excluded from the acreage calculation for NPDES permit purposes. Road maintenance is defined under the Chapter 102 regulations as earth disturbance activities within *an existing road cross-section.* 25 Pa. Code § 102.1 (emphasis added). Some or all of the driveway/road is an abandoned railroad bed. Drummond argues that because the driveway/road is an old train bed and not a former passageway for vehicular traffic, it is not *an existing road cross-section* and that activities therein do not constitute road maintenance. Drummond cites the Pennsylvania Vehicle Code which defines the term "roadway" to mean only that which is used for *vehicular* traffic. 75 Pa. C.S.A. § 102. The Vehicle Code further defines "vehicle" to exclude devices used exclusively on rails or tracks. *Id.* Thus, Drummond concludes that an old railroad bed is not *an existing road cross-section.* As such, activities within that old railroad bed do not constitute road maintenance and must be *included* in the acreage calculation for NPDES permit analysis purposes. MC Resource claims that Vehicle Code is not applicable to the Chapter 102 NPDES/Erosion and Sedimentation control regulations at issue here because the Vehicle Code, unlike Chapter 102, relates to unpaved vehicular road surfaces. MC Resources argues that the former railroad bed would qualify as *an existing road cross-section* under the Chapter 102 regulations. These questions involve disputed issues of fact and/or mixed questions

of law and fact which we will not resolve on summary judgment.

In addition, MC Resource maintains the original permit only planned to disturb 1.28 acres through construction and under the amended permit only 2.11 acres were disturbed by construction. MCRM ¶¶ 55-56 Ex. 2, Permit Application-General Information p. 4 of 6, § 1.1; Amended Permit Application-General Information p. 4 of 6, §1.1. However, these calculations exclude any earth disturbance activities associated with the road/driveway. Drummond includes the driveway/road disturbance area in his calculation that yields the total disturbed acreage of 5.363407. DRM ¶¶ 54-55, Ex. C, Affidavit of John Drummond including Attachment 1 and 2. MC Resources, then, disputes the methodology Drummond used to calculate acreage even assuming the road bed activities were included in the calculation. MCRRB pp. 1-2. It argues that, even including the road bed activities, that the total disturbed acreage is only 3.93. *Id.* at p. 2. These issues present another layer of disputed issues of fact which cannot be resolved at the summary judgment stage.

Finally, MC Resource did not adequately explain how, if at all, the Amended Permit affected the NPDES process. That question also must await trial for resolution.

Erosion and Sedimentation Plan

Drummond contends that in issuing the Original Permit the Department acted contrary to the Clean Streams Law in that it failed to adequately consider the potential for non-point source pollution from entering Indian Run. As we have discussed, MC Resource developed an initial erosion and sedimentation control plan (E & S Plan 1) for its earth disturbance activities as contemplated under the Original Permit and then another E & S Plan for its earth disturbance activities as contemplated under the Amended Permit (E & S Plan 2). MCRM ¶¶ 88-99. An E & S Plan is designed to minimize or prevent non-point source pollution from being deposited

into Indian Run. *Id.* Beside his claim that MC Resources needed an NPDES Permit and not just an E & S Plan, which we have already discussed, Drummond complains that the E & S Plan, which would necessarily have to mean E & S Plan 1 in the context of this appeal, is, or was, inadequate. He claims that there continued to be muddy water and pollution discharges into Indian Run after construction on the commercial roadway/driveway had ceased in May 2001. DR ¶ 99. Drummond also contends that during operations of the facilities, fluid from the tanker trucks such as antifreeze, oil, or gas will seep into Indian Run. MCRM and DR ¶ 97.

Whether MC Resource is currently committing or has committed violations of E & S Plan 1 is not an issue for this appeal. *Middleport Materials, Inc. v. DEP*, 1997 EHB 78, 188 ("In an appeal challenging the issuance of a permit, alleged post-issuance violations are not relevant and will not be considered."). The same is true to the extent that Drummond' claim can be considered as a protestation that the Department is allowing or has allowed such alleged violations of an E & S plans without taking enforcement action. *Riddle v. DEP*, Docket No. 98-142-MG slip op. at 29-30 n. 48 (Adjudication issued March 25, 2002).

Likewise, this appeal does not involve E & S Plan 2 to the extent E & S Plan 2 is different from E & S Plan 1. However, there is not enough in the record now to conclude that the question of whether E & S Plan 1 issued in connection with the Original Permit should be eliminated from the case in MC Resource's favor. We cannot tell which, if any, parts of E & S Plan 1 were left intact and not touched upon by E & S Plan 2 which differs from E & S Plan 1. Nor can we tell with precision on this record which aspects, if any, of the E & S Plan 1 are still even in effect at this point in time. In other words, we do not have a clear handle on whether the activity for which E & S Plan 1 had been designed in connection with the Original Permit may

now be over and E & S Plan 1 perhaps now not in force. For these reasons, it is too early to grant judgment on this part of the case.

Dam Safety and Encroachments Act

Drummond asserts that the driveway/road connecting Kepner's Road to the loadout station and MC Resource's activities with respect thereto constitutes an ongoing encroachment of the wetlands adjacent to Indian Run and the unnamed tributary in violation of the Dam Safety and Encroachments Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27 (Dam Safety and Encroachments Act) (DSEA). Again, as with the E & S Plan violation allegation to the extent that Drummond's claim in this regard amounts to a protestation that MC Resources is engaging in or has engaged in violations of the DSEA, such a claim is not pertinent to this appeal. *Middleport Materials, Inc. v. DEP*, 1997 EHB 78, 188 ("In an appeal challenging the issuance of a permit, alleged post-issuance violations are not relevant and will not be considered"). The same would apply to the extent that Drummond's claim here can be considered as a protestation that the Department is allowing such alleged ongoing violations of the DSEA without taking enforcement action. *See Riddle v. DEP*, Docket No. 98-142-MG slip op. at 29-30 n. 48 (Adjudication issued March 25, 2002).

Nonetheless, to the extent that Drummond is contending that the Department did not properly consider the DSEA when it reviewed the application and issued the Original Permit, or that issuance of the Original Permit was violative of the DSEA, those contentions are fairly at issue. Drummond is challenging, at the least, the Department's and the Army Corp's of Engineer's conclusions during the permit review process that the permitted activity would not create an encroachment. We cannot conclude on this record that MC Resources is entitled to summary judgment on this challenge. Nor can we conclusively determine now whether or to

what extent this challenge relates to the issuance of the Original Permit as opposed to having been eclipsed by the issuance of the Amended Permit. Accordingly, a trial will be needed to sort these issues out.

Acts 67, 68, and 127 of 2000 and the Municipalities Planning Code

In the NOA, Drummond asserts that the Department "failed to consider the Pennsylvania Municipalities Planning Code (MPC) Acts 67, 68, and 127 of 2000." These acts are the much talked about and much written about amendments to the Municipalities Planning Code which direct that state agencies "shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities". *See* 53 P.S. § 10619.2. To date we are not aware of any judicial decisions dealing with the Department's compliance, or lack thereof, with these newly enacted provisions.

Drummond does not elucidate on what the Department was supposed to have done to comply with Acts 67, 68, and 127. Nor does MC Resource fully explain what the Department did to comply with Acts 67, 68 and 127 and how that action was appropriate. There is nothing in the discovery presented with the parties' papers that directly answers the question of what the Department did to comply with Acts 67, 68 and 127 with respect to the Original Permit. The Department stood mute at the summary judgment stage on the important questions of what it did during the review to comply with Acts 67, 68 and 127 and how its actions allegedly complied with those laws.

Instead of telling us what the Department did in its review process to comply with Acts 67, 68, and 127, the parties in their papers have supplied us with a plethora of zoning litigation pleadings, zoning hearing transcripts, zoning authorities' letters and decision documents. At this point, we are not sure what the latest zoning status of the various aspects of the MC Resource

facilities may be. Even if we did know their latest exact zoning status, that begs the ultimate questions of what the Department did in its review process to comply with Acts 67, 68 and 127 and how its actions in that regard are or are not compliant with those Acts.

There can be no summary judgment then on the Act 67, 68 and 127 question. The question of what the Department did to comply with Acts 67, 68, and 127 in the review process associated with issuance of the Original Permit and how those actions were compliant or not compliant with those three Acts remains an open and unresolved question for trial in this case.[6] We certainly expect that the Department will take an active role in the trial litigation of these issues which present novel and important questions about *its* activities with respect to these newly enacted statutes.

Anti-Degradation Requirements

NOA paragraphs 1, 2 and 6 amount to an assertion that the Department did not adequately consider the Commonwealth's anti-degradation rules when it issued the Original Permit. Although Drummond's papers filed in response to MC Resources motion for summary judgment refer to the Department's failure to consider the anti-degradation regulations in connection with the Amended Permit, such a challenge would be beyond the purview of this appeal since the Amended Permit was not appealed. Thus, we do not consider as part of this appeal any of the matters relating to loadout flow or passby flow as set forth in Special Conditions Nos. 2 and 3 of the Amended Permit.

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[6] In this regard, the Act 67, 68 and 127 issues open at trial would pertain only to the aspects of the Original Permit that remain in effect and are not overridden by the Amended Permit. For example, the Amended Permit changed the location of the loadout facility from East Brunswick Township to West Penn Township. We do not believe, then, that Act 67, 68 and 127 compliance with respect to the relocation of the loadout facility as to West Penn Township could be part of this appeal and to the extent Drummond is so contending, summary judgment is entered in MC Resource's favor.

The anti-degradation regulations appear at Chapter 93 of Title 25 of the Pennsylvania Code. There is a dispute whether Indian Run has been designated as a Class B High Quality Cold Water Fishery, as Drummond asserts, or whether it is classified as a Cold Water Fishery (CWF) as MC Resource's asserts. Drummond points to a 1993 Pennsylvania Fish and Boat Commission report as support for its classification of Indian Run as a Class B High Quality Cold Water Fishery. DR ¶ 29-31 and Ex. B. MC Resource counters that, "as a tributary to the Little Schuylkill River, Indian Run is within the Little Schuykill River Basin which is in the Delaware River Basin. The Little Schuykill River and its basin are designated a Cold Water Fishery (CWF). 25 Pa. Code § 93.9f. Indian Run is thus a CWF and not High Quality." MCRB p. 9-10.

We will not resolve this dispute about the classification of Indian Run on summary judgment, but instead will wait for testimony on the subject. Also, no party has addressed whether, even if the regulations may classify Indian Run as a Cold Water Fishery, Drummond could now challenge that designation in this proceeding in connection with review of the Department's action which, presumably, involved treating Indian Run as a CWF. In addition, we are not clear whether it makes a difference with respect the propriety of the issuance of the Original Permit whether Indian Run is a CWF or a Class B High Quality Cold Water Fishery.

Article I Section 27 of the Pennsylvania Constitution

Drummond contends that the Original Permit violates Article I Section 27 of the Pennsylvania Constitution, which provides:

> Sec. 27. Natural Resources and the Public Estate.
>
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

> come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. Art. I § 27.

MC Resource maintains that the standard to determine if the Department has complied with Article I Section 27 depends on whether the Department is acting pursuant to a statute which implements this provision. *City of Scranton v. DEP*, 1997 EHB 985, 1021. Where the Department acts pursuant to a statute implementing Article I Section 27, it is deemed to be constitutional so long as the action complies with the statute and its regulations. *Id.* MC Resource asserts that the purpose of Safe Drinking Water Act and its regulations is to further the intent of Article I Section 27. 35 P.S. 721.2(b). Accordingly, MC Resource asserts that the permit complies with Article I Section 27 because the permit complies with the Safe Drinking Water Act.

We deny MC Resource summary judgment on this issue because, as we have been discussing throughout this opinion, there are a host of unresolved issues of material fact and/or unresolved questions of mixed law and fact regarding whether the Original Permit complies with "other laws within the Department's jurisdiction" and thus, whether it was issued in compliance with the SDWA. 35 P.S. § 721.7(j) (Department may grant permit if it determines, among other things, that the permit complies with all other applicable laws administered by the Department).

Allegations of Applicant Fraud and Misrepresentation

Drummond accuses MC Resource of applicant fraud and misrepresentation and offers what it contends is supporting evidence. MC Resource denies any such allegations and also provides supporting evidence. There is no need to get into the details of this issue here because there is competing evidence which has been proffered by both sides regarding the alleged fraud and misrepresentation. Thus, there are disputed issues of fact regarding whether fraud or

misrepresentation occurred. Also, determination of this question in this case will depend upon an evaluation of the credibility of witnesses who testify on this subject. We have held many times that summary judgment is not the appropriate platform to reach any conclusions on issues the determination of which depend upon credibility determinations. *Lower Paxton Township v. DEP*, EHB Docket No. 2000-169-K slip op. at 23-24 (Opinion and Order issued August 23, 2001)(credibility question cannot be resolved on summary judgment); *Stern v. DEP*, EHB Docket No. 2000-221-K slip op. at 22-23 (Opinion and Order issued June 15, 2001)(credibility of witnesses cannot be decided on summary judgment); *Defense Logistics Agency v. DEP*, EHB Docket No. 2000-004-MG slip op. at 6 (Opinion and Order issued April 16, 2001)(Chairman Miller writing that where resolution of the case requires the Board to consider disputed facts and to make judgments concerning the credibility of witnesses, summary judgment is inappropriate); *Smedley v. DEP*, 2000 EHB 84, 86-87 (trial on the papers is not appropriate). In addition, evidence would be required to determine whether the supposed fraud or misrepresentation, even if it did occur, was material in any way and whether the Department relied on the fraud or misrepresentation as a basis or part of the basis for granting the Original Permit.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN O. DRUMMOND	:	
	:	
v.	:	**EHB Docket No. 2001-074-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MC RESOURCE COMMONWEALTH OF PENNSYLVANIA,	:	

Issued: April 10, 2002

ORDER

AND NOW this 10th day of April, 2002 upon consideration of the MC Resource's Motion for Summary Judgment, Drummond's Answer To MC Resource's Motion For Summary Judgment and Contra Motion For Summary Judgment, and MC Resource's Motion To Strike Drummond's Contra Motion For Summary Judgment, IT IS HERBY ORDERED that:

1. MC Resource Development Inc.'s motion for summary judgment is granted in part and denied in part. The Motion is granted to the extent that the appeal purports to challenge the issuance of the Amended Permit. The Motion is DENIED in all other respects;

2. Drummond's "Contra Motion for Summary Judgment" is DENIED;

3. MC Resource Development Inc.'s Motion to Strike Drummond's Contra Motion for Summary Judgment is DENIED as moot.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **April 10, 2002**

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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2000-198-CP-K**
ANDREW LENTZ	:	**Issued:** April 18, 2002

OPINION AND ORDER ON DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO QUASH

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants the Department's Motion to Quash a filing by the Defendant which is apparently purporting to be his Pre-Hearing Memorandum. The deadline for Defendant's Pre-Hearing Memorandum was March 25, 2002. On March 21, 2002 Defendant requested a sixty-day extension to that deadline. By Order dated March 22, 2002 the Board denied the request for an extension. The Defendant, ignoring and defying the March 22, 2002 Order, filed what he appears to be treating as a Pre-Hearing Memorandum on April 1, 2002. The Board enforces its Order dated March 22, 2002 denying the requested extension and quashes the filing to the extent it purports to be Defendant's pre-hearing memorandum.

Introduction

This is a Clean Streams Law civil penalty assessment case which the Department commenced by Complaint filed on September 20, 2000. The trial is set to start on April 23, 2002. This case has had a rather torturous history which has already resulted in two published Opinions and Orders, the first of which was prompted by and dealt with Mr. Lentz's

obstreperous and contemptuous behavior. *See DEP v. Lentz*, EHB Docket No. 2000-198-K (Opinion and Order issued September 13, 2001) and *DEP v. Lentz*, EHB Docket No. 2000-198-K (Opinion and Order issued November 9, 2001). Before us today is the Department's April 9, 2002 Motion to Quash (Motion) a filing by Mr. Lentz which, although entitled "Interrogatory Answers", has some of the attributes of and bears a resemblance to a Pre-Hearing Memorandum. On April 10, 2002, the Board ordered that Mr. Lentz respond to the Motion, if he intended to do so, by no later than April 17, 2002. Lentz filed no response. The background of this particular Motion is as follows.

Procedural and Factual Background

On January 22, 2002, the Board entered its Pre-Trial and Trial Scheduling Order which called for the Department's Pre-Hearing Memorandum to be filed by March 8, 2002 and Mr. Lentz's responding Pre-Hearing Memorandum to be filed by March 25, 2002. That Order specifically reminded the parties that the Pre-Hearing Memoranda were to be in full compliance with the form required for same as provided in 25 Pa. Code § 1021.82. The Department duly filed its Pre-Hearing Memorandum on March 8, 2002. On March 21, 2002, Mr. Lentz filed a request to extend the deadline for the filing of his Pre-Hearing Memorandum. This request stated "[w]e need more time to adequately prepare a satisfactory response and obtain adequate counsel. Andrew W. Lentz does not understand what Statutes he violated that we are having a hearing for and would like the Environmental Hearing Board to inform Mr. Lentz of the Statutes he violated".[1]

[1] Mr. Lentz has proceeded in this matter *pro se*. By letter dated January 3, 2001, the Board warned Mr. Lentz about the pitfalls of proceeding *pro se* in a case before the Board, warned him that a *pro se* litigant assumes the risk that his lack of legal training will prove his undoing, and warned him that his failure to follow Board rules/and or obey Board orders issued during the course of these proceedings may require the imposition of sanctions pursuant to 25 Pa. Code §

On March 22, 2002 the Board entered an Order denying the requested extension. On March 25, 2002 Mr. Lentz filed what he labeled "Answers for Complaint For Assessment of Civil Penalties". That document, which we will refer to as the "Answers" document, is one page in length and states as follows:

> This matter must be dismissed, because:
>
> Andrew Lentz is Expressly Reserving and preserving All Rights, U.C.C. 1-207. I preserve my right not to be compelled to perform under any contract or commercial agreement that I did not enter into knowingly, voluntarily and intentionally. And furthermore, I do not accept the liability of the compelled benefit of any unrevealed contract or commercial agreement.
>
> Answers for Complaint For Assessment of Civil Penalties
> Andrew Lentz is demanding his civil liberty rights under the United States Constitution to preserve his rights, by protecting his life, liberty and property. Andrew Lentz is hereby preserving ALL of his constitutional rights, which are provided by the United States Constitution.
>
> Andrew Lentz is reserving his rights and therefore declaring constitutional immunity with the frivolous statues of the State of Pennsylvania.
>
> I, Andrew William: do not understand "anything" concerning this matter and especially, why the Commonwealth of Pennsylvania, Department of Environmental Protection (DEP) is prosecuting me, in their interest to collect revenue by accessing civil penalties.

1021.125 of the Board's Rules. Mr. Lentz attempted to qualify for *pro bono* counsel from the Pennsylvania Bar Association Section of Environmental, Minerals and Natural Resources Law's *Pro Bono* Counsel Program (*Pro Bono* Program). He was denied *pro bono* counsel by letter dated June 12, 2001 from the Acting Administrator of the *Pro Bono* Program in which the Acting Administrator wrote that, "I have evaluated the financial documentation you provided to me, as well as certain supplemental information concerning real estate holdings. It does not appear that you qualify for representation under the guidelines of our *Pro Bono* program, which is closely linked to the official poverty threshold established by the federal government." EHB Docket No. 2000-198-K Docket Entry No. 21. Mr. Lentz elected to continue to proceed *pro se* afterward.

> Andrew Lentz had no contract with the plaintiff, was not a responsible party and was not given due process. See Attachment A (Soil Erosion and Sedimentation Control narrative Report & NPDES permit) and see attachment B (Previous defendant answers dated November 2000)
>
> Plaintiff did not follow the statutes they put in place. See attachment B
>
> Referenced here is the United States Constitution and all cases and studies thereby guaranteeing constitutional rights.
>
> WHEREFORE, **Andrew William: demands that this matter be dismissed with prejudice.**
>
> Respectfully submitted,
> Signed/ Andrew William: Lentz
>
> Expressly Reserving All Antecedent Rights

This "Answers" document provides no witness list, but it does cryptically refer to two documents which are purportedly attached, but are not actually attached, namely (1) Attachment A - A Soil Erosion and Sedimentation Control Narrative Report and NPDES Permit; and (2) Attachment B - previous defendant answers dated November 2000. Obviously, this "Answers" document in no way comports with the requirements of a Pre-Hearing Memorandum as is required by 25 Pa. Code § 1021.82 and as reinforced and restated by Order in the Board's Pre-Trial and Trial Scheduling Order dated January 22, 2002.

Then, on April 1, 2002, Mr. Lentz filed by telecopy the document which is the subject of the instant Motion, namely a document entitled "Interrogatory Answers". This document, in part, seems to contain a paragraph-by-paragraph response to the Department's Pre-Hearing Memorandum, a list of 8 witnesses, and list of 17 documents all but three of which are attached as exhibits to the "Interrogatory Answers". It was explained that the three missing documents were to be filed later because their size did not allow for telecopy transmission. On April 4,

2002, the Board received by mail a hard copy version of the "Interrogatory Answers" which did have copies of the previously missing documents. Although this document is not labeled as a Pre-Hearing Memorandum and its does not comport in full with 25 Pa. Code § 1021.82, it does possess some of the attributes of and resembles in parts a Pre-Hearing Memorandum.

The Department's Motion notes that Mr. Lentz apparently intends that the "Interrogatory Answers" filing serve as a Pre-Hearing Memorandum. The Department argues that Mr. Lentz, through these filings, has "made a blatant attempt to grant himself an extension of time to file a pre-hearing memorandum, a request which he made of the Board and which the Board denied." Motion ¶ 7. The Department requests that the Board "quash[ ]" and "disallow[ ]" the "Interrogatory Answers" document, at least to the extent that it purports as a Pre-Hearing Memorandum. The Department's brief in support of its Motion argues that the Board should grant this requested relief as a sanction under our authority to impose sanctions under 25 Pa. Code § 1021.125.

Discussion

The disposition of this Motion boils down to the answer to one question—is the Board going to enforce its Order dated March 22, 2002? In essence, the Department's Motion to Quash asks for nothing more than that we follow through and enforce the Order we issued on March 22, 2002. Our answer to this question, which is not a question about sanctions, is yes, and, therefore, we will grant the Department's Motion. The "Interrogatory Answers" filing will be stricken and disregarded. It will not be treated as a Pre-Hearing Memorandum and Mr. Lentz will not be allowed to present at trial the witnesses, exhibits and substance therein, to the extent they expand upon the "Answers" document.

The Department has not requested that we quash or impose sanctions with respect to the March 25, 2002 "Answers" document. That document, as we have noted, is not at all in compliance with 25 Pa. Code § 1021.82(a) as reinforced and restated by Order in the Board's Pre-Trial and Trial Scheduling Order dated January 22, 2002. Subsection (b) of 25 Pa. Code § 1021.82 provides that "[t]he Board may impose sanctions on a party which does not comply with the requirements of subsection (a). These sanctions may include the preclusion of testimony or documentary evidence and the cancellation of the hearing."

We could impose sanctions under 25 Pa. Code § 1021.82(b) *sua sponte*. At this time, though, we will not interpose the operation of 25 Pa. Code § 1021.82(b). Obviously, only Mr. Lentz potentially would like to have the hearing cancelled and that would not be a sanction to him, but a reward, and we would not even consider doing that. As for testimonial or documentary evidence preclusion, Mr. Lentz's trial presentation is already strictly limited. Even giving Mr. Lentz the benefit of the doubt and treating the March 25, 2002 "Answers" document as being the functional equivalent of a Pre-Hearing Memorandum, Mr. Lentz's presentation at trial of his case-in-chief will be limited by the operation of that document to him alone being a potential witness and his prospective testimony being limited to the subjects addressed in his "Answers" document. The Department, of course, will be free to object to any proffered testimony if such testimony is otherwise objectionable under the Rules of Evidence, which objections, if any, would be ruled upon at trial. In addition, he could, at most, attempt to offer into evidence the two attachments referred to in his "Answers" filing. The Department will also be free in that case to interpose any objections to admissibility that it may deem appropriate, which objections would be ruled upon at trial.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2000-198-CP-K**
ANDREW LENTZ	:	

ORDER

AND NOW, this 18th day of April, 2002, it is HEREBY ORDERED that the Motion of the Department to Quash is granted and Mr. Lentz's filing entitled "Interrogatory Answers" (both the telecopy filing of April 1, 2002 and the hard copy filing of the same document filed on April 4, 2002, which included copies of some documents which were not in the telecopy version) is stricken from the record and will not be considered. In addition, Mr. Lentz's presentation at trial of his case-in-chief is limited to, at most, his being the only witness with his testimony being limited to the subjects addressed in the "Answers" document to the extent such testimony is otherwise admissible under the Rules of Evidence. Furthermore, Mr. Lentz is limited to offering into evidence in his case-in-chief, at most, the two documents specifically referenced in the "Answers" document to the extent that such documents are otherwise admissible under the Rules of Evidence.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: April 18, 2002

VIA TELECOPY AND FIRST CLASS MAIL

c: **For the Commonwealth, DEP:**
Charles Haws, Esquire
Southcentral Region

Defendant:
Mr. Andrew Lentz, *pro se*
Morningstar Marketplace
5309 Lincoln Highway West
P.O. Box 364
Thomasville, PA 17364

DEP Bureau of Litigation
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

NORTH AMERICAN REFRACTORIES COMPANY	:	
v.	:	**EHB Docket No. 99-199-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 19, 2002**

SECOND ADJUDICATION

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

Synopsis:

A party's challenge to a regulation that imposed a one-year deadline for an application for emission reduction credits is rejected because the party failed to meet its statutory burden of proving that the deadline, although more stringent than federal law, is not reasonably necessary in order for the Commonwealth to achieve or maintain ambient air quality standards or satisfy related statutory requirements.

BACKGROUND

The North American Refractories Company ("NARCO") appealed from a letter from the Department of Environmental Protection (the "Department") denying NARCO's application for emission reduction credits (ERCs) as untimely. The Department denied the application pursuant to its interpretation of 25 Pa. Code § 127.207(2), which provides that an application must be

submitted within one year of the initiation of an emissions reduction used to generate ERCs. NARCO's appeal boiled down to a claim that the Department had incorrectly interpreted the regulation, and that the regulation was invalid because it was more stringent than federal law. A majority of this Board sustained the appeal on the interpretation issue, holding that the Department erroneously denied NARCO's application based upon the Department's misinterpretation of the one-year requirement. As a result, the Board did not find it necessary to address the stringency issue in its first adjudication.

On the Department's petition for review, the Commonwealth Court reversed. In *Department of Environmental Protection v. North American Refractories Company*, No. 1298 C.D. 2001 (February 8, 2002), the Commonwealth Court made the following ruling:

> The Court concludes that the EHB erred in refusing to defer to the Department's interpretation of [25 Pa. Code] Section 127.207(2) once the EHB concluded that the Department's interpretation of the regulation was reasonable. However, because of the EHB's erroneous reasoning and result reached on the issue of regulatory interpretation, the EHB did not address North American's alternative argument that the Department's interpretation of Section 127.207(2) is invalid on grounds that it is more stringent than the requirements of federal law in violation of Section 4.2 of the Air Pollution Control Act, added by Section 5 of the Act of July 9, 1992, P.L. 460, 35 P.S. § 4004.2. The Department correctly argues that the Court should not reach this issue before it has been decided by the EHB. Accordingly, the EHB's order is reversed, and the matter is remanded to the EHB to determine whether Section 127.207(2), as interpreted by the Department, is invalid on grounds that it is more stringent than the requirements of federal law.

Slip op. at 10.

Following the remand, the Board held a conference call with the parties. The parties declined the Board's invitation to submit additional briefing in response to the Commonwealth Court's remand order. Both parties expressed the opinion that the remanded issue should be decided based upon the existing record and prior briefing. We acceded to the parties' preference.

FINDINGS OF FACT

1. Marsha Spink is the Associate Director of the Office of Air Programs for the United States Environmental Protection Agency (EPA). Her job responsibilities include oversight of the state implementation plans (SIPs) for Pennsylvania and other states located in EPA Region III. (T. 17-19.)

2. Ms. Spink testified that Pennsylvania's SIP would have been approved without the one-year application deadline for ERCs. (T. 28.)

DISCUSSION

Section 4.2(b) of the Air Pollution Control Act ("APCA") reads in the pertinent part as follows:

> Control measures or other requirements adopted under subsection (a) of this section shall be no more stringent than those required under the [federal] Clean Air Act unless authorized or required by this act or specifically required by the Clean Air Act. This requirement shall not apply if the [Environmental Quality] board determines that it is reasonably necessary for a control measure or other requirement to exceed minimum Clean Air Act requirements in order for the Commonwealth:
>
> (1) To achieve or maintain ambient air quality standards;
>
> (2) To satisfy related Clean Air Act requirements as they specifically relate to the Commonwealth....

35 P.S. § 4004.2(b). Pennsylvania's one-year statute of limitations for applying for ERCs is more stringent than federal law. (F.F. 1-2), and it is not expressly authorized or required by the APCA or the federal Clean Air Act. Therefore, the question that remains in this appeal is whether the requirement is "reasonably necessary" in order for the Commonwealth to achieve or maintain ambient air quality standards or to satisfy related Clean Air Act requirements as they specifically relate to the Commonwealth.

This Board has the authority to review the validity of a regulation in the context of an appeal from a Departmental action. *Duquesne Light Company v. DEP*, 724 A.2d 413, 416 n.9

(Pa. Cmwlth. 1999). Ordinarily, we would review the regulation to determine whether it is (1) within the agency's granted power, (2) issued pursuant to proper procedure, and (3) reasonable. *Housing Authority of Chester County v. Pa. State Civil Service Commission*, 730 A.2d 935, 942 (Pa. 1999); *Eagle Environmental II, L.P. et al. v. DEP*, EHB Docket No. 2001-198-MG, slip op. at 10 (Opinion and Order issued April 4, 2002).

This appeal, however, is somewhat unusual because NARCO's only remaining challenge to the regulation is that it is invalid because it is unnecessarily more stringent than the requirements of federal law. The APCA expressly defines this Board's role in addressing such a challenge. Our standard of review is defined as follows:

> In any challenge to the enforcement of regulations adopted to achieve and maintain the ambient air quality standards or to satisfy related Clean Air Act requirements, the person challenging the regulation shall have the burden to demonstrate that the control measure or other requirement or the stringency of the control measure or requirement is not reasonably required to achieve or maintain the standard or to satisfy related Clean Air Act requirements.

35 P.S. § 4004.2(d)

Thus, NARCO bears the burden of proving that the one-year limitations period is *not* reasonably required. Our review of the record readily reveals that NARCO failed to satisfy that burden.

NARCO's case may be summarized as follows. (1) Most of Pennsylvania's neighboring states do not have a one-year deadline. Thus, the requirement puts Pennsylvania at a competitive disadvantage in attracting and maintaining new businesses and business expansions, which is precisely the opposite of what the Legislature intended in passing the pertinent section of the APCA. (2) The Department has considered and will continue to consider changing or eliminating the requirement, and has allegedly hinted in discussions with business leaders that the requirement is not a good idea. (3) The EQB's written finding that the requirement is

necessary is expressed too generally; the EQB should have made an express written finding specific to the one-year requirement. (4) The Department failed to prove that the requirement is reasonably necessary. (5) The requirement results in the loss, rather than the creation, of ERCs. The Southwestern Pennsylvania Growth Alliance submitted a post-hearing brief as *amicus curiae* primarily in support of the first argument.

Even if we accept all of these arguments as true, they do not amount to a showing by a preponderance of the evidence that the one-year requirement is *not* reasonably necessary. The fact that the requirement may put Pennsylvania at a competitive disadvantage is not relevant to whether it is necessary. What neighboring states have done is, at best, remotely relevant. The fact that the Department is *considering* changes proves nothing. We have little or no record of what findings the EQB made, and in any event, the EQB's lack of a specific written finding on the regulation at issue falls substantially short of satisfying NARCO's affirmative burden of proof on the substantive question. The Department has no obligation to prove to this Board that the requirement is necessary, especially where the challenging party has not even made a preliminary showing that it is not. Finally, that the requirement results in the loss of ERCs does not mean that it is not otherwise reasonably necessary to achieve or maintain the identified clean air requirements.

As one illustration of NARCO's failure of proof, we refer to the testimony of its EPA witness, Marsha Spink. Ms. Spink testified that the one-year requirement is more stringent than federal law and EPA did not require that it be included in Department's regulations. Ms. Spink did *not* testify, however, that the requirement is not reasonably necessary to achieve or maintain ambient air quality standards or satisfy related statutory requirements in Pennsylvania. Indeed, the record is devoid of *any* testimony directly in support of such a conclusion.

The Department has advanced a number of arguments in support of the one-year requirement. It is not necessary for us to determine whether those arguments equate to a showing that the requirement is reasonably necessary to achieve the stated statutory objectives because it is NARCO that bears the burden of proof, and NARCO has fallen well short of meeting its burden of presenting a preponderance of evidence that the requirement is *not* necessary.

CONCLUSIONS OF LAW

1. The one-year deadline set forth in 25 Pa. Code § 127.207(2) is more stringent than federal law.

2. NARCO failed to prove by a preponderance of the evidence that the one-year deadline in Section 127.207(2) is not reasonably required to achieve or maintain the ambient air quality standards or to satisfy related statutory requirements.

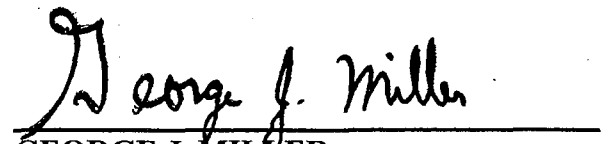
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTH AMERICAN REFRACTORIES COMPANY	:	
v.	:	EHB Docket No. 99-199-L
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of April, 2002, NARCO's appeal is **DISMISSED.**

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **April 19, 2002**

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

For the Commonwealth, DEP:
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Southcentral Regional Counsel

For Appellant:
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WILLIAM T. PHILLIPY IV
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PHILADELPHIA WASTE SERVICES	:	
	:	
v.	:	**EHB Docket No. 2001-136-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 23, 2002**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies the Department's motion for summary judgment seeking dismissal of Appellant's appeal because there are material issues of fact regarding whether the Appellant is subject to the 300-yard setback requirement from a park for waste processing facilities. Specifically, questions remain with regard to the adjacent property's status as a park.

OPINION

This appeal is from the Department of Environmental Protection's (the "Department's") denial of Philadelphia Waste Service's (the "Appellant's") application for a municipal waste permit to construct and operate a construction and demolition transfer processing facility at 1620 South 49th Street, Philadelphia, Pennsylvania ("Site"). The Appellant filed its application for a permit pursuant to 25 Pa. Code, Chapters 271, 279 and 283 of the Department's Municipal Waste Regulations on July 27, 1999. On May 18, 2001, the Department denied the Appellant's application, in part, because the proposed facility was located within 300 yards of a park and

Appellant failed to demonstrate that it had obtained a waiver of the 300-yard setback from the park owner.[1] On June 18, 2001 the Appellant filed this appeal asserting that the nearest park to the site is 1,500 feet from its proposed facility, and therefore, it is not subject to the setback.[2] Appellant also asserts, that even if the Site is located within 300 yards of a park, the Site has been a permitted municipal waste facility since April 14, 1985 and therefore is exempt from the setback requirement of 25 Pa. Code § 279.202 and 25 Pa. Code § 283.202.

On December 31, 2001 the department filed this motion for summary judgment seeking dismissal of Appellant's appeal. The Department's motion asserts that the proposed facility is located within 300 yards of a park and that the Site is not a permitted facility prior to April 9, 1988 for purposes of exemption from the setback requirement. The Appellant responds that the property adjacent to the Site is not a park, and therefore, it is in compliance with the setback requirement. Appellant also responds that the Site is a municipal waste facility permitted prior to April 9, 1988 and is therefore exempt from the 300-yard setback requirement. In any event, Appellant argues that this matter is not ripe for summary judgment because issues of fact remain with regard to the adjacent property's status as a park and whether the Site is a waste facility permitted prior to April 9, 1988 for purposes of exemption.

Rules 1035.1 through 1035.5 of the Pennsylvania Rules of Civil Procedure govern the Board's consideration of motions for summary judgment.[3] The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after the completion of discovery relevant to the motion, the party opposing the motion

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[1] 25 Pa. Code §§ 279.202(a)(6), 283.202(a)(6); 53 P.S. § 4000.511(a).
[2] *Id.*
[3] 25 Pa. Code § 1021.73(b).

who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[4] The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment.[5]

The Department's motion is based upon 25 Pa. Code §§ 279.202 and 283.202, which prohibit new transfer and/or resource recovery facilities from being located within 300 yards of a park unless a waiver is obtained from the park owner or the facility was permitted prior to April 9, 1988.[6] At issue here is (1) whether the Site in question is located within 300 yards of a park and, if so, (2) whether the Site is a waste facility permitted prior to April 9, 1988 exempting the Appellant from the setback requirement.

The proposed facility is located approximately 1500 feet from a park known as Bartram's Garden. Bartram's Garden is owned by the City of Philadelphia and is under the jurisdiction of the Fairmount Park Commission. It became part of the City's public park system in 1891. (Mifflin Affidavit ¶¶ 4, 5). Bartram's Garden includes the John Bartram House Museum, historic farm buildings and a botanical garden. (LeFevre Affidavit ¶ 19 a-c) Bartram's Garden has "3,000 feet of riverfront and is used daily by fishermen, rowers, bicyclists, hikers, canoeists and children participating in educational programs." (LeFevre Affidavit ¶ 23). It has been designated by the National Park Service as part of the National Recreation Trail and designated by the Pennsylvania Heritage Parks Program as part of the Schuylkill River Heritage Corridor.

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[4] *Jones v. SEPTA,* 772 A.2d 435 (Pa. 2001); *Schreck v. Department of Transportation,* 749 A.2d 1041 (Pa. Cmwlth. 2000).

[5] *See Young v. Department of Transportation,* 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997).

[6] 25 Pa. Code §§ 279.202, 283.202.

The Department argues that between Bartram's Garden and within 300 yards of the proposed facility is a 16.7-acre "park" known as Bartram's Garden Meadow (the "Meadow"). Warner Concrete Company formerly owned the property. The Department offers several affidavits in support of its motion for summary judgment on the ground that this is a park. Affidavits are provided from William E. Mifflin, Executive Director of Philadelphia's Fairmount Park Commission, William E. L, and James Wentzel, P.E., Chief of the Engineering Services Section of the Department's Southeast Regional Office, Waste Management Program. These affidavits indicate that the City of Philadelphia acquired the Meadow for park purposes in 1981 and that the Meadow is under the jurisdiction of the Fairmount Park Commission. In addition, they provide that the Meadow is used for recreational activities such as biking, walking and fishing. The Department asserts that the above evidence establishes that the Meadow is a park.

However, Appellant responds that the Site has not been remediated; the industrial buildings used by the former Warner facility remain on the property. In addition, several letters have been provided which indicate there is conflict among City of Philadelphia officials concerning the property's status as a park. We believe this is sufficient to raise a question of fact with regard to the Meadow's status as a park. Therefore, the Department's motion for summary judgment is denied. Because we have determined that a hearing is required to resolve the issue of the Meadow's status as a park and whether Appellant is subject to the 300-yard setback, it is unnecessary to decide the issue of Appellant's exemption from the setback as an area permitted prior to April 9, 1988.

Accordingly, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PHILADELPHIA WASTE SERVICES	:	
	:	
v.	:	**EHB Docket No. 2001-136-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of April, 2002, the Department's motion for summary judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **April 23, 2002**

c: **For the Commonwealth, DEP:**
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Southeast Region

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

ENVIRONMENTAL & RECYCLING SERVICES, INC.	:	**EHB Docket No. 2000-172-C**
v.	:	**(Consolidated with 2000-213-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 8, 2002**

ADJUDICATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis: The Board sustains an appeal of the Department's denial of an application for a modification of Appellant's permit to operate a construction/demolition waste disposal facility in which Appellant sought an increase in the landfill's average daily volume limit. Appellant satisfied its burden of proving that it met the requirements for approval of its application, and the Board amends the permit to increase the average daily volume limit as requested.

BACKGROUND

Appellant Environmental & Recycling Services, Inc. (ERSI) owns and operates a construction/demolition waste landfill located in Taylor Borough, Lackawanna County, Pennsylvania pursuant to Solid Waste Permit No. 100932 issued by the Department of Environmental Protection (DEP) to ERSI in October 1995. This matter concerns DEP's denial of ERSI's application for a permit modification.

In April 1999, ERSI submitted an application to DEP for a minor permit modification seeking an increase in its permitted average daily volume limit from 800 tons per day to 1,350

tons per day. Almost sixteen months later, by letter dated August 4, 2000, DEP returned, but did not explicitly deny, ERSI's application. ERSI timely filed a notice of appeal of the August 4th letter, which appeal was docketed at EHB Docket No. 2000-172-C. Subsequently, in a letter dated September 14, 2000, DEP confirmed that in returning ERSI's application under cover of the August 4th letter, DEP intended to deny that application. ERSI filed a timely appeal of the September 14th letter, docketed at EHB Docket No. 2000-213-C, and the two appeals were consolidated by Order dated November 9, 2000.

The Board has issued one prior opinion in this matter resolving a motion in limine related to several evidentiary issues. *Environmental & Recycling Services, Inc. v. DEP*, 2001 EHB 824. Administrative Law Judge Michelle A. Coleman presided over ten days of hearing conducted between September 10, 2001 and October 3, 2001. Filing of post-hearing briefs was completed on March 5, 2002, and the matter is now ripe for adjudication. The record consists of a 1,638-page hearing transcript, 44 exhibits, and stipulated testimony. After a careful review of the record, the Board makes the following findings of fact.

FINDINGS OF FACT

1. The Department of Environmental Protection is the agency with the authority and duty to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* (SWMA), the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.101 *et seq.* (Act 101), and the regulations promulgated pursuant to those statutes. (Joint Stipulation ("Jt. Stip.") at ¶¶ 1-2).

2. Appellant ERSI is a Pennsylvania corporation with a business mailing address of 1100 Union Street, Taylor, Pennsylvania. (Jt. Stip. at ¶ 3).

3. ERSI operates a construction and demolition ("C/D") waste landfill in Taylor

Borough, Lackawanna County, Pennsylvania ("ERSI Landfill") pursuant to Solid Waste Permit No. 100932 ("Permit"), which permit was issued to ERSI on October 6, 1995. ERSI commenced operation of the ERSI Landfill in November 1996. (Jt. Stip. at ¶¶ 4-5, 9; Exh. DEP-2).

4. The ERSI Landfill consists of a 30.6 acre disposal area within a 158-acre permit area, and is located on property previously operated as a municipal waste landfill known as the Amity Landfill. (Jt. Stip. at ¶ 6; Exh. DEP-2; Hearing Transcript ("Tr.") at 982-84, 1439).

5. ERSI was initially permitted to receive an average daily volume ("ADV") of waste in the amount of 500 tons per day. According to the Permit, ADV is calculated as the total tons of C/D waste accepted for disposal at the ERSI Landfill during a standard calendar year quarter divided by the number of days during the quarter that the landfill was permitted to operate, including partial days. (Jt. Stip. at ¶¶ 9-10; Exh. DEP-2).

6. In June 1998, ERSI applied to DEP for a permit modification to increase its permitted ADV limit from 500 tons/day to 800 tons/day ("1998 Application"). The 1998 Application was submitted by ERSI, and reviewed by DEP, as an application for a minor permit modification. (Jt. Stip. at ¶¶ 11, 13; Exh. DEP-44.)

7. In December 1998, DEP approved the 1998 Application and granted a permit modification increasing the ERSI Landfill's ADV limit from 500 tons/day to 800 tons/day. The permit modification also included a condition setting a maximum daily volume limit of 1,500 tons/day. (Jt. Stip. at ¶¶ 14-15; Exh. DEP-11; Tr. 494-98).

8. On or about April 19, 1999, ERSI filed a second application for a minor permit modification in which ERSI sought another increase in its permitted ADV limit, this time from 800 tons per day to 1,350 tons per day ("1999 Application"). The 1999 Application also sought approval to install an additional truck scale and a truck tire wash facility at the ERSI Landfill.

DEP's ultimate denial of the 1999 Application forms the subject of these consolidated appeals. (Jt. Stip. at ¶ 16; Exh. ERSI-14).

I. DEP Review of the 1999 Application

9. Carl Zbegner is currently employed by DEP's Northeast Regional Office as a sanitary engineer in the Hazardous Sites Cleanup Program; he has held that position since August 1999. Prior to his current position, Mr. Zbegner was employed, for approximately ten years, by DEP's Northeast Regional Office as a sanitary engineer in the Waste Management Program. In that position, he was responsible for reviewing permit applications for C/D and municipal waste landfills. (Jt. Stip. at ¶ 34; Tr. 479-82).

10. Mr. Zbegner was involved in the review of ERSI's original permit application for construction and operation of the ERSI Landfill, and was the designated DEP sanitary engineer responsible for permitting issues at the ERSI Landfill during the period from 1992 until August 1999. He was the sole engineer responsible for technical review of the 1998 Application. Mr. Zbegner was the engineer initially responsible for technical review of the 1999 Application during the period from April 1999 until he transferred to his current position in August 1999. (Jt. Stip. at ¶ 34; Tr. 481-82, 483-89, 491-98).

11. Robert Wallace is currently employed by DEP as chief of the engineering and facility section of the Waste Management Program in the Northeast Regional Office and he held that position during the relevant period. In that position, Mr. Wallace had oversight responsibility for the section engineers and technical reviews of landfill permit applications. After Mr. Zbegner moved to his current position in August 1999, Mr. Wallace assumed responsibility for technical review of the 1999 Application. (Jt. Stip. at ¶ 33; Tr. 660-63).

12. William Tomayko is employed by DEP in its Northeast Regional Office as the Program Manager for the Land Recycling and Waste Management Program; he has held that

position since 1995. Mr. Tomayko was ultimately responsible for DEP's decision to deny the 1999 Application. (Jt. Stip. at ¶ 32; Tr. 980-81, 986).

13. Robert Kretschmer is employed as the Traffic Engineer for District 4 of the Pennsylvania Department of Transportation (PennDOT), and he has held that position for the past five years. As District Traffic Engineer, Mr. Kretschmer's duties include the review and approval of traffic studies submitted for landfill operations. (Tr. 80-81).

14. Michael Rudy is a registered professional engineer in Pennsylvania, Delaware, and Maryland and is currently employed by Blazosky Associates, Inc., a firm specializing in waste management consulting. Mr. Rudy has substantial training and experience in the design, construction and operation of landfills, and has first-hand experience with operations of the ERSI Landfill, having been employed as its site manager for over a year. At the hearing, Mr. Rudy was qualified as an expert in landfill design and landfill operations. (Tr. 147-152, 156, 165).

15. Blazosky Associates was employed by ERSI to prepare the 1998 and 1999 Applications and their respective supporting materials. Mr. Rudy was personally involved in preparing the original permit application for the ERSI Landfill, the 1998 Application, and the 1999 Application. (Tr. 165-166, 179-180, 184; Exh. DEP-44; Exh. ERSI-14).

A. The Initial Technical Review of the 1999 Application

16. The 1999 Application was supported, in part, with information concerning ERSI's economic justification for the ADV increase; a Traffic Impact Study performed by Trans Associates Engineering Consultants, Inc.; analyses of facility operations; various completed forms pertinent to a minor permit modification application; and manufacturers information on the proposed additional truck scale and tire wash facility. (Exh. ERSI-14).

17. The Traffic Impact Study analyzed the traffic impacts from operations at the ERSI Landfill at the level of the maximum daily volume permitted for the ERSI Landfill—*i.e.*, 1,500

tons/day—thus analyzing traffic impacts from a daily amount of waste 150 tons/day in excess of the amount actually sought for the ADV limit by the 1999 Application. (Exh. ERSI-8).

18. After initial administrative processing of the 1999 Application by a DEP facility specialist, Mr. Zbegner performed the initial technical review of the 1999 Application between mid-April and early August 1999. After his review, Mr. Zbegner concluded that the 1999 Application did not raise any significant traffic issues, and he was satisfied that, with the addition of the proposed truck scale, the ERSI Landfill had sufficient equipment to properly handle the ADV increase. (Tr. 31-32, 482, 513-16, 520-21).

19. Mr. Zbegner determined that the 1999 Application did not raise any concerns with respect to public nuisance issues such as increased dust, odors or noise. He also concluded that the ADV increase to 1,350 tons/day would not create any other potential harms. (Tr. 521-22).

20. During the relevant period, DEP had a policy of requiring an applicant for an ADV increase to inform local municipal officials of the permittee's application, so that such officials would have an opportunity for comment. DEP also required some form of written communication from local officials stating that they did not have any objections prior to approving an ADV increase. Mr. Zbegner communicated this policy to ERSI and requested ERSI to provide the required materials as part of its 1999 Application. (Tr. 522-28).

21. On April 27, 1999, ERSI sent a letter to Taylor Borough in which ERSI notified local government officials that ERSI was seeking an increase in the ERSI Landfill's ADV limit from 800 tons/day to 1,350 tons/day. A copy of the April 27th letter was provided to DEP as part of the 1999 Application. (Exh. ERSI-16; Tr. 523-24).

22. DEP received a copy of a letter from the Taylor Borough Administrator, dated May 27, 1999, stating that the ERSI April 27, 1999 letter to Taylor Borough had been reviewed

by borough council members and the public at a work session held by borough council on May 25, 1999, that all were given an opportunity to comment on the content of the ERSI letter regarding the ADV increase, and that no objection was expressed. (Exh. ERSI-18; Tr. 523-25).

23. After completing his technical review of the 1999 Application, Mr. Zbegner determined that the 1999 Application contained all the information necessary to approve the permit modifications sought by ERSI. (Tr. 530).

24. Mr. Zbegner transferred to another position in mid-August 1999 and at that time Mr. Wallace assumed Mr. Zbegner's role as engineer responsible for technical review of the 1999 Application. Very shortly thereafter, DEP issued a Technical Review Letter to ERSI, dated August 20, 1999, and signed by Mr. Wallace. (Tr. 517-18, 668-70; Exh. ERSI-21).

25. The August 20, 1999 Technical Review Letter raised only two issues with respect to the 1999 Application. First, DEP complained of an absence of information sufficient to justify the ADV increase and requested additional information "sufficient to substantiate an environmental need or benefit." Second, DEP asked for information on the numbers, types and projected arrival times of vehicles that would be accessing the ERSI facility as a result of the proposed ADV increase. The data on increased truck traffic was to include a plan for ensuring "that all transfer trailer vehicles utilize the adjacent Pennsylvania Turnpike whenever possible" and, addressing the staging of trucks prior to the facility's daily opening. (Exh. ERSI-21).

26. In the Technical Review Letter, DEP agreed that "installation of an additional scale, tire wash facility and the extension/interface to the existing pavement will be beneficial in helping to minimize mud and dust nuisances associated with waste vehicle traffic entering and exiting the ERSI facility." DEP suggested that ERSI submit a request to separate the scale and tire wash aspects from the application so those modifications could be approved immediately and

ERSI could commence construction of those facilities while DEP completed its review of the "justification" and "traffic concerns" information related to the ADV increase. (Exh. ERSI-21).

27. DEP's Technical Review Letter did not raise concerns about any harms to the environment or public health and safety, except for issues of traffic related to use of the Turnpike as opposed to local road usage and the staging of trucks prior to daily opening. (Exh. ERSI-21).

28. ERSI responded to the Technical Review Letter by letter dated August 26, 1999. ERSI's written response provided detail on the number and types of trucks projected to use the facility as a result of the proposed ADV increase and expanded on the findings contained in the Traffic Impact Study included with the application. The letter also explained measures being implemented by ERSI to mitigate DEP's specific traffic concerns. (Exh. ERSI-22; Tr. 198-204).

29. With respect to the truck staging issue, ERSI noted that it had begun inspecting trucks one half hour prior to opening time and then allowing inspected trucks to queue along the site access road so as to prevent accumulation of truck traffic along Union Street prior to commencing disposal operations. ERSI also explained that installation of the proposed additional truck scale would process trucks much more quickly and efficiently and would prevent any staging problems from increased truck traffic. The letter outlined a plan to ensure Turnpike usage by trucks disposing of waste at the facility which had already been implemented by ERSI. Finally, ERSI's response provided additional information on the economic need for an ADV increase and described some of the social and economic benefits to the community which would accrue from the proposed ADV increase. (Exh. ERSI-22; Tr. 198-204).

B. Denial of the 1999 Application Based on Requirements Contained in Guidance Policies and the Geographic Origin of Waste to be Disposed at the ERSI Landfill

30. In response to Executive Order 1996-5, issued by the Governor's Office on August 29, 1996, DEP developed and issued several formal written policies regarding its review

of municipal waste permit applications, including the following: (1) Local Municipality Involvement Process, Doc. No. 254-2100-100 (Feb. 7, 1997) ("LMIP Policy"); (2) Environmental Assessment Process, Phase I Review, Doc. No. 254-2100-101 (Feb. 7, 1997) ("Harms/Benefit Policy"); (3) Municipal Waste Facility Review—Traffic Analysis, Doc. No. 2540-2100-102 (Feb. 7, 1997) ("Traffic Policy"); and (4) Process for Evaluating Daily Volume, Doc. No. 254-2100-103 (Feb. 7, 1997). (Tr. 1037-48; Exhs. ERSI-1 through ERSI-5).

31. Mr. Wallace and Mr. Tomayko testified that they applied the Harms/Benefit Policy to the 1999 Application. Mr. Tomayko testified that DEP also applied the LMIP Policy to the 1999 Application. (Tr. 708-09; 1049-50; 1055-56; 1061-62; 1066-67; 1078-79).

32. The reference in DEP's Technical Review Letter of August 1999 requiring ERSI to provide a justification for the ADV increase "sufficient to substantiate an environmental need or benefit" was drawn from the Harms/Benefit Policy. (Tr. 581-82, 708-09; 1055-56).

33. A meeting between DEP and ERSI representatives to discuss the pending 1999 Application was held on September 29, 1999. Following the meeting, Mr. Rudy prepared and sent a letter to DEP, dated October 6, 1999, summarizing the parties' discussions. The October 1999 letter supplied further detail on the economic and operational justification for the ADV increase. (Jt. Stip. at ¶ 22; ERSI-23; Tr. 205-06).

34. At the September 29th meeting, the traffic concerns stated in the Technical Review Letter were generally resolved by the information provided in ERSI's August 26, 1999 response letter and discussions held at the meeting. However, DEP insisted on the application of the Harms/Benefit Policy requirements and continued to request additional "justification" from ERSI based on an analysis of the purported social and economic benefits of the ADV increase. (Tr. 212-26; Exh. ERSI-23).

35. A second meeting between DEP and representatives of ERSI to discuss the pending 1999 Application was held on December 9, 1999, and ERSI submitted a letter to DEP summarizing the points discussed at the December meeting. This letter included information concerning economic conditions in the solid waste industry which supported the economic rationale for the requested ADV increase. Ongoing discussions continued to involve purported benefits to the host community from the ADV increase. (Jt. Stip. at ¶ 22; Exh. ERSI-24).

36. Approximately two months after the December 1999 meeting, DEP issued an Intent to Deny Letter, dated February 4, 2000. (Exh. ERSI-26).

37. References in the Intent to Deny Letter regarding a major permit modification application and the necessity for public involvement, environmental assessment and a further traffic study are intended to impose requirements from the LMIP Policy, the Harms/Benefit Test Policy and the Traffic Policy. (Tr. 1078-79).

38. The Intent to Deny Letter introduced a new concern that ERSI was seeking to manage its increased waste volume "through long term contracts with long haul sources of waste." Noting that in ERSI's original permit application materials, ERSI expected to attract waste only from within northeast Pennsylvania, DEP expressed its intent to deny the application because of a concern that the sought-after ADV increase would be filled by "long haul sources of waste." The references to long term contracts with long haul sources of waste were intended to mean out-of-state sources of waste. (Exh. ERSI-26; Tr. 723-35; 1124-25; 1161-68).

39. DEP's Intent to Deny Letter did not raise concerns about any harms to the environment or public safety, except for reiterating the issue of long haul truck traffic using the Turnpike instead of local roads—despite this issue's previous resolution. (Exh. ERSI-26).

40. The parties met to discuss the 1999 Application and the Intent to Deny Letter on

March 16, 2000. ERSI subsequently submitted a detailed letter responding to the issues raised in DEP's Intent to Deny Letter. (Jt. Stip. at ¶ 23; Exh. ERSI-28).

41. Mr. Tomayko became aware of this Board's decision in *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521 in March 2000 very shortly after the decision was rendered. He understood the import of the Board's decision and was concerned about the decision's impact on the 1999 Application because DEP had been applying the guidance policies at issue in *Dauphin Meadows* to the 1999 Application. (Tr. 1069-79).

42. By letter dated March 24, 2000, ERSI submitted a letter in further response to DEP's Intent to Deny Letter. The March 24th letter fully responded to DEP's contentions and, after noting that eleven months had already passed since the 1999 Application was submitted, requested that DEP make a final decision as soon as possible because the delay was creating additional economic hardship for ERSI. (Exh. ERSI-28).

43. By letter dated April 13, 2000, ERSI requested that DEP separately consider the request for installation and use of an additional truck scale and tire wash facility. By letter dated April 28, 2000, DEP approved only the portion of the 1999 Application related to the modification of the facility through installation of an additional truck scale and automated tire wash facility. (Jt. Stip. at ¶¶ 25-26).

44. No further communication regarding the ADV increase aspect of the 1999 Application occurred for nearly five months subsequent to ERSI's March 24, 2000 letter. However, in June 2000 Mr. Tomayko sent an internal e-mail to a member of his staff responsible for the initial processing of permit applications. The e-mail requested that she draft a letter to ERSI regarding the 1999 Application. The e-mail states in part: "The letter is a returning the application type of action versus an outright denial. However, it should read like a denial. Make

it clear that we can not approve the application." (Tr. 1147-54; 1365; Exh. ERSI-32).

45. Several months after Mr. Tomayko's internal e-mail, by letter dated August 7, 2000, after nearly sixteen months had elapsed since the 1999 Application was submitted, DEP simply returned the 1999 Application and indicated that it must be re-filed as an application for a major permit modification. The August 7th return letter did not include standard language regarding the applicant's right to appeal the agency's action. (Tr. 1147-54; Exh. ERSI-34).

46. After ERSI filed a mandamus action in Commonwealth Court, Dkt. No. 366 M.D. 2000, asserting that DEP had failed to make any determination on the 1999 Application, DEP sent a letter to ERSI, dated September 14, 2000, stating that DEP's action in returning the 1999 Application in August 2000 was actually a denial of the 1999 Application. The September 14th letter included the standard language regarding the applicant's right to appeal the agency's action. (Tr. 1364-65, 1575-76; Exh. ERSI-35).

47. In its denial letter, DEP reiterates its concern about acceptance of C/D waste by ERSI from outside the local northeast region of Pennsylvania, and again refers to elements of the LMIP Policy and the Harms/Benefit Policy. The denial letter also introduced a new rationale: because ERSI had submitted a major permit modification application for a landfill expansion in December 1999, DEP wanted ERSI to combine the 1999 Application with the landfill expansion application so that the two applications could be reviewed simultaneously. However, even as of the time of hearing in September 2001, ERSI's landfill expansion application was still in the very initial stage of review. (Exh. ERSI-35; Tr. 1355-56, 1359).

48. During the course of its review of the 1999 Application, DEP applied the LMIP Policy and the Harms/Benefit Test Policy to ERSI's permit modification application, and DEP required ERSI to meet the requirements stated in the Harms/Benefit Test Policy and the LMIP

Policy as conditions to approval of the 1999 Application. (F.F. # 48).

49. DEP denied the 1999 Application in part because ERSI had not fulfilled the requirements contained in the Harms/Benefit Policy and the LMIP Policy. (F.F. # 49).

50. DEP denied the 1999 Application in part because the proposed increase in C/D waste which would be disposed at the ERSI Landfill as a result of approving the ADV increase would be filled by out-of-state sources of C/D waste. (F.F. # 50).

II. Evidence Presented at the Hearing Regarding the 1999 Application's Request for an ADV Increase

51. Charles Rogers is currently employed by DEP as a solid waste specialist where his duties include inspection of waste management facilities. Rogers was the inspector for the ERSI Landfill from October 1995, when ERSI first received its Permit, until April 1999. During that period he performed monthly, unannounced, inspections of the ERSI Landfill, and prepared inspection reports for each of those inspections. (Tr. 607-608, 933; Exh. DEP-46).

52. Fred Karl is currently employed by DEP as a waste management specialist, where his duties include inspection of waste management facilities; he has held that position for approximately 15 years. Mr. Karl is currently assigned as the waste management specialist for the ERSI Landfill and has had that assignment since May 1999. (Tr. 930-31).

53. Mr. Rogers characterized the ERSI Landfill as a well managed facility. Mr. Karl described the facility as being operated in compliance with the law. (Tr. 620-21, 943-44).

54. There are no violations noted, either by category or in the narrative comment, in any inspection report from the time that ERSI first was permitted in October 1995 through the time of the hearing. Generally, minor issues or concerns that were raised by Messrs. Rogers or Karl during the course of their inspection of the ERSI facility were promptly addressed by ERSI. (DEP-46; Tr. 611, 936, 618-619, 651, 939-40.)

55. Mr. Zbegner was the engineer responsible for the ERSI Landfill from its original permitting in October 1995 until August 1999. During that period he visited the landfill on a regular basis, generally once or twice monthly, and he was very familiar with the landfill's operations. (Tr. 519-20).

56. Mr. Zbegner concluded that the ERSI Landfill facility could handle the ADV increase from 800 tons/day to 1350 tons/day without causing operational problems for the facility. (Tr. 582).

57. During the review process, DEP expressed a willingness to approve an ADV limit of 1,350 tons/day for the second and third quarters of the calendar year, while maintaining an ADV limit of 800 tons/day for the fourth and first quarters of the calendar year. (Tr. 448, 1191-92, 1282-83; Exh. ERSI-28).

A. Potential Adverse Effects to the Environment or Public Health and Safety from the ADV Increase to 1,350 Tons/Day

58. The Traffic Impact Study submitted with the 1999 Application analyzed traffic conditions using ERSI's maximum daily volume of 1,500 tons/day of waste and examining peak morning and afternoon loading conditions in the year 1998 and for the year 2008 (using projected background traffic levels for the latter year). The Traffic Impact Study concluded that the existing roadways surrounding the ERSI Landfill could accommodate the traffic associated with the maximum daily volume of 1,500 tons/day without adversely impacting the approach routes. (Exh. ERSI-8; Exh. ERSI-14; Tr. 436-39, 518).

59. Mr. Zbegner determined that the 1999 Application did not raise any traffic issues and, after his review of the application, Mr. Zbegner determined not to send the Traffic Impact Study to PennDOT. (Tr. 516, 519).

60. The Traffic Impact Study submitted with the 1999 Application, analyzing

conditions at 1,500 tons/day, was also submitted as part of the 1998 Application. PennDOT reviewed and approved the Traffic Impact Study as part of the 1998 Application. (Tr. 491-93).

61. Mr. Kretschmer sent a letter, dated June 12, 2000, to DEP regarding certain concerns PennDOT had with respect to approach routes and truck traffic. The intent of the letter was to request that PennDOT be involved in the review process of the 1999 ERSI Application, and was not to lodge any complaint with DEP concerning traffic problems, nor suggest that any problems with truck traffic could not be resolved. (Tr. 107-109, 131, 139; Exh. ERSI-31).

62. PennDOT's concern centered on use of the Turnpike by trucks accessing the ERSI Landfill, and could be resolved through a system in which long haul trucks produced a Turnpike ticket before being permitted to access the landfill site. (Tr. 107-109, 131, 139).

63. The only public road issue DEP had with the 1999 Application was ensuring that all long-haul transfer trailers utilize the Turnpike to access the site. (Tr. 1114).

64. The public nuisance issues of consequence for a C/D waste landfill are generally dust, odors and litter. Odor is less of a problem for C/D waste landfills because the odors tend to be not very strong or offensive. Given the proximity of the ERSI Landfill to certain residential areas, noise emanating from operation of the landfill equipment and from truck traffic accessing the facility could potentially present a public nuisance problem. (Tr. 631-33, 937-38, 1406-13).

65. Mr. Zbegner determined that the 1999 Application did not create concerns with respect to public nuisance issues such as increased dust, odors or noise, and that the ADV increase to 1,350 tons/day would not create any other potential harms. Mr. Zbegner testified that during his involvement with the ERSI Landfill noise had never been a problem, and he did not have concern about noise with respect to the 1999 Application. (Tr. 521-22).

66. The testimony of Mr. Rogers indicated that, with a few minor exceptions, the

ERSI Landfill was generally not creating problems with public nuisance issues, even after the increase in ADV limit from 500 to 800 tons/day. Although a few citizen complaints regarding dust had been received, Mr. Rogers was unable to verify that the ERSI Landfill was the cause of such dust problems. (Tr. 607-21, 626-27, 631-35, 641-42, 647-53).

67. Mr. Karl testified that dust was not a concern at the ERSI Landfill in his experience. Although dust from the access roads could become a problem on windy days, the ERSI Landfill has three water trucks, and a large truck that sprays waste as it comes off the trucks; this equipment takes care of any dust problems. He also testified that, in his experience, the amount of equipment that ERSI has at the landfill for dust control is sufficient to handle dust associated with the landfill's maximum daily volume of 1,500 tons/day. (Tr. 960-61, 971-74).

68. Mr. Karl could not recall ever having received any complaints with respect to noise associated with the ERSI Landfill during his tenure as waste facilities specialist assigned to inspect the facility. Nor did he testify as to any problems with odors. (Tr. 962-63, 971-74).

69. On two dates during which DEP personnel were inspecting the ERSI facility, ERSI received more than 1,350 tons of waste—on June 20, 2000, ERSI received 1,491 tons of waste and on August 9, 2000, ERSI received 1,422 tons. No violations or problems were noted in the corresponding inspection reports. (Tr. 1553-1557; Exh. DEP-48).

70. ERSI's compliance history indicates that it is capable of operating at levels approaching its maximum daily volume limit of 1500 tons/day, using its current complement of equipment and employees, without causing public nuisances. (Exh. DEP-46).

71. Mr. Rudy opined that, with the measures proposed by ERSI as part of the 1999 Application, there was adequate control of public nuisances such as dust, odor, noise and litter that might result from the proposed increase in ADV. He opined that ERSI would be able to

accommodate an increase in ADV to 1350 tons/day without generating adverse impacts on the surrounding community in the form of public nuisances. (Tr. 250-52, 254-56, 306-08, 419-31).

B. Specific Measures Employed by ERSI to Mitigate Potential Adverse Impacts from the ADV Increase

72. ERSI adopted a policy requiring all transfer trailer drivers accessing the ERSI Landfill to use the Pennsylvania Turnpike when traveling to the facility. ERSI enforces the policy by requiring drivers to show a Turnpike receipt demonstrating that they have utilized the Turnpike to reach the facility; if the driver does not have the requisite Turnpike receipt, she is not permitted to access the ERSI Landfill on that occasion. (Tr. 1369-70, 1512-1515).

73. ERSI also utilizes a three strike system for infractions for waste transport companies utilizing the ERSI Landfill. If a truck comes into the facility that does not have proper signage, proper tarp or any other similar problem, ERSI records a violation for the driver's company. A company that receives three violations is prohibited by ERSI from returning to the ERSI Landfill for disposal. (Tr. 1516-1517).

74. To mitigate possible nuisances caused by truck traffic from the ADV increase, ERSI has installed an automated truck tire wash facility and an additional truck scale, improved its truck queue area, and placed additional paving on the haul road. (Tr. 190, 1544-1545).

75. The truck tire wash facility is an automatic device that washes the tires and undercarriage of a vehicle prior to its leaving the facility in order to remove mud and debris. The automated tire wash supplants the manual washing of trucks by ERSI employees and is much more effective in removing mud and debris. (Tr. 1548-1549).

76. Installation of the additional scale enables smoother ingress and egress of trucks accessing the ERSI Landfill. The new scale, located approximately 1,000 feet from the entrance of the facility, serves as the inbound scale, while the old scale, located approximately 200 feet

from the facility entrance, now serves as the outbound scale. The location of the new scale allows more trucks to enter the facility and to utilize the queue area for untarping prior to crossing the inbound scale. Use of the scale closer to the facility entrance as the outbound scale allows outgoing trucks to accumulate inside the ERSI facility if there is a line waiting to cross the outbound scale. (Tr. 197-198, 1545-47).

77. ERSI made operational changes to move the queue area for trucks further away from the Powell Street residences by constructing a parking area inside the gate of the ERSI facility. The location of the current queue area off Union Street is not located near any residences, and having a staging area inside the ERSI gate stops vehicles from backing onto Union Street. (Tr. 191, 195, 874).

78. ERSI currently stages trucks away from Powell Street and closer to a part of Union Street where there are no residences thus alleviating concerns regarding trucks as a nuisance to surrounding residents. The queue area is located as far away from the Powell and Union Street residences as possible. ERSI also requires waiting drivers to turn off their engines after they arrive at the facility in the morning. (Tr. 1004, 1549, 1553).

79. ERSI paved haul roads within the facility and constructed additional stone parking area to control dust associated with the increase in truck traffic. (Tr. 1544-45).

80. ERSI voluntarily shuts down the ERSI Landfill on days when the wind reaches relatively high levels in an effort to control dust and litter problems. (Tr. 427-28, 1564).

81. ERSI uses multiple temporary fences in the vicinity of the disposal area to catch litter blown from the landfill area. ERSI sends out a crew of employees to collect litter from those temporary fences and from the perimeter fence on a daily basis. (Tr. 1557-1558).

C. ERSI's Economic and Operational Justification for the ADV Increase

82. Scott Haan is the operations manager at the ERSI Landfill and has held that

position since January of 1998. As the operations manager, Mr. Haan is responsible for the day-to-day operations of the Landfill. He is familiar with all the equipment used at the ERSI Landfill and is capable of operating that equipment; he supervises the landfill employees, prepares all reports required to be filed with DEP, and is responsible for and familiar with the financial aspects of the operation. (Tr. 1438-1439).

83. The construction business is seasonal in the geographic area served by the ERSI Landfill due to weather changes; construction activity slows significantly during the cold winter months, and picks up again when the weather improves. Consequently, the C/D waste facility business is also seasonal, with elevated amounts of waste during the warmer weather—generally coinciding with the second, third and fourth calendar quarters—and substantially lower amounts of waste during the colder months—generally coinciding with the first calendar quarter from January to March. (Tr. 1454-56, 249, 322-23; Exh. ERSI-14; Exh. ERSI-22; Exh. ERSI-23).

84. ERSI sought the ADV increase requested in the 1999 Application for economic and operational reasons. ERSI's intent in submitting the 1999 Application is to remain economically viable, because ERSI has not been able to adequately meet operating costs of the ERSI Landfill at the ADV limit presently established in its Permit. (Tr. 181, 1465-76, 1478-79; Exh. ERSI-14; Exh. ERSI-22; Exh. ERSI-23; Exh. ERSI-28).

85. When ERSI started receiving waste, the company was approximately $4,000,000 in debt from engineering and construction costs. In order to maintain and improve the quality of its operation, ERSI has had to purchase new equipment costing between $300,000 and $500,000 to replace the equipment from the Amity Landfill used by ERSI when it first began operating. In addition to replacing equipment, ERSI has maintained equipment by rebuilding engines and undercarriages, each of which cost approximately $40,000. (Tr. 1442-43, 1457-59).

86. ERSI has 20 full-time employees and 13 part-time employees. For each of the full-time employees, ERSI provides Blue Cross and Blue Shield health insurance and an SEP retirement plan fully funded by the employer. During the slow winter months, ERSI does not lay off its employees. (Tr. 1476-1478).

87. As part of its Permit, ERSI must bear closure costs related to the Amity Landfill; annual monitoring, sampling and analysis costs related to the closed landfill total approximately $100,000. (Tr. 1461-63).

88. In order to meet its operating costs, ERSI must obtain more revenue during the construction season, in order to make up for the loss of revenue during the cold winter months when there is little construction activity and consequently low C/D waste volumes. Increasing the ADV limit from 800 tons/day to 1,350 tons/day would give the operation the flexibility it needs to obtain greater amounts of C/D waste during the late spring, summer, and early fall when the C/D waste is available, thus increasing the landfill's revenue sufficiently to meet annual operating costs. (Tr. 181, 201, 353-54, 451-52, 1454-57, 1465-76; Exh. ERSI-14; Exh. ERSI-22; Exh. ERSI-23; Exh. ERSI-24; Exh. ERSI-28).

89. Increasing the ADV limit to 1,350 tons/day would also enable ERSI to better accommodate the local spot market for C/D waste. The greater margin in the ADV limit would enable the landfill to meet its revenue needs with long-term contracts that supply a steadier and more consistent waste stream, while maintaining the capacity to handle spot, short-term, relatively large volume, demolition jobs that arise on an irregular and more unpredictable basis. (Tr. 232, 1451-54; Exh. ERSI-22; Exh. ERSI-23; Exh. ERSI-28).

90. At its present ADV limit, ERSI is currently unable to enter into new long-term contracts with waste haulers or brokers because ERSI cannot guarantee the new sources that it

will be able to accept their C/D waste at the end of any particular calendar quarter. Long-term contracts enable ERSI to place conditions on access to the facility such as use of the Turnpike by the waste haulers. (Tr. 1503-1504).

91. With the sought-for ADV increase, ERSI would be better able to serve the local market for C/D waste without experiencing economic hardship. As with the spot market service, a greater ADV margin would allow ERSI to obtain a sufficient quantity of waste from steady long-haul sources while still retaining capacity to serve the local market. (Tr. 224-25, 1534-37; Exh. ERSI-22; Exh. ERSI-23; Exh. ERSI-28).

DISCUSSION

I. Standard of Review

The Board reviews DEP's final actions *de novo*. *See, e.g., Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Smedley v. DEP*, 2001 EHB 131, 155-60. Generally, the Board reviews DEP final actions to determine, based on the evidence presented to the Board, whether those actions conformed with applicable law and were reasonable and appropriate. *See Smedley*, 2001 EHB at 160 (we determine whether "DEP's action is reasonable and appropriate and otherwise in conformance with the law"); *O'Reilly v. DEP*, 2001 EHB 19, 32.

The Board's duty is to review the correctness of the agency action challenged in an appeal. If the Board finds that the agency's action was unreasonable or otherwise contrary to law, the Board may substitute its judgment for that of the agency. *Pequea Township*, 716 A.2d at 686-87 ("Board's duty is to determine if [DEP's] action can be sustained or supported by the evidence taken by the Board"); *Young v. DER*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991) (de novo review "involves full consideration of the case anew"; consequently, the EHB, "as a reviewing

body, is substituted for the prior decision maker, DER, and redecides the case"); *Warren Sand & Gravel Co., Inc.*, 341 A.2d at 565 (the Board "may substitute its discretion for that of DER").

While the Board conducts a *de novo* review of all relevant factual and legal issues, the Board applies the law in effect at the time of DEP's final action. *See, e.g., Eastern Consolidation and Distribution Services, Inc. v. DEP,* 1999 EHB 312, 328; *Fiore v. DER*, 1986 EHB 744, 752-53. Thus, although the Environmental Quality Board passed new regulations governing landfill permit applications after the denial of the 1999 Application, *see* 30 Pa. Bull. 6685 (Dec. 23, 2000), we apply the regulations in effect on August 7, 2000 when DEP issued the return letter subsequently confirmed as a denial of the 1999 Application. *See* 1 P.S. § 1926; *Acme Markets, Inc. v. W.C.A.B.*, 725 A.2d 863, 865 (Pa. Cmwlth. 1999) (a regulation promulgated by an administrative agency shall not be construed to have retroactive effect unless it is clearly and manifestly intended to be so applied); *Hospital Association of America, Inc. v. Foster*, 629 A.2d 1055, 1060 (Pa. Cmwlth. 1993) (same).

ERSI contends that DEP misapplied the law by imposing requirements outside the scope of relevant statutes and regulations, and that the agency acted in bad faith when processing the 1999 Application. ERSI also contends that the evidence presented to the Board demonstrates that ERSI has met the applicable regulatory requirements for approval of the ADV increase. DEP controverts ERSI's objections to the review process and asserts that ERSI failed to submit information sufficient to justify the requested ADV increase. DEP also contends that the 1999 Application has the potential to raise important traffic and environmental impacts which should be evaluated before a decision can be made to grant an increased daily volume. Essentially, DEP argues that ERSI should be compelled to re-submit its request for a permit modification after supplementing the application with an expansive environmental assessment and undergoing a

formal public participation process for the local municipality.

ERSI bears the burden of proving by a preponderance of the evidence that DEP's denial of the 1999 Application was an error of law or otherwise unreasonable and inappropriate. 25 Pa. Code § 1021.101(c)(1). ERSI also bears the burden of proving, based on the evidence before the Board, that the 1999 Application should be approved and ERSI's permit modified to increase the ADV limit. We are persuaded that ERSI has carried its burden of proof on both counts.

II. The Review and Denial of the 1999 Application Was Not in Conformance With Law

This Board held in *Dauphin Meadows* that the Harms/Benefit Policy (Guidance Document No. 254-2100-101) constituted a regulation that was not duly promulgated according to the requirements of the Commonwealth Documents Law, 45 P.S. §§ 1102 *et seq.*; the Board therefore reversed DEP's denial of a request for a permit expansion based in part on DEP's application of the guidance policy requirements. *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521, 523-30. ERSI argues that the record demonstrates that DEP relied on the Harms/Benefit Policy when determining that the 1999 Application should be denied, and that DEP's reliance on the guidance policy when denying the 1999 Application was a violation of law.

There is no dispute that the Harms/Benefit Policy was determined to be an invalid regulation in the *Dauphin Meadows* case and we need not revisit that issue here. Moreover, DEP reviewing officials were aware of the Board's decision and its import on the 1999 Application.[1] There is indeed ample evidence in the record that DEP applied the substantive requirements of the Harms/Benefit Policy to the 1999 Application, and that the agency rendered its decision to deny the application at least in part on the failure of the applicant to meet the requirements contained in that guidance policy.

[1] *Dauphin Meadows* was decided in March 2000 significantly in advance of DEP's return of the 1999 Application in early August 2000 and the subsequent confirmation of the application's denial in September 2000. Mr. Tomayko became aware of the *Dauphin Meadows* holding in March 2000. *See* Tr. at 1069-79.

Where an agency relies upon a policy statement in taking an action, and the policy statement proves to be a regulation that was not duly promulgated according to the Commonwealth Documents Law, the agency's action must be overturned. *See, e.g.*, *Giant Food Stores, Inc. v. Dep't of Health*, 713 A.2d 177, 181 (Pa. Cmwlth. 1998) (terms of an agency handbook were not binding rules and agency "erred in relying on the Handbook as a basis to deny" application for recertification); *Hillcrest Home, Inc. v. Dep't of Public Welfare*, 553 A.2d 1037, 1040-42 (agency erred in relying on statement of clarification when denying appeal); *Dauphin Meadows*, 2000 EHB at 524 (where agency relies on a pronouncement in taking an action and pronouncement proves to be a regulation not duly promulgated, agency's action must be overturned). Thus, DEP's reliance on the Harms/Benefit Policy in reaching its decision to deny the 1999 Application was a violation of well-established administrative law.[2]

DEP argues that the agency never actually applied the policy to the 1999 Application because, for DEP, there is a distinction between requiring an applicant to submit a harms/benefit analysis as a condition to approval of its application and the agency's actual review of that analysis; according to DEP only the latter constitutes an "application" of the invalid policy to ERSI's permit modification request. This argument is misplaced because the question is whether the agency relied on the policy as a basis for its denial, *see Giant Food Stores*, 713 A.2d at 181. DEP has not refuted the fact that it specifically relied on the requirements in the policy when denying the 1999 Application. Moreover, the semantic distinction DEP draws is of no import here. A substantive rule is distinguished from a statement of policy by the "practical effect that these two types of pronouncements have in subsequent administrative proceedings."

[2] Although DEP controverted ERSI's contention that the agency, in fact, applied the invalid guidance policy to the 1999 Application, DEP did not provide substantial credible evidence to support its assertion. DEP relied primarily on testimony of Mr. Wallace, however, we did not find this testimony credible; in fact, the testimony was contradicted by explicit testimony of Mr. Tomayko. *See, e.g.*, Tr. at 1056.

Pennsylvania Human Relations Comm'n v. Norristown Area School District, 473 Pa. 334, 350 (1977). A rule establishes a "standard which has the force of law" or a "binding norm" while a policy statement merely "announces the agency's tentative intentions for the future." *Id.*; *see also, e.g.*, *Metromedia, Inc. v. Director, Division of Taxation*, 97 N.J. 313, 331-32 (1984) (identifying factors for determining that an agency action constitutes a rule including: "prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization"). The practical effect of DEP's use of the Harms/Benefit Policy here was to prescribe a legal standard, or impose a binding norm, on the applicant—*viz.*, before the 1999 Application could be approved ERSI had to justify the requested ADV increase by demonstrating that the benefits outweighed the potential harms. This is precisely the type of standard with the force of law that constitutes a regulation, and DEP's imposition of such a binding norm on ERSI was an error of law.

ERSI also argued that DEP's denial of the 1999 Application based on its concern that the increase in ADV would be filled by long-haul, non-local, sources of waste violated applicable law because it similarly placed a legal requirement on the applicant not found in relevant statutes or regulations.[3] DEP did not adduce at the hearing any credible evidence that disposal of non-local waste at the ERSI Landfill—meaning waste originating from outside the northeast region of Pennsylvania—would create any particular harms not associated with local waste. In the

[3] More specifically, ERSI argued that DEP's denial of the 1999 Application because of the non-local origin of waste that would be disposed at the landfill violated the Commerce Clause of the United States Constitution. There was evidence showing that DEP's insistence that ERSI demonstrate that any ADV increase would be met with C/D waste originating only in the local northeast Pennsylvania region would, in practice, result in discrimination against out-of-state sources of waste. Although we need not resolve the issues relevant to the Commerce Clause objection, we note that DEP's placing of such a condition on approval of the 1999 Application may effectively establish a preference for local over out-of-state sources of waste, thus placing an incidental burden on interstate commerce and raising Constitutional concerns. *See, e.g.*, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992) (striking Michigan law that prohibited private landfill operators from accepting solid waste that originated outside the county in which a landfill facility was located); *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102 (superseding permit conditions that discriminated against out-of-state waste).

absence of specific substantial evidence to that effect, the agency was unable to articulate any cogent statutory or regulatory basis for imposing the waste-origin criteria on its approval of the C/D landfill's request for an ADV increase. Vague concerns of agency officials about long-haul sources of waste are outside the scope of the relevant regulatory requirements, and consequently DEP's reliance on such a criterion when denying the 1999 Application was a violation of law.[4]

DEP's action of denying the 1999 Application violated applicable law, and was unreasonable under the circumstances. We will therefore overturn DEP's final action. ERSI urges the Board not to remand this matter to DEP for further review, but rather to exercise the Board's power to substitute its discretion for the agency and reach a final determination on ERSI's application for an ADV increase. *See Warren Sand & Gravel Co., Inc.*, 341 A.2d at 565 (the Board "may substitute its discretion for that of DER"). We see no purpose in remanding this matter to DEP. There is ample evidence before the Board on the potential effects of the ADV increase, and the mitigation measures adopted by ERSI, to enable the Board to make a decision on the permit modification. Moreover, to remand the matter would only subject the appellant to further needless delay. *See Giordano v. DEP*, 2000 EHB 1184, 1194-99 (discussing factors affecting decision to remand).

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[4] ERSI also asserted that the manner in which DEP processed the 1999 Application was so unreasonable as to be violative of basic principles of administrative law. ERSI contended that DEP acted unreasonably by presenting a constantly moving target during the review process, unduly delaying a decision on the 1999 Application and, being uncooperative in their dealings with ERSI representatives. DEP clearly has a duty to administer the law in good faith; as the Pennsylvania Supreme Court has stated: "Discretion does not entail unbridled freedom for an agency to do absolutely whatever it pleases. Flagrant abuse of discretion, as a matter of law, can occur, and our courts will provide a remedy upon such an occurrence." *Commonwealth v. State Conference of State Police Lodges of the Fraternal Order of Police*, 513 Pa. 285, 290 (1987); *see also, e.g.*, Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 705 (1913) ("Administration of justice according to law means administration according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment."); LON FULLER, THE MORALITY OF LAW 39, 81-90 (1964) (a fundamental premise of a system of legal rules is congruence between the rules as announced and their actual administration). Nevertheless, given our holding above we need not resolve the complex question whether the circumstances here are appropriately characterized as a flagrant abuse of agency discretion as a matter of law.

III. ERSI Has Met the Pertinent Regulatory Requirements for the ADV Increase

From the Board's perspective as *de novo* reviewer of DEP's final action, the question presented by this appeal is whether ERSI has met the criteria for approval of its application seeking to modify the Permit by increasing the ADV limit from 800 to 1,350 tons/day. Under the applicable regulations, ERSI was required to file with DEP an application for a permit modification "prior to making a change that would affect the terms or conditions of the existing permit." 25 Pa. Code § 271.222(a)(2). According to Section 271.222, an "application for a permit modification shall be complete and contain the following information: . . . (2) A description of the proposed modifications, including appropriate maps, plans and applications *to demonstrate that the proposed modification complies with the act, the environmental protection acts and this title.*" 25 Pa. Code § 271.222(b)(2) (emphasis added). Before its 1999 Application can be approved, ERSI must demonstrate that the proposed ADV increase will not adversely affect the environment, create a hazard to public health and safety, or cause any public nuisance that will not be adequately mitigated by the applicant. *See* 35 P.S. § 6018.503(e); *cf.* 53 P.S. 4000.1112(d).[5] Under the regulatory scheme in place at the time, the specific regulatory requirements pertinent to the 1999 Application are found in 25 Pa. Code § 277.213 (access roads); § 277.215 (equipment); § 277.218 (nuisance control); and § 277.220 (litter).

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[5] Section 4000.1112 of Act 101, which applies to municipal waste landfills but not to exclusively C/D waste landfills such as the ERSI Landfill, *see* 53 P.S. § 4000.103, states in pertinent part:

> The department may not approve any permit modification request under the [SWMA] to increase the maximum or average daily volumes of solid waste received at a municipal waste landfill unless the applicant demonstrates all of the following to the department's satisfaction:
>
> (1) Increased daily volumes will not cause or contribute to any violations of this act, the [SWMA], any other statute administered by the department, or any regulations promulgated pursuant to this act, the [SWMA] or any other statute administered by the department.
>
> (2) Increased daily volumes will not cause or contribute to any public nuisance from odors, noise, dust, truck traffic or other causes. . . .

53 P.S. §§ 4000.1112(d)(1), (2).

ERSI contends that, based on the evidence presented to the Board at the hearing, the permittee has made the requisite showing for approval of the 1999 Application. We agree. There was no evidence that the ADV increase would result in any significant adverse effect on the environment (such as pollution of the groundwater). Rather, the evidence showed that any potential harms associated with the ADV increase related to the effects from an increase in truck traffic and the intensity of the landfill's daily operations; these would include traffic congestion issues and public nuisance concerns such as increased dust, odors, noise and unsightliness. ERSI has shown that any harms that may be caused by the ADV increase will be adequately mitigated with the equipment installed and the measures implemented by the landfill operator.

The Traffic Impact Study concluded that the existing roadways surrounding the ERSI Landfill could accommodate traffic associated with the maximum daily volume of 1,500 tons/day without adversely impacting the approach routes. The only real issue related to roadway impacts concerned an assurance that the Turnpike would be used by larger trucks accessing the landfill. In our view, the measures implemented by ERSI have resolved that concern. The other traffic issue related to potential congestion from trucks accessing the landfill. *See* 25 Pa. Code § 277.213(f) (access road "shall be designed, constructed and maintained to allow the orderly egress and ingress of vehicular traffic when the facility is in operation"). The changes made to the design and construction of the access roads, and the installation of the second truck scale, will alleviate any ingress/egress concerns. Similarly, installation of the automated truck tire wash will prevent mud and debris from being tracked off-site. *See* 25 Pa. Code § 277.213(k) (access road shall be maintained "to prevent or control the tracking of mud off the site").

With respect to public nuisance concerns, there was persuasive testimony by DEP inspectors, the DEP engineer most familiar with the ERSI Landfill (Mr. Zbegner), and ERSI's

expert Mr. Rudy, that ERSI has the necessary equipment to handle the proposed ADV increase without operational difficulties and without causing or contributing to increased dust, noise, odors or unsightliness. *See* 25 Pa. Code § 277.215(a) ("operator shall maintain on the site equipment necessary for the operation of the facility in accordance with the permit"); 25 Pa. Code § 277.218(b) (operator shall prevent and eliminate conditions which create "odors, dust, noise, unsightliness and other public nuisances"). There was also no credible evidence of any litter problems associated with the ADV increase; in addition, the landfill has already implemented adequate litter control measures. *See* 25 Pa. Code § 277.220(a) (operator "may not allow litter to be blown or otherwise deposited offsite").

DEP maintains that the ADV increase has the potential to raise significant traffic and environmental impacts, relying on the testimony of Messrs. Tomayko and Wallace. However, with respect to the issue of potential harms resulting from the proposed ADV increase, we did not find their testimony credible. Neither individual demonstrated an adequate understanding of the landfill operations or could factually support the allegations of harm. Notably, there was testimony by Mr. Tomayko that, during the review process, DEP expressed a willingness to approve an ADV increase for ERSI of 1,350 tons/day for two calendar quarters and retain the ADV limit of 800 tons/day for the other two quarters. The agency's willingness to approve the increase for the two busiest quarters of the construction season belies assertions that an ADV limit of 1,350 tons/day would cause harms that will not be adequately mitigated.

In contrast, we found the testimony of the other DEP employees (Messrs. Zbegner, Rogers and Karl) on the landfill's operations and potential harms from the ADV increase to be credible. Those witnesses uniformly testified that, with the implementation of the various mitigation measures, the ADV increase could be handled by ERSI without causing harm to the

environment or public safety and without creating public nuisances. Similarly, Mr. Rudy's opinion that the ADV increase would not cause harm that would not be adequately mitigated was credible and persuasive. We are consequently satisfied that the ADV increase will not result in any adverse effects to the environment, will not create a public safety hazard, and will not cause or contribute to any public nuisances that will not be adequately mitigated or prevented.

DEP also argued that the 1999 Application should have been submitted as an application for a major permit modification pursuant to 25 Pa. Code § 271.144(a)(2), which, in the relevant iteration, required a major modification application for a "change in daily waste volume." In support, DEP relied on testimony by stipulation—*i.e.*, not subject to cross-examination—of William Pounds, Chief of the Municipal and Residual Waste Division in DEP's Harrisburg office. According to the Pounds testimony, DEP interpreted § 271.144(a)(2) to refer to changes in average daily volume as well as to changes in maximum daily volume, and that such has been DEP's interpretation since at least April 1999 when the 1999 Application was submitted. We reject this argument for several reasons.

In stark contrast to Mr. Pounds' testimony, there was extensive testimony by other DEP witnesses, including Mr. Tomayko, that DEP's Northeast Regional Office interpreted § 271.144(a)(2) as not pertaining to requests for an ADV limit increase but rather only to changes in maximum daily volume, and that the regional office had previously applied the regulation in that manner to numerous ADV increase applications. (Tr. at 38-39, 499-503, 506-07, 547-48, 1023-24, 1045-46, 1061-62; Exh. ERSI-10; Exh. ERSI-12). In fact, DEP had processed, reviewed and approved ERSI's 1998 Application for an increase in its ADV limit as a minor permit modification. *See supra* F.F. 6-7. Moreover, prior to submitting the 1999 Application ERSI representatives consulted with Mr. Zbegner, the DEP engineer assigned to the ERSI

Landfill, regarding the form of the 1999 Application, and Mr. Zbegner informed ERSI that, like the 1998 Application, the 1999 Application should be submitted as a minor permit modification. (Tr. at 185-86, 506, 1047-48, 1473). Further, DEP actually processed the 1999 Application as a minor permit modification throughout the review process; indeed, the agency did not request that the application be filed as a major permit modification until the concept appeared in the letters returning and denying the application—some sixteen months after it was submitted. (Tr. at 32, 36, 186-88, 205-06, 513-14, 1028, 1031, 1542-44).

There was also explicit testimony by DEP witnesses that, in general, DEP's application of § 271.144(a)(2) to ADV limit increases was inconsistent and unpredictable, and that a regulated entity would have no means of knowing whether to file an ADV increase as a major or minor permit modification, except by asking an individual DEP official responsible for review of the application being submitted. *See, e.g.*, Tr. at 445, 503-07, 1023-27, 1037, 1044-46, 1057-62. Indeed, DEP conceded that the agency had conflicting interpretations of the regulation during the relevant period. *See* DEP Post-hearing Brief, at 12-16.

While we recognize that the Board must defer to DEP's interpretation of environmental regulations when the Board determines that DEP's interpretation is reasonable, *see DEP v. North American Refractories Company*, 791 A.2d 461, 464-67 (Pa. Cmwlth. 2002), under the facts of this case there is no single interpretation to which the Board can defer, but rather conflicting agency interpretations. Where DEP applies differing interpretations of a regulation to an appellant, we are not required to defer to the agency's revised interpretation of the subject regulation. *See Tri-State Transfer Company, Inc. v. DEP*, 722 A.2d 1129, 1134 (Pa. Cmwlth. 1999) ("considering the variety of interpretations of [the regulation] proffered by the Department in its dealings with TST, we believe that the EHB was not compelled to defer to the

Department's revised interpretation of the regulation"). Consequently, we have treated the 1999 Application as a minor permit modification, in line with the regional office's treatment of the application, the regional office's prior practice (including its treatment of the 1998 Application), and the agency's communications to Appellant throughout the review process.[6]

Finally, ERSI provided a reasonable economic and operational justification for the proposed ADV increase. Mr. Haan credibly testified that the ADV increase is necessary for ERSI to meet its operating costs, and DEP did not present any credible evidence to the contrary. It is clear from the testimony that ERSI must obtain more revenue during the construction season, in order to make up for the loss of revenue during the cold winter months when there is little construction activity and consequently low C/D waste volumes. Additional daily volume will increase revenue without the need for an increase in tipping fees that would hurt ERSI's ability to compete in the market. Mr. Haan also persuasively testified that an ADV increase will better enable ERSI to handle the spot market and to serve the local market for C/D waste without experiencing economic hardship.

In sum, ERSI proved that DEP's denial of the 1999 Application was a violation or law and was otherwise unreasonable and inappropriate under the circumstances. DEP's final action will therefore be overturned. Further, ERSI has met its burden of showing that it is entitled to approval of the 1999 Application based on the evidence presented to the Board, and we will accordingly approve the 1999 Application and modify ERSI's Permit.

CONCLUSIONS OF LAW

1. DEP committed errors of law when it denied the 1999 Application based on the

[6] We note that, with respect to future cases, the agency's internal interpretative conflict has been resolved by relevant amendments to the solid waste regulations promulgated after the final action at issue here. *See* 30 Pa. Bull. 6685 (Dec. 23, 2000); 25 Pa. Code § 271.144(a)(2) (2001) (amended to require a major permit modification application for a "change in the average or maximum daily waste volume").

requirements of the Harms/Benefit Policy, in contravention of this Board's holding in *Dauphin Meadows v. DEP*, 2000 EHB 521.

2. DEP committed errors of law when it denied the 1999 Application because the proposed increase in C/D waste which would be disposed at the ERSI Landfill as a result of approving the ADV increase would purportedly be filled by out-of-state sources of C/D waste.

3. The ADV increase requested in the 1999 Application will not result in any adverse effects to the environment, will not create a public health or safety hazard, and will not cause or contribute to any public nuisances that will not be adequately mitigated or prevented, and ERSI provided a reasonable economic and operational justification for the proposed ADV increase for the ERSI Landfill.

4. ERSI demonstrated that it has satisfied the statutory and regulatory requirements applicable to the requested ADV increase and has met its burden of showing that it is entitled to approval of the 1999 Application based on the evidence presented to the Board.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ENVIRONMENTAL & RECYCLING SERVICES, INC.	:	
v.	:	**EHB Docket No. 2000-172-C (Consolidated with 2000-213-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 8, 2002**

O R D E R

AND NOW, this 8th day of May, 2002, it is hereby ORDERED as follows:

1. The appeals of Environmental & Recycling Services, Inc. docketed at 2000-172-C and 2000-213-C are sustained;

2. DEP's denial of the 1999 Application is voided; and

3. The 1999 Application is approved and Part III, Permit Condition # 3, on Page 27 of 35 of the Solid Waste Permit No. 100932, originally issued to ERSI by DEP on October 6, 1995, is modified as follows:

> No more than an average of 1,350 tons of solid waste may be received at this facility for disposal per operating day during the standard calendar year quarter. This figure represents the Average Daily Volume (ADV).
>
> Compliance with this provision shall be determined by dividing the total tons of solid waste received for disposal at this facility during a standard calendar year quarter, divided by the number of days during that quarter that the facility was permitted to operate, including partial days.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: May 8, 2002

Administrative Law Judge Bernard A. Labuskes, Jr. is recused from these appeals.

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

JAMES E. BRUMAGE and CHERRY K. BRUMAGE	:	
v.	:	**EHB Docket No. 2001-212-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RAG EMERALD RESOURCES, L.P., Permittee	:	**Issued: May 16, 2002**

OPINION AND ORDER ON MOTION TO DISMISS FOR MOOTNESS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appeal of a pillar permit authorizing the removal of coal within 150 feet of a natural gas well is dismissed as moot where the coal removal has already taken place, the Appellants did not seek a supersedeas of the permit, and the Board is unable to grant the relief requested by the Appellants.

OPINION

This appeal was filed by James E. Brumage and Cherry K. Brumage (the Appellants) from the issuance of Pillar Permit No. 059-23067B by the Department of Environmental Protection (the Department) to RAG Emerald Resources, L.P. (Emerald). The Appellants are the owners of a natural gas well located in Franklin Township, Greene County on property permitted

for longwall mining by Emerald. Section 214 of the Pennsylvania Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101 – 601.605, at § 601.214, requires a coal operator to obtain written approval from the Department before removing coal or cutting any passageway within 150 feet of an oil or gas well. The pillar permit that is the subject of this appeal authorized Emerald to remove coal from around the Appellants' well but required that pillars of coal with specific dimensions be left in place around the well. In their appeal, the Appellants requested that the Board "reverse the DEP's decision on issuance of this permit and thus require maintenance of the 150 foot barrier around its well when mining occurs."

Before the Board is a Motion to Dismiss for Mootness filed by Emerald asserting that since mining around the well has already taken place and has been completed, the appeal is moot since the Board can no longer grant the relief requested by the Appellants. According to the affidavit of James J. Bryja[1] that accompanies the motion, Emerald does not intend to mine or remove any more coal within 150 feet of the Appellants' well. Further according to the affidavit, the mining around the pillars was done as prescribed by the pillar permit, and it would be impossible at this stage to change the coal pillar dimensions around the well. (Exhibit A to Motion) The Department filed a letter with the Board stating that it concurred with Emerald's motion. The Appellants filed no response. Therefore, the facts set forth in the motion are deemed admitted pursuant to Section 1021.70(f) of the Board's Rules of Practice and Procedure. 25 Pa. Code § 1021.70(f).

A matter becomes moot when an event occurs that deprives the Board of the ability to provide effective relief. *Alice Water Protection Assn. v. DEP*, 1997 EHB 447, 448. This Board

[1] According to the affidavit, Mr. Bryja is the president of Pennsylvania Services Corporation, a subsidiary of RAG American Coal Company and corporate affiliate of Emerald. Mr. Bryja is responsible for supervising Emerald agents and its overall operations. (Exhibit A to Motion)

has previously held that the complete removal of coal from the site in question is such an event. *Id.* In this case, the Appellants could have sought a supersedeas or expedited hearing on the merits to prevent further mining from taking place before their request for relief could be addressed. They chose not to do so. At this stage of the proceeding, the only relief the Board could grant would be to opine whether the Department made a mistake in granting the pillar permit. As stated in *Kilmer v. DEP*, 1999 EHB 846, 849, that is the essence of the mootness doctrine.

Nor does this case fall within any of the exceptions to the mootness doctrine. As noted by Emerald, the conduct complained of is the issuance of a specific, individually designed pillar permit for a specific well. The issue of whether the Department erred in granting the pillar permit is relative to the specific facts and circumstances of this case. Any future permit would likely involve different dimensions and facts specific to the particular well and coal removal involved in that case. Therefore, this is not a matter of conduct that is capable of repetition but unlikely to evade review, nor involving issues of importance to the public interest.

Finally, this is not a case where some party will suffer detriment without the Board's decision. The coal has already been removed and there is no further relief the Board can grant. As noted above, the Appellants did not seek a supersedeas to prevent coal removal from proceeding. This, coupled with the fact that the Appellants did not respond to the motion to dismiss, warrants the granting of Emerald's motion to dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES E. BRUMAGE and CHERRY K. BRUMAGE	:	
v.	:	**EHB Docket No. 2001-212-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RAG EMERALD RESOURCES, L.P., Permittee	:	

ORDER

AND NOW, this 16th day of May, 2002, RAG Emerald Resources' Motion to Dismiss is granted. The appeal at Docket No. 2001-212-R is **dismissed as moot**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: May 16, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOA

CITIZENS ALERT REGARDING THE ENVIRONMENT	:	
v.	:	**EHB Docket No. 2000-162-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP	:	**Issued: May 16, 2002**

OPINION AND ORDER
ON MOTION TO WITHDRAW

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

Synopsis:

The Board denies an appellant's motion to withdraw its earlier withdrawal of an appeal. Absent compelling and persuasive reasons not shown to be present here, a withdrawal of appeal, once accepted by the Board, terminates the proceedings and will not be rescinded.

O P I N I O N

By letter dated April 19, 2002, Citizens Alert Regarding the Environment ("CARE") withdrew its appeal. By order dated the same day, the Board accepted the withdrawal and marked the docket closed and discontinued. On April 30, 2002, CARE filed a "Motion to Withdraw Motion Filed by Counsel April 19, 2002 to Withdraw Appeal and to Reinstate Appeal." Jefferson Township and the Department have filed responses in opposition to the motion.

Under the Board's current rules, "[a] proceeding before the Board may be terminated by...[w]ithdrawal of the appeal prior to adjudication." 25 Pa. Code § 1021.120(a). "When a

proceeding is withdrawn prior to adjudication, withdrawal shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board." 25 Pa. Code § 1021.120(b).

A party who seeks reconsideration of a final order of the Board, including an order accepting a party's withdrawal and closing the docket in an appeal, must file a petition for reconsideration. 25 Pa. Code § 1021.124. *See also Commonwealth Environmental Systems, L.P.* v. *DEP*, 1996 EHB 340, 341 (following withdrawal of appeal, motion for reconsideration considered by the Board). The petition must be filed within 10 days of the Board's final order, and it must set forth compelling and persuasive reasons justifying reconsideration. § 1021.124. *See also Potts Contracting Company v. DEP*, 2000, EHB 145, 147 (reconsideration only granted for compelling and persuasive reasons).

We will give CARE the benefit of the doubt and treat its motion to withdraw its previous withdrawal as a petition for this Board to reconsider its order accepting the previous withdrawal, which is the proper petition under the circumstances. It would appear that CARE's petition was filed one day too late. Even if the petition had been filed on time, however, it has failed to set forth compelling and persuasive reasons for rescinding our order.

CARE has not alleged that its attorney acted without authority. There is no claim of fraud, mistake, or clerical error. Rather, CARE acknowledges that it withdrew its appeal because it believed that the matter was moot and because it was unable to pay additional attorney and expert witness fees and costs. (Motion ¶ 12.) CARE now regrets its decision, not because anything has changed, but because it is concerned that its withdrawal may hinder its rights in future appeals due to the doctrine of administrative finality. (Motion ¶¶ 14-15.) CARE's alleged "confusion" (Motion ¶ 15) regarding the legal ramifications of its decision to withdraw its

appeal, however, falls well short of compelling and persuasive reasons that would justify rescission of our case closure order.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS ALERT REGARDING THE ENVIRONMENT	:	
v.	:	**EHB Docket No. 2000-162-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP	:	

ORDER

AND NOW, this 16th day of May, 2002, the Appellant's Motion to Withdraw Motion Filed by Counsel April 19, 2002 to Withdraw Appeal and to Reinstate Appeal is **DENIED.**

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: May 16, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CLEARVIEW LAND DEVELOPMENT CO., CITY WIDE SERVICES, INC. AND RICHARD R. HELLER	:	
v	:	**EHB Docket No. 2001-191-K (Consolidated with 2001-192-K and 2001-193-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 16, 2002**

OPINION AND ORDER ON THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION IN LIMINE

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board denies the Department's Motion In Limine which asks that the Board, on the basis of the doctrine of collateral estoppel, enter an Order precluding the Appellants from contesting liability for underlying Solid Waste Management Act violations in a Civil Penalty Assessment case. The Department contends that two previous Commonwealth Court Orders from litigation involving the same parties and the same Site establish that the underlying violations in the Civil Penalty Assessment took place. The Motion is denied because a Motion In Limine should not and cannot be used to seek a dispositive order on the merits of the appeal.

Factual and Procedural Background.

This case is the trial of an August 2, 2001 Civil Penalty Assessment in the amount of $59,500 against all three Appellants. The Civil Penalty Assessment alleges, among other things,

that Appellants operated a site in Philadelphia for the transfer, storage, collection, transportation, processing, disposal or depositing of municipal waste material without a permit (the Site). Specifically, piles of putrescent household municipal waste, waste tires, leaf waste, ash waste and waste automobiles were present on the Site at various times. The Department alleges that the Appellants' conduct is in violation of Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605 (SWMA).

Each Appellant filed a separate appeal on or about August 23, 2001 and the three cases were consolidated. All deadlines for discovery and dispositive motions set forth in Pre-Hearing Order No. 1 expired in due course on February 19, 2002 without any party having requested an extension or filing a dispositive motion. Each party reported to the Board by their respective periodic status reports that no settlement could be reached on the matter and that the case was ready for trial. Thus, by Pre-Trial and Trial Scheduling Order dated March 4, 2002, as amended on March 13, 2002, the Board set this case for trial starting on June 19, 2002.

Appellants filed their Pre-Hearing Memorandum on April 15, 2002. Appellants' Pre-Hearing Memorandum in Section II lists various "Legal Issues", outlined in paragraphs A through L, that they are attempting to put into issue in this case. These "Legal Issues" pose questions whether the Department erred in its "Findings" as outlined in the Civil Penalty Assessment or whether the Department erred in disregarding certain facts when it assessed its Civil Penalty.

Upon its review of the Appellant's Pre-Hearing Memorandum, the Department filed the instant Motion in Limine on May 10, 2002. It seeks to have the Board enter an order precluding Appellants from contesting that they violated the SWMA. The basis for the Motion, states the Department, is that in previous Commonwealth Court injunction litigation brought by the

Department against the same Appellants involving the same site, the Commonwealth Court found that the Appellants had violated the SWMA and had made various other specific findings adverse to the Appellants as well. The Department argues that we should enter the preclusion order that it requests by application of the doctrine of collateral estoppel. Specifically, the Department seeks an Order from the Board "precluding Appellants from contesting that they violated the SWMA as found by the Commonwealth Court in its Orders of February 28, 2001".

Appellants oppose the Motion In Limine by arguing that the Department has the burden of proving all of the alleged violations in the August 2, 2001 Civil Penalty Assessment. Appellants further argue that they are not seeking to re-litigate issues already decided by the Commonwealth Court. They say that the Commonwealth Court did not, in fact, make various specific determinations on the issues they wish to contest here. For example, Appellants argue that the Commonwealth Court made no findings regarding the following matters which Appellants wish to make a part of this case: (1) whether certain violations have been corrected (Appellants' Pre-Hearing Memorandum, Section II, Parag. B.); (2) whether Appellants had been issued a junkyard permit by the Township of Darby allowing for the sorting of recyclables at the Site (Appellants' Pre-Hearing Memorandum, Section II, Parag. C.); (3) the status of Richard Heller and his relationship with Appellant Clearview (Appellants' Pre-Hearing Memorandum, Section II, Parag. D.); (4) the responsibility of trespassers and other third-parties unknown to Appellants for the creation of the alleged violations (Appellants' Pre-Hearing Memorandum, Parag. F.); (5) the alleged stockpiling of tires that were located on property not owned by Appellants and the removal of such tires one day before the Commonwealth Court entered its Orders (Appellants' Pre-Hearing Memorandum, Section II, Parag. G); (6) whether Richard Heller has any responsibility, control or liability for the alleged violations (Appellants' Pre-

Hearing Memorandum, Section II, Parag. I); and (7) whether Richard Heller can be liable in light of his filing for protection under the federal bankruptcy laws (Appellants' Pre-Hearing Memorandum, Section II, Parags. K, L).

Discussion.

We deny the Department's Motion because it seeks, in essence, to secure a dispositve order on the merits of the case. In doing so, we follow Judge Labuskes's recent decision in *Dauphin Meadows v. DEP*, EHB Docket No. 2000-L (Opinion and Order issued March 5, 2002). In that case, the Department sought to have the doctrine of administrative finality applied *via* a Motion In Limine. Judge Labuskes declined to do so stating as follows:

> A party may obtain a ruling on evidentiary issues by filing a motion in limine." 25 Pa. Code § 1021.88. A motion in limine is a procedure for obtaining a ruling on the admissibility of evidence before it is offered at the hearing. *Delpopolo v. Nemetz*, 710 A.2d 92, 94 (Pa. Super.1998). The motion is an extremely useful device that enables the Board to consider important evidentiary questions in a setting more conducive to thoughtful analysis than that presented when an oral objection is raised in the midst of a hearing. Therefore, the Board welcomes such motions.
>
> Motions in limine, however, should not be used as motions for summary judgment in everything but name. A typical (and perfectly acceptable) motion in limine is presented on the eve of a hearing and otherwise does not usually comply with all of the procedural requirements that relate to a motion for summary judgment. *See* 25 Pa. Code § 1021.73. There is obviously good reason for those requirements, and we must be wary of permitting parties to disregard them by using the vehicle of a motion in limine to obtain a ruling on the merits. Thus, a motion in limine generally should only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. Of course, this principle can be easier to state than to apply. One clue to determining whether a motion is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.
>
> Dauphin Meadows characterizes both of the motions as motions for summary judgment, essentially in their entirety, and argues that they should be rejected on that basis alone. Although we do not go as far as Dauphin Meadows, we do agree that UDACAC's argument regarding administrative finality relates to the merits of appeal far more than any particular evidence offered in support of an issue in the appeal. Therefore, we will not address that issue in the instant context.

Dauphin Meadows, slip op. at 3-4.

We think that rationale applies with equal force where the Motion In Limine seeks application of the doctrine of collateral estoppel in the fashion it does here. Like administrative finality, collateral estoppel, as the Department seeks to have it applied here, relates more to the merits, or lack thereof, of Appellants' appeal than to any particular piece of evidence. What the Department seeks here is really an entry of summary judgment in its favor on the liability aspect of its case with the only issue at trial being the amount of the penalty. That type of request should come in summary judgment practice, not pre-trial motion in limine practice. This is not a situation which can fairly be said to involve the Department's not being able to raise this issue before the Appellants filed their Pre-Hearing Memorandum either. A pre-emptive motion for summary judgment on the issue of liability could well have been filed.[1]

What we have said so far is enough to deny the Motion, but we also make the following observations because we trust that this matter will come up again at trial in the form of objections to proffered evidence. Obviously, we do not mean here to constrain the Department's right to object at trial to any evidence proffered by Appellants at trial. However, it is only fair to advise the parties of the analytical perspective from which the Board, at this juncture, views the question having now had the benefit of seeing the Motion In Limine and reviewing the relevant case-law on the subject.

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[1] We do note that the Department could not have pointed to specific pieces of evidence in its Motion In Limine because Appellants' Pre-Hearing memorandum was deficient in that it failed to identify particular pieces of evidence or exhibits. Instead, it identified broad categories of documents. Upon the Department's meritorious complaint about that in its Statement of Objections To Appellants' Exhibits, we issued an Order dated May 8, 2002 requiring that Appellants supplement their Pre-Hearing Memorandum to include reference to specific documents which Appellants will attempt to introduce into evidence at the trial. In any event, the jist of the Motion In Limine is, as we have said, much more

We agree with Appellants' observation that that there is not necessarily a perfect identity between what the Commonwealth Court found in its two Orders of February 28, 2001 and what Appellants seek to present at trial in this case. The Commonwealth Court did not seem to make any findings on; (1) whether certain violations had been corrected; (2) the alleged junkyard permit issued by the Township of Darby; (3) the status of Richard Heller and his relationship, or lack thereof, to Clearview; (4) the supposed responsibility of trespassers and third-parties for creation of violations; (5) the alleged stockpiling of tires on property not owned by Clearview and the supposed removal of those tires on February 27, 2001; and (6) the effect, if any, of Richard Heller's bankruptcy filing with reference to the Civil Penalty Assessment against him.

Finally, we think that even if collateral estoppel could or did apply to liability in this case, at least some if not all of the matters Appellant would like to put before the Board would be relevant and admissible for the purpose of determining whether the penalty under the circumstances was appropriate. In a SWMA civil penalty assessment case, the Department "must prove by a preponderance of the evidence that the [penalized party] violated the applicable statutes and regulations, *and* the amount of the penalty assessed for the violations reflects an appropriate exercise of discretion. *Shay v. DEP*, 1996 EHB 1583, *affirmed*, 175 C.D. 1997 (Pa. Cmwlth. filed November 17, 1997)." *FR & S v. DEP*, 1999 EHB 241, 262 (emphasis added). *See also Brandywine Recyclers v. DEP*, 1993 EHB 629 (analyzing the question of violation of the SWMA separately from the question of the reasonableness of the penalties assessed). The Board has recently illustrated the point we are making here in *Farmer v. DEP*, 2001 EHB 271, which was a case involving a civil penalty assessment under the analogous Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, as amended, 35 P.S. § 6021.101, et seq.

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akin to a Motion For Partial Summary Judgment As To Liability.

("Storage Tank Act"). In that case the Board had found in prior litigation that Farmer had committed a violation of the Storage Tank Act's conflict-of interest rule, 25 Pa. Code § 245.106, by inspecting his own facilities and that determination of the Board was upheld on appeal to the Commonwealth Court. *Id.* at 284. The Board in *Farmer* did hold that Farmer was precluded by collateral estoppel from relitigating the Board's previous finding that he violated the conflict of interest rule. *Id.* However, at the same time, the Board noted that, "although we precluded Farmer from relitigating the fact of the violation at the hearing, we allowed evidence concerning the violation that related to the civil penalty criteria (willfulness, etc.)". *Id.* at 284 n.1 (citation to the record omitted). Thus, even if liability had already been determined by summary judgment practice, the matters Appellants now want to put before the Board would be admissible for the purposes of evaluating Appellant's contention that the penalty amount is excessive and unreasonable as well as for the purpose of making our own evaluation whether the penalty amount is reasonable and appropriate.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEARVIEW LAND DEVELOPMENT CO., CITY WIDE SERVICES, INC. AND RICHARD R. HELLER	:	
v	:	**EHB Docket No. 2001-191-K (Consolidated with 2001-192- and 2001-193-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 16, 2002**

ORDER

AND NOW, this 16th day of May, 2002, upon consideration of the Department's Motion In Limine and the Appellants' response thereto, the Motion is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: May 16, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

WHEELABRATOR FALLS, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-100-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 16, 2002**

OPINION AND ORDER ON WHEELABRATOR'S MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board denies Appellant's motion for summary judgment in an appeal of the issuance of its Title V Operating Permit for its Falls Township, Bucks County resource recovery facility on the grounds that the Department was mandated to have provided in the permit temporally limited periods of relief from meeting specific contaminant emissions limitations during start-up, shutdown and malfunction (SSM Relief). Instead, the Permit provides for such relief only for carbon monoxide (CO) and nitrogen oxides (NOx) and only during start-up and shutdown and not for malfunction. Wheelabrator argues that federal regulations, which provide for such comprehensive SSM Relief, which are incorporated by reference into Pennsylvania's air regulations mandate that such broad SSM Relief be provided for in the permit. More limited SSM Relief, however, is set forth in the Department's Best Available Technology Policy regarding resource recovery facilities. Summary judgment is denied because Section 509(a) of Act 101, 35 P.S. § 4000.509, provides that the Department is to promulgate and publish a Best

Available Technology criteria for resource recovery facilities and it shall not issue a permit for a new resource recovery facility that is less stringent than any provision thereof. Wheelabrator is not entitled to judgment as a matter of law as there are triable issues regarding, among other things, whether Section 509(a) applies to this permit.

Introduction

This is an appeal by the Permittee, Wheelabrator Falls Inc., (Wheelabrator) from the Department's issuance to it of a Title V Operating Permit (Title V Permit or Title V Operating Permit) for Wheelabrator's resource recovery facility located in Falls Township, Bucks County (the Facility or Resource Recovery Facility). At issue in this case is to what degree the Title V Permit should have provided so-called start-up, shutdown and malfunction relief (SSM Relief). Wheelabrator claims that the Permit was required under the federal regulations, as incorporated by reference into state regulations, to provide for broad, comprehensive SSM Relief whereby during start-up, shutdown and malfunction the normal operating conditions of performance relating to emissions limits for *all* contaminants, for which there is a specified emissions limitation, do not apply. The Title V Permit, however, limits SSM Relief to emissions limits for only carbon monoxide (CO) and nitrogen oxides (NOx) and only during periods of start-up and shutdown, not malfunction. The Department claims that this more limited SSM Relief is in line with the Department's Best Available Technology Policy applicable to resource recovery facilities.

Before us is Wheelabrator's timely Motion for Summary Judgment and supporting memorandum of law. The Department filed a response and brief in opposition to Wheelabrator's motion for summary judgment, and Wheelabrator filed a reply. The relevant procedural and factual background behind Wheelabrator's motion is set forth below and is derived from the

notice of appeal, the motion, the response thereto and the exhibits attached to them. [1]

Factual and Procedural Background

On March 28, 2001, the Department issued Wheelabrator the Title V Permit under appeal. WM Ex. A, Title V Permit. The Title V Permit is 96 pages long and governs a wide array of operational, testing, monitoring and reporting parameters. Wheelabrator first applied for a permit for the Facility in February, 1989. (DM Ex. J, K, L, M, N, O). Before issuing the Title V Operating Permit for the Facility, the Department had issued the following plan approvals and operating permits to Wheelabrator covering the Facility: (1) Plan Approval 09-340-003 issued May 29, 1992 (DM Ex. J); (2) Plan Approval 09-340-003A issued January 11, 1996 which superseded Plan Approval 09-340-003 (DM Ex. K); (3) Operating Permit OP-O9-0013 issued January 11, 1996 (DM Ex. L); (4) Amended Plan Approval 09-340-003A issued May 17, 1996 (DM Ex. M); (5) Amended Operating Permit OP-09-0013 issued May 17, 1996 (DM Ex. N); and (6) Revised Operating Permit OP-09-0013 issued on April 13, 2000 (DM Ex. O).

Section D of the Title V Permit sets forth the specific emissions limitations for specific contaminants applicable to the Facility. These emissions limitations are specified on a contaminant by contaminant basis and include emissions limits on the following contaminants: (1) particulate matter (Section D, Parag. 001); (2) dioxin/furan (Section D, Parag. 002); (3)

---

[1] The "record" for purposes of motions for summary judgment, consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, if any. Pa. R.C.P. 1035.01. Thus, the record for summary judgment review in this case is derived entirely from Wheelborator's NOA, and the parties' various filings regarding Wheelbarator's motion for summary judgment. Citation form will be as follows: "WM" is the Wheelbarator's motion for summary judgment, "MB" is Wheelbarator's memorandum of law in support of its motion for summary judgment; "MRB" is Wheelabrator's reply brief; "DEPR" is DEP's Response to Wheelbarator's motion for summary judgment; "DEPB" is DEP's brief in opposition to MC Resource's motion for summary judgment; "WRB" is Wheelabrator's Reply Brief.

carbon monoxide (CO) (Section D, Parag. 003); (4) heavy metals (Section D, Parag. 004, 005); (5) nitrogen oxide (NOx) (Section D, Parag. 006); (6) hydrochloric acid (Section D, Parag. 007); (7) sulfur dioxide (SO_2) (Section D, Parag. 008); volatile organic compounds (VOCs) (Section D, Parag. 009) and; (8) visible air contaminants (Section D, Parag. 010). (DM Ex. P, WM Ex. A). These specific contaminant by contaminant emissions limitations are also referred to as "performance standards". The paragraphs relating to CO and NOx are qualified as follows: "the [CO/NOx] limit applies at all times when municipal wastes are combusted, except during periods of start-up and shutdown. Provided, however, that the duration of the start-up or shut-down shall not exceed three (3) hours per occurrence". No other such provision is attached to any of the other specific contaminant emission performance standards. That is the crux of Wheelabrator's complaint and the subject of its summary judgment motion. [2]

Wheelabrator complains that the Department illegally and improperly refused to include performance standards set forth in Subparts Ea and Cb of Part 40 of the Code of Federal Regulations, which provide that during temporally limited periods of start-up, shut-down *and malfunction*, the normal emissions limitations for *all* contaminants do not apply. The federal regulations to which Wheelabrator refers, *i.e.*, Subparts Ea and Cb, are part of the federal New Source Performance Standards (NSPS Standards) and provide in relevant part as follows:

> The standards under this subpart apply at all times, except during periods of start-up, shutdown, or malfunction; provided, however, that the duration of start-up, shutdown, or malfunction shall not exceed 3 hours per occurrence.

---

[2] In its NOA, Wheelabrator raised four additional objections relating to the method for calculating particulate limits, ambiguous language in the opacity limit, improper streamlining of the data availability standard, and applicability of the Subpart Dc standards. The parties report that they have negotiated a settlement in concept as to those issues, but have not yet executed a settlement agreement pertaining to them.

> . . . the standards under this subpart apply at all times except during periods of start-up, shutdown, or malfunction. Duration of start-up, shutdown, or malfunction shall not exceed 3 hours per occurrence.

40 CFR §§ 60.58a(a), 60.58b(a)(1). These federal NSPS Standards have been incorporated by reference into Pennsylvania's air regulations in Chapter 122 of Title 25 of the Pennsylvania Code. Specifically, 25 Pa. Code § 122.3 provides as follows:

> Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources, promulgated in 40 CFR Part 60 (relating to standards of performance for new stationary sources) by the Administrator of the EPA under section 111 of the Clean Air Act (42 U.S.C.A. § 7411) are adopted in their entirety by the Department and incorporated herein by reference.

25 Pa. Code § 122.3. According to Wheelabrator, pursuant to the Subparts Ea and Cb of the federal NSPS regulations, as incorporated into Pennsylvania regulations *via* 25 Pa. Code Part 122, its Title V Permit was required to have contained the full range of SSM Relief as set forth in Subparts Ea and Cb.

Wheelabrator claims that the Department applied a more stringent "policy document" which provides for only limited SSM Relief for resource recovery facilities. The "policy document" involved is the "Air Quality Permitting Criteria Including Best Available Technology For Municipal Waste Incineration Facilities" (BAT Policy) (DM Ex. B, WM Ex. H). The BAT Policy specifies criteria for plan approval requirements including Best Available Technology as required by 25 Pa. Code § 127.12(a)(5). Under 25 Pa. Code § 127.12(a)(5), an applicant for a plan approval is required to "show that the emissions from a new source will be the minimum

attainable through the use of the best available technology." 25 Pa. Code § 127.12(a)(5).[3] Section A of the BAT Policy sets forth various emissions limitations for specific contaminants, *i.e.*, performance standards, that a resource recovery facility must be able to meet in order to be permitted. Other sections of the BAT Policy provide for specific operating, monitoring, and testing requirements as well as other specifications which a resource recovery facility must meet in order to be permitted. As for the Section A emissions limitations, the BAT Policy provides for specific emissions limitations for: (1) particulate matter; (2) hydrochloric acid; (3) sulfur dioxide; (4) carbon monoxide; (5) dioxins/furans; (6) nitrogen oxide; and (7) various metals. The BAT Policy provides at the end of Section A's recitation of specific emissions limitations for these specific contaminants that, "[t]he carbon monoxide and nitrogen oxide emission limits apply at all times when the municipal wastes/refuse derived fuel are combusted, except during periods of start-up and shutdown. Provided, however, that the duration of the start-up or shutdown shall not exceed three hours per occurrence." BAT Policy Section A(8). No other mention is made of SSM Relief in the BAT Policy.

The Department does not seem to contest that the reason it did not incorporate into Wheelabrator's Title V Permit the full range of SSM Relief is because, as Wheelabrator puts it, "such relief is not authorized under the terms of the [BAT Policy]". WB at 6. Wheelabrator claims that this is an obvious violation of the Commonwealth Documents Law. *See also Dauphin Meadows v. DEP*, 2000 EHB 521. In *Dauphin Meadows* we held that a guidance document is not a legally binding regulation that has the force of law and the Department cannot rely on a mere guidance document in arriving at its determination. Under Wheelabrator's

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[3] Best Available Technology is defined as, "[e]quipment, devices, methods or techniques as determined by the Department which will prevent, reduce or control emissions of air contaminants to the maximum degree possible and which are available or may be available. 25

argument, the Pennsylvania regulations specifically incorporate the full SSM Relief provisions of Subparts Ea and Cb of the federal regulations and no mere policy document, which is not a regulation, can trump that. Thus, according to Wheelabrator, as a matter of law, its Title V Permit should have included full SSM Relief and it was error for the Department to have gone only so far as the more limited provisions relating to such relief outlined in the BAT Policy.

Summary Judgment Standard

As we recently set forth in *Drummond v. DEP*, EHB Docket No. 2001-074-K slip op. at 9 (Opinion and Order issued April 10, 2002):

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

Discussion.

Wheelabrator states that the "only question presented is a purely legal one, namely whether the BAT [Policy] requirements can reasonably be interpreted as nullifying or amended the SSM [Relief] regulations." WRB p. 4. At first blush, Wheelabrator's argument is very convincing. After all, not even the Department would or does dispute that, under normal circumstances, a policy cannot override a regulation. However, this case seems to present abnormal circumstances. Wheelabrator did not bring to our attention in its motion papers

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Pa. Code § 121.1

Section 509(b) of the Municipal Waste, Planning and Recycling and Reduction Act of July 28, 1988, P.L. 556, 53 P.S. §§4000.101-1904 (Act 101), which provides in relevant part as follows:

> **§ 4000.509. Best available technology**
>
> **(a) Publication of criteria.** – The department, after public notice and an opportunity for comment, shall publish in the Pennsylvania Bulletin criteria for best available technology (as defined in 25 Pa. Code § 121.1 (relating to definitions)) for new resource recovery facilities.
>
> **(b) Restriction on issuance of certain permits.** – The department shall not issue any approval or permit for a new resource recovery facility under the act . . . known as the Air Pollution Control Act, that is less stringent than any provision of the applicable best available technology criteria . . . .

53 P.S. § 4000.509. The Department in its response brief did point us to Section 509. This statutory provision precludes the conclusion on this record that Wheelabrator is entitled to judgment a matter of law at this stage of the case. Section 509(b) is a *statutory* provision which seems to directly infuse or embody a BAT Policy regarding resource recovery facilities with enhanced authority, even leapfrogging such a Policy above the authority of a duly promulgated regulation, as long as the BAT Policy has been promulgated and published in the manner outlined in Section 509(a).

Wheelabrator responds in its reply that Section 509 of Act 101 is not applicable because the BAT Policy here was not one which was published pursuant to Section 509. [4] Wheelabrator contends, for example, that the BAT Policy the Department relies upon was not published in the

[4] We note specifically that Wheelabrator is arguing here that the BAT Policy relied upon by the Department is not one which was effectuated pursuant to the terms of Section 509 of Act 101 and is, thus, not entitled to the "enhanced authority" effect which Section 509 visits upon a BAT Policy which meets that Section's requirements. Thus, Wheelabrator is not contesting that Section 509 of Act 101 does provide that enhanced authority to a BAT Policy document which is promulgated pursuant to the terms of Section 509. Nor is Wheelabrator arguing that the Legislature either did not or cannot confer such enhanced authority upon a policy document.

Pennsylvania Bulletin. Perhaps this is true, but we cannot conclude on this record that there are no material issues of fact regarding whether Section 509 applies to this BAT Policy or that Wheeabrator is entitled to judgment as a matter of law that Section 509 does not apply. As we just said, Wheelabrator did not mention, even in passing, Section 509 of Act 101 in its motion papers or supporting brief. Thus, it presented nothing in the summary judgment record in support of its contentions about the BAT Policy's relationship, or, as it is arguing, lack thereof, to Section 509 of Act 101. Also, the Department is claiming that the BAT Policy meets the requirements of Section 509. Given that we must take the record on a summary judgment motion in the light most favorable to the non-moving party, in this case the Department, we will await trial on the issue of whether this BAT Policy is entitled to the enhanced authority conferred by Section 509 of Act 101.

Wheelabrator also argues that the BAT Policy does not preclude the provision of full federal Subpart Ea and Cb SSM Relief. Wheelabrator seems to be advancing the argument that the BAT Policy itself can be read to *not* preclude granting a resource recovery facility permit which *does* contain the full range of SSM Relief as provided in Subparts Cb and Ea. WB at 17. Wheelabrator's rationale is that the BAT Policy is "silent" as to SSM Relief beyond the specific provisions relating to start-up and shutdown relief for CO and NOx. Thus, according to Wheelabrator, the "BAT Policy does not mean that municipal waste incinerators, such as Wheelabrator's facility, is not entitled [full SSM Relief], it simply does not address that issue." *Id.*

This argument seems weak in the extreme. It seems to us at this stage of the proceedings that the four corners of the BAT Policy is clear on the subject. The Emissions Limitations section of the BAT Policy, on its face, provides for *only* start-up and shutdown relief and *only* in

the case of CO and NOx. DEPM Ex. A, BAT Policy, Parag. A. 8. There are no other exceptions to the emissions limits for any other parameter at any other time or for any other circumstance.

The drafting history of the BAT Policy makes it even more clear that Wheelabrator's argument in this regard is not persuasive. The BAT Policy in place now, and that which is relevant for this case, was made available in draft form for public comment on February 8, 1992. DB Ex. A, Pennsylvania Bulletin February 8, 1992. The January 31, 1992 Background Document On Revisions To Air Quality Permitting Criteria Including Best Available Technology For Municipal Waste Incineration Facilities the Department provides as follows with respect to SSM Relief:

> The NSPS requires the standards to apply at all times except during start-up, shutdown, and malfunction periods. The IRR commented that the Department should adopt the EPA approach toward start-up, shutdown and malfunction periods. Historically, the Department has never exempted any source from any standards during start-up or shutdown periods. However, in the case of MWI [municipal waste incinerators], the standards are racheted down to the levels which can generally be achieved during normal combustion of municipal wastes/refuse derived fuel. The data from operating MWI facilities show that the CO standards are very difficult to meet during start-up periods.
>
> Therefore, the Department has proposed that the CO emission limit is not applicable during start-up and shutdown periods as defined in the BAT. Unlike the NSPS, the proposed revisions would not exempt malfunction periods from the standards.

DEPR Ex. C p. 9-10. Later, the Department re-reviewed its draft BAT Policy with respect to SSM Relief and it did decide, in response to further public comment, to expand the start-up and shutdown relief in the BAT Policy to include one more parameter, *i.e.*, NOx. The Department explained its decision to include NOx in response to yet another comment on the draft BAT Policy that the BAT Policy should provide that the emissions limitations for *all* contaminants, not just NOx, should not apply during limited periods of time during start-up, shutdown malfunction events. DB Ex. D, p. 9). The Department's response provided as follows, "[t]he

Department has reviewed its position on start up, shut down and malfunctions. It has, in addition to CO added NOx to the pollutants involved. However, we have not extended the exemptions to beyond the normal start-up or shutdown periods. DB Ex. D. p. 9, Comments and Responses On Air Quality Permitting Criteria Including Best Available Technology For Municipal Waste Incineration Facilities dated March 26, 1993.

In light of the plain language of the BAT Policy on its face as well as taken in the context of the drafting history, it is not tenable to maintain that the full range of SSM Relief provided in the federal NSPS Subparts Cb and Ea can co-exist with the BAT Policy. Furthermore, if the BAT Policy is one upon which Section 509 of Act 101 operates, there does not seem to be any room at all for the Department to grant resource recovery facility permits with broader SSM Relief than that specifically set forth in the BAT Policy.

The parties did seem to address various matters which we perceive as extraneous to the issue presented. Wheelabrator in arguing that it is entitled to summary judgment, points to provisions in its various previous plan approvals and operating permits for the Facility which provide, in essence, that Subparts Ea and Cb are incorporated into those permits. WB at 11-12. For example, the Plan Approval and the Operating Permit issued on January 11, 1996 both provide that, "[t]his [Plan Approval/Operating Permit] incorporates the requirements of Subpart Ea of Standards of Performance for New Source Stationary Sources, 40 CFR § 60.50a-60.59a. DEPR Ex. K, Condition 2.B., Ex. L, Condition 3.C. Wheelabrator is apparently arguing that it is an undisputed fact that its previous plan approvals and operating permits provided federal style Subpart Ea and Cb SSM Relief. DEP counters by denying that the previously issued plan approvals and operating permits contained federal Subpart Ea and Cb style SSM Relief. The Department points out, for example, that the plan approval and operating permit just mentioned

both also incorporate the BAT Policy (DEPR Ex. K, Condition 2.A. and Ex. L, Condition 3.A.) and both provide, consistent with the BAT Policy, that the emissions limits for only CO and NOx are not applicable during start-up and shutdown. No other contaminants are provided like relief from compliance and the relief from compliance for CO and NOx apply only to start-up and shutdown and not to malfunction. DEPR Ex. K, Condition No. 6, Ex. L, Condition No. 6. The Department argues that this matter is a disputed issue of fact precluding summary judgment.

We agree that this is a disputed issue of fact and/or a disputed mixed issue of law and fact. However, at this stage, we fail to see how it would be a material fact. Even if it could be argued that the previous plan approvals and permits could be viewed as being internally inconsistent to some degree, we are dealing with the Title V Permit, not these previous permits, and the operation of Section 509(b) of Act 101 with respect to this Title V Permit. Perhaps there is some nuance of the Title V program that we are missing at this point which makes the previous plan approvals and operating permit still effective to some degree or another together with the Title V Operating Permit which has now been issued. If so, then we will need to be educated about that at the trial. Even if it were so, however, Wheelabrator still has not demonstrated that it would be entitled to summary judgment. Even if the extant effective permit or permits, were, perhaps, internally inconsistent on the question at hand, Section 509(b) and the BAT Policy, assuming that this BAT Policy were entitled to Section 509 enhanced authority, would seem to preclude any construction of the Title V Permit that would involve the full range of SSM Relief that Wheelabrator propounds.

In a similar vein, we fail to see the point in the parties' arguing about whether Wheelabrator knew subjectively whether its previous plan approvals and operating permits provided for the full federal Subpart Ea and Cb SSM Relief or the more limited relief provided in

the BAT Policy. First, as we just said, this appeal is about the Title V Permit, not the previously issued plan approvals and operating permits. Secondly, we simply do not see what difference it makes one way or the other what Wheelabrator may have subjectively thought its previous plan approvals and operating permits provided in terms of answering the question posed here which is whether the Department erred in drafting the Title V Permit to provide for the more limited SSM Relief provided in the BAT Policy versus the broader SSM Relief outlined in Subparts Ea and Cb.

Finally, the Department argues that Wheelabrator's appeal here is barred by the doctrine of administrative finality because it failed to appeal its previously issued plan approvals and operating permits on the question of what scope of SSM Relief was provided therein. The Department points to the case of *Emporium Water Company v. DEP*, 1997 EHB 395, in which the Board stated that "while the doctrine of administrative finality is typically invoked to preclude litigation of issues where permits are revised or reissued, it can also apply where an appellant could raise the same issue in appeal of a different permit". *Id.* at 398. Also, the Department points out that Wheelabrator failed to appeal a penalty assessment for excess SO_2 emissions which allegedly occurred during a period of startup, but instead, it paid a $2,400 penalty. There were supposedly other times that Wheelabrator could have filed appeals which the Department contends would have posed the question of the scope of SSM Relief it had under its previous plan approvals and permits.

We do not believe that any of the Department's points here are convincing from either a legal or a factual perspective. *Emporium* does not apply here. *Emporium* dealt with an appellant's attempt to appeal certain terms of an operating permit which terms had been included but not appealed from in the earlier construction permit. As Wheelabrator correctly points out,

this is the opposite situation. Even given the fact that we have yet to fathom the point of Wheelabrator's complaint in this regard, it is arguing that conditions that *were* present to its satisfaction in earlier permits are *not* present in the later permit.

The Department's argument on the civil penalty assessment is a particular stretch. There is no case law cited for the Department's extra-broad interpretation of administrative finality which would preclude an Appellant from challenging a subsequently issued permit because, in the past, it had not litigated a penalty assessment that had been based on a condition or conditions of a past permit which, arguably, may have some theoretical relationship to the condition the Appellant seeks to challenge in the pending permit appeal. Also, Wheelabrator settled the alleged SO_2 emissions limit exceedences *via* Consent Assessment of Civil Penalty (CACP) entered into between it and the Department on March 6, 2000 (WRB Ex. N). While Wheelabrator admitted that the SO_2 exceedences did occur, it specifically did *not* admit that such exceedences were a violation of its then extant permit. (WRB Ex. N, Parags. J, K, M and Section 3.a.) Specifically, Paragraphs J and K of the introductory portion of the CACP recite the fact of the exceedences. Paragraphs L and M recite that such exceedences are inconsistent with good operating practices, constitute a violation of the Pennsylvania Code and unlawful conduct under the Pennsylvania Air Pollution Control Act. Then, Section 3.a. of the CACP specifically states that Wheelabtrator agrees that the findings set forth in Paragraphs *A though K* are true and correct. Conspicuously absent from that group of Paragraphs which Wheelabrator agrees are true and correct are Paragraphs *L and M* which are the paragraphs that recite that the exceedences constitute unlawful activity. In any event, it is impossible to tell whether the exceedence even occurred during start-up, shutdown or malfunction which, presumably, would have been the only circumstance in which Wheelabrator could have even thought to have

pursued a further challenge of the Department's allegations of exceedences based on SSM Relief. Thus, even though we still do not see the relevance of what Wheelabrator's previous permits provided with respect to SSM Relief, or the relevance of what Wheelabrator subjectively thought on that subject, its payment of the penalty for excess SO_2 emissions cannot be viewed as its agreement that the previous permits did not provide full federal style SSM Relief or as an indication that it thought the previous permits did not provide such SSM Relief.

After having read the parties' summary judgment papers and their exhibits, the seminal questions that we now see for trial are whether Section 509(b) of Act 101 applies to this BAT Policy and this Wheelabrator Title V Permit. For example, we would need to know whether the Facility is considered a "new resource recovery facility". We would also need to know whether the BAT Policy propounded by the Department is one which was promulgated "after public notice and an opportunity for comment." The record as it stands now could support a conclusion that the BAT Policy here was indeed promulgated after public notice and opportunity for comment, but we leave that issue for trial and later determination by the entire Board. On the other hand, we see no indication that the BAT Policy which the Department is relying upon was published in the Pennsylvania Bulletin. That seems to be a very critical question in terms of whether this BAT Policy is entitled to Section 509 enhanced authority. In any event, we will need to have a full factual presentation from both sides on all aspects of the question whether the BAT Policy the Department is relying on here is or is not entitled to Section 509 enhanced authority—whatever those presentations may include. Also, there is the question of what is the result if it turns out that the BAT Policy, for whatever reason or reasons, is *not* one to which Section 509 applies.[5]

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[5] We provide these thoughts to the parties so that they are clear as to the matters upon which the

Accordingly, we enter the following Order:

Board is not clear at this stage of the proceedings based on its review of the summary judgment record. We by no means intend to squelch or limit what the parties themselves will determine that they need or wish to present to the Board at trial to make any points they deem appropriate or how they wish to present their cases.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHEELABRATOR FALLS, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-100-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of May, 2002, upon consideration of Wheelabrator's Motion for Summary Judgment, the Department's response thereto, and Wheelabrator's reply, it is HEREBY ORDERED that Wheelabrator's Motion for Summary Judgment is **DENIED.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: May 16, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SARAH CURRAN SMITH	:	
	:	
v.	:	**EHB Docket No. 2002-067-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MC RESOURCE DEVELOPMENT, INC., Permittee	:	**Issued: May 22, 2002**

OPINION AND ORDER ON MOTION TO DISMISS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants Permittee's Motion to Dismiss the Appellant's Notice of Appeal stating 5 individual objections to the Department's issuance of a Public Water Supply Operating Permit where the Appellant, in response to the Motion to Dismiss, informs the Board that objection 1 is moot and objections 2 through 5 are withdrawn.

Factual and Procedural Background

Appellant, Sarah Curran Smith (Smith), appeals the Department of Environmental Protection's (Department or DEP) issuance of Public Water Supply Operating Permit No. 3546482 (Operating Permit) to MC Resource Development Inc., (MC Resource), the permitee. Very briefly, the Operating Permit authorizes MC Resource to extract water from two wells and

transport it by an underground pipeline to a loadout facility. From there, the water will be loaded onto trucks for bottling offsite. [1]

Smith's notice of appeal lists five objections to the Department's issuance of the Operating Permit:

> 1. The Project is in violation of local zoning.
> 2. The Permittee has violatedthe [sic] plain meaning of Special Condition No. 2 of the Operating Permit by artificially manufacturing a pass by flow.
> 3. Permitte [sic] is in violation of DEpartment [sic] regulations mandating that the well heads be at least 18 inches above ground.
> 4. Permittee is discharging ground water to surface water without proper permitting.
> 5. Incorporate all complaints contained in DRummond [sic] v. DEP, EHB Docket No. 2001-074.

Smith's Response states in full:

> Appellant, Sarah Curran Smith, files this Response to Permittee's Motion to Dismiss and in support thereof avers the following:
>
> Appellant's objection No. 1 has been mooted. Please see Memorandum of Law. With respect to Objection Nos. 2 through 5, Appellant herby withdraws her Appeal of the issuance of the Operations permit.

Before us is MC Resource's timely Motion to Dismiss and supporting memorandum of law. We will not describe the basis for the Motion to Dismiss in great detail because Smith's

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[1] Also pending before the Board is the related case of *Drummond v. DEP*, EHB Docket No. 2001-074-K. That is the appeal of the Department's issuance of Public Water Supply Construction Permit No. 5499507 to MC Resource. The Appellant in this case, Ms. Sarah Curran Smith, is the counsel for Mr. Drummond in the *Drummond* case. On April 10, 2002 the Board issued an Opinion and Order in *Drummond* granting in part and denying in part MC Resource's Motion For Summary Judgment. That Opinion describes in detail the nature of the permitted activity and the procedural events regarding MC Resource's public water supply operations and the reader is referred to that opinion for a more detailed discussion of the background of this matter.

responding Memorandum of Law informs the Board that objection no. 1 is now moot and that she is withdrawing objections nos. 2 through 5.

Smith describes in detail why her objection no. 1 is now moot. She states that after the Department issued the Operating Permit, Smith appealed to the Zoning Hearing Board of Schuylkill County (ZHB) claiming that the Permit violated Schuylkill County's zoning laws. On May 2, 2002 the ZHB held a hearing to address, among other things, Smith's appeal. At that hearing, the ZHB barred Smith from testifying about events related to MC Resource's operations subsequent to June, 2001. She concludes her discussion by stating that:

> Appellant will appeal the decision of the Zoning hearing Board to the Court of Common Pleas and fully expects that it will be some time before this issue is fully litigated. For the purposes of this appeal at Bar, Appellant's Objections No. one has been mooted.

Smith Memorandum of Law p. 2.

Discussion

"The Board evaluates Motions to Dismiss in the light most favorable to the non-moving party. Moreover, the Board will grant a Motion to Dismiss only when there are no material factual disputes and the moving party is entitled to judgment as a matter of law." *Ainjar Trust v. DEP*, 2000 EHB 505, 507.

We think that it is clear that this appeal has to be dismissed. Smith's Notice of Appeal states five separate objections. Smith has withdrawn objections 2 through 5 and has told the Board herself that objection no. 1 is moot.[2] The only matter left is to accomplish the procedural

[2] A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *In re Gross*, 382 A.2d 1000 (Pa. Super. 1980); *Amber Energy Inc. v. DEP*, 1998 EHB 1111, 1113. We are obviously not going to question Smith's own conclusion communicated to us that objection no. 1 is moot.

task of dismissing the case, which we shall proceed to do via the Order accompanying this Opinion.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SARAH CURRAN SMITH	:	
	:	
v.	:	**EHB Docket No. 2002-067-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MC RESOURCE DEVELOPMENT, INC., Permittee	:	

ORDER

AND NOW this 22th day of May, 2002 upon consideration of the MC Resource's Motion To Dismiss and Smith's Response, IT IS HERBY ORDERED that: MC Resource's Motion TO Dismiss is **GRANTED** and Smith's Appeal is **DISMISSED.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: May 22, 2002

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

For the Commonwealth, DEP:
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Northeast Regional Counsel

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ky

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARI

KIM GRAVES	**: EHB Docket No. 2000-189-MG**
	: (consolidated with EHB Docket
v.	**: Nos. 2000-217-MG and**
	: 2000-219-MG)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	**:**
	: Issued: June 12, 2002

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis

The Department was fully justified in revoking the underground storage tank permits at two retail gasoline stations owned by the appellant. The record demonstrates that the Department has gone to great lengths to secure the appellant's compliance with the storage tank laws and regulations to no avail. The appellant has failed to perform proper leak detection which resulted in at least two releases at one gas station, and has not completed a site characterization and remedial action plan as required by orders not only of the Department but also from the Commonwealth Court. The appellant has also failed to perform proper leak detection at the second facility and has not performed a limited release investigation as required by the Department and the Commonwealth Court.

The Department also assessed a civil penalty for the appellant's failure to timely install Stage II vapor recovery systems at both facilities and also for his failure to perform

corrective action and for the two releases at one of the gas stations. Given the appellant's poor compliance history and the circumstances of these violations, we find the penalty assessments to be reasonable.

INTRODUCTION

This matter involves three appeals from enforcement actions by the Department of Environmental Protection in connection with two retail gasoline stations operated by the Appellant, Kim Graves.[1] The first appeal, filed on August 25, 2000, challenged an order of the Department which revoked operating permits for underground storage tanks located at the Appellant's gas station known as the Hook Road Facility, and required the production of leak detection records and a limited release investigation.[2] The second appeal, filed on October 16, 2000, objects to an order which revokes operating permits for underground storage tanks and assesses a civil penalty for the location known as the Market Street Facility for violations of the Storage Tank Act.[3,4] Finally, in an appeal docketed on October 19, 2000, the Appellant appeals the assessment of a civil penalty for his failure to install Stage II vapor recovery systems at both facilities in violation of the Air Pollution Control Act.[5,6]

The Board issued two opinions relative to these appeals. In one opinion the Board granted the Department's motion for summary judgment on the question of the

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[1] The appeal of these orders by the corporate appellant, Bob North, Inc., was dismissed by the Board on October 23, 2001, for failing to secure counsel in accordance with 25 Pa. Code § 1021.22(b).

[2] EHB Docket No. 2000-189-MG.

[3] EHB Docket No. 2000-217-MG.

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

[5] EHB Docket No. 2000-219-MG.

[6] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4006.

Appellant's liability for a civil penalty for the Air Pollution Control Act violations because he admitted in his notice of appeal that he had failed to install the Stage II systems by November 15, 1993 as required by the Department's regulations. Therefore the only issue left for the hearing was the reasonableness of the amount of the civil penalty.[7]

The Board also granted partial summary judgment on the appeal of the permit revocation at the Hook Road Facility. Due to the Appellant's failure to appeal an earlier civil penalty assessment, the Board held that many of the facts underlying the current enforcement action were unassailable by the Appellant and that his liability was established. However, the question of the appropriateness of the Department's action could not be judged on the motion papers and was left open for the hearing.[8]

Accordingly, a hearing on the merits was held for four days before Administrative Law Judge George J. Miller on November 28-30, 2001 and December 10, 2001. Although he initially acted *pro se*, the Appellant was represented by counsel for the latter part of the hearing. The record consists of a transcript of 954 pages and 111 exhibits. Both the Department and the Appellant filed post-hearing briefs which included proposed findings of fact, conclusions of law and legal analysis. By letter dated April 2, 2002, the Department opted to forego the filing of a reply brief. After a full and complete review of these materials, we therefore make the following:

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[7] *Graves v. DEP*, 2001 EHB 790.
[8] *Graves v. DEP*, 2001 EHB 781.

FINDINGS OF FACT[9]

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act (Storage Tank Act),[10] the Air Pollution Control Act,[11] Section 1917-A of the Administrative Code of 1929,[12] and the rules and regulations promulgated thereunder.

2. Kim Graves (Appellant), is an individual.

Witnesses

3. Linda Wnukowski is a compliance specialist with the Department in its Southeast Regional Office. She has been employed by the Department since 1993. She served as an inspector at the Market Street Facility from 1993 to approximately 1995. (N.T. 27, 28, 45)

4. Stephan Brown is a water quality specialist with the Department in its Southeast Regional Office. He has worked for the Department for approximately 9½ years. He is also a member of the emergency response team and has special training in hazardous materials. (N.T. 120-21)

5. Myron Suchodolski is a compliance specialist with the Department in its Southeast Regional Office. Although currently with the waste management program, he was a water quality specialist in the storage tank program. Among his responsibilities

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

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

[11] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4006.

[12] Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (Administrative Code).

were the inspection of storage tanks in Delaware County, including the Market Street Facility. (N.T. 147-48)

6. Walter Payne is a hydrogeologist with the Department in its Southeast Regional Office. He has worked for the Department in various capacities since 1992. He has been involved with the Market Street Facility since 1994 by providing technical review of documentation submitted from the facility. (N.T. 176, 178, 185)

7. Kathy Nagle is a supervisor in the storage tank section at the Department. Among her responsibilities are the supervision of field staff, administrative work associated with site visits and technical support. She has been with the Department for 9½ years. She is an expert in leak detection. (N.T. 291-92; 721)

8. Steven Sinding is the Department's section chief for the storage tank program. He has held that position since 1995. He has served the Department for a little over 20 years. (N.T. 322)

9. Anne Gasior has been an air quality specialist with the Department since 1994. She has calculated approximately 100 civil penalties relative to violations involving the Stage II vapor recovery requirement. (N.T. 785-86)

The Market Street Facility

10. The Appellant, as the sole shareholder and chief executive officer of Bob North, Inc., owns a retail gas station located at 2350 Market Street, Upper Chichester Township, Delaware County, referred to as "the Market Street Facility." The Market Street Facility has one 10,000 gallon underground gasoline storage tank, two 6,000 gallon underground storage tanks together with associated product piping, pumps and dispensers. (Exs. C-2; C-9)

11. There had been gasoline contamination at the site before the Appellant became involved with it. (Payne, N.T. 181-82)

12. During her time as the inspector of the Market Street Facility, Ms. Wnukowski was involved with problems with leak detection, releases and ordered corrective action. (Wnukowski, N.T. 33-34)

13. On September 24, 1993, Ms. Wnukowski spoke with David Holland the Fire Marshal for Upper Chichester Township. The fire department had responded to a complaint on September 21 of gas fumes in the sewer system. (Wnukowski, N.T. 31-32; Ex. C-4)

14. She inspected the Market Street Facility. Her field notes stated that the facility was closed down and that there had been recent excavation in the tank field and that there was a gravel fill area at the west end. (Wnukowski, N.T. 63; Ex. C-4)

15. On September 27, 1993, the tanks at the Market Street Facility tested tight, however there was a bad diaphragm or gasket in one of the lines and product was squirting out of the threads of the gasket. (Wnukowski, N.T. 32)

16. The Department issued an order to the Appellant in September 1993 which required an interim response to the release at the Market Street Facility. (Wnukowski, N.T. 37; Ex. C-1)

17. The Department received no information from the Appellant relating to compliance with the terms of the September 1993 order. (Wnukowski, N.T. 38)

18. The Department issued a more comprehensive order requiring remedial action at the Market Street Facility in August 1994. This order, among other things, required the Appellant to cease operations at the facility until certain conditions were met, and to

submit leak detection records, a site characterization report and remedial action plan to the Department. (Wnukowski, N.T. 37-40; Ex. C-2)

19. The Appellant did not appeal either the September 1993 order or the August 1994 order.

20. The Appellant never responded to the August 1994 order, but did cease operations at the facility until December 1994. (Wnukowski, N.T. 38-39)

21. In December 1994, the Department inspected the site and found that the Appellant was operating the tanks at the Market Street Facility in violation of the Department's order. (Wnukowski, N.T. 39)

22. Although the Appellant was attempting to use inventory control as a method of leak detection, there is no record that he or his tenants performed proper leak detection for the Market Street Facility. (Wnukowski, N.T. 41-42; 66)

23. Although there was evidence of excavation work at the site from time to time, the Department never received documentation concerning who did the work. (Wnukowski, N.T. 48)

24. From August, 1994 until June, 1996, the Department received only sporadic reports from various consultants concerning remediation work performed at the site. (See Payne, N.T. 190-200; Exs. C-8; A-2; A-5)

25. During that time the Commonwealth Court issued several orders for contempt for the Appellant's failure to perform the remediation work in accordance with the deadlines of the Department's orders. (Ex. C-3)

26. In January, 1996 the Market Street premises were leased to Bill Singh as Stop 'n Go Enterprises. (Ex. A-1)

27. Powell-Harpstead, a consultant hired by the Appellant, submitted a proposal for a remedial action plan to the Department on June 5, 1996. This plan was approved by the Department on June 18, 1996. (Payne, N.T. 200-202; Ex. C-8)

28. Powell-Harpstead did some work at the site through the end of 1996 including a proposed final site characterization work plan. (Exs. C-8, A-9, A-37, A-59)

29. The reports from the site indicated that the contamination had migrated beyond the boundaries of the Market Street Facility and therefore an off-site investigation needed to be done. (Payne, N.T. 198; 219-20)

30. On September 5, 1996 the Department received a report of the presence of gasoline in the Southern Delaware County Authority Boothwyn Sewage Treatment Plant. (Wnukowski, N.T. 81)

31. The Department also received a report of gasoline vapors and seepage in the street adjacent to the Market Street Facility in May 1996. (Brown, N.T. 123-24)

32. This contamination was attributed to the Market Street Facility for several reasons:

a. A nearby Getty gasoline facility was located downhill from the contamination; gasoline does not flow uphill.

b. A nearby Exxon station was cross-gradient and gasoline will not travel laterally when it can flow downhill.

c. There was contamination previously at the Market Street Facility.

(Brown, N.T. 127; 144-45)

33. A consultant called Poulson & Associates also did remediation work at the site from sometime in 1997 until the end of 1998. (See Payne, N.T. 225-36; Ex. C-8;

Exs.A-10, A-13, A-14, A-15, A-17B, A-18, A-19, A-20, A-23, A-24, A-25, A-26, A-27, A-29, A-30, A-32, A-39, A-57, A-58)

34. A tracer test performed in May 1998 on the Market Street tanks revealed that at least two of the storage tanks were leaking product. These results were reported to the Department. (Payne, N.T. 234; Nagle, N.T. 318-19; Ex. A-16)

35. In July 1998 there was another release at the Market Street Facility. It was caused by a broken line leak detector on one of the storage tanks. As gasoline was being dispensed at the pumps gasoline was spraying into the peat gravel and infiltrating into the gravel over the tank area. (Suchodolski, N.T. 151)

36. While inspecting the observation wells at the site, the leak was discovered by Gregor Majeske, an employee of Poulson & Associates, a contractor employed by the Appellant. (Suchodolski, N.T. 153; 159-60)

37. Mr. H.S. Gill, the site manager for the facility, contacted Monarch Environmental who brought out a tanker truck to pump as much free product from the tank field as possible. Additionally the fire department used 500 gallons of water to displace vapors in the sanitary sewer. (Suchodolski, N.T. 156-57)

38. Although some off-site investigation has been done, it has not been adequate to gauge the lateral extent of the contamination plume. (Payne, N.T. 253-55; 266)

39. None of the leak detection records submitted for the Market Street Facility either from the Appellant or from the Appellant's lessees have met the technical requirements for appropriate leak detection. (Nagle, N.T. 299-301)

40. Ms. Nagle testified that both the release in 1993 and the release in 1998 would have been discovered if proper inventory control had been done. (Nagle, N.T. 303)

41. The Commonwealth Court has issued at least 14 orders requiring the Appellant to comply with the Department's regulations at the Market Street Facility. (Ex. C-3)

42. By order dated June 29, 1999, the Commonwealth Court ordered the Appellant to either enter into a lease with or sell the Market Street Facility to a financially responsible party who is capable of and committed to compliance with the applicable law or to enter into a contract with a competent environmental contractor to perform corrective action, by October 6, 1999. To date, this order has not been complied with.

43. On August 24, 2000, the Department calculated a civil penalty against the Appellant based on a failure to perform corrective action and the release of a polluting substance. (Ex. C-5)

44. The penalty assessment was an attempt by the Department to impress upon the Appellant the importance of compliance, because the Department had gone through a number of orders and a number of Commonwealth Court appearances which did not seem to impress upon him the need for compliance. (Sinding, N.T. 331-32)

45. The Department also revoked the storage tank permits for the Market Street Facility because the Appellant had not demonstrated that proper leak detection was being performed and had not completed the corrective action required by the Department's orders and regulations. (Sinding, N.T. 332-33)

46. In the Department's view, the Appellant was not demonstrating an ability to operate the facility within the confines of the regulations. (Sinding, N.T. 332-33)

47. The Department assessed a $210,000 penalty for the Appellant's failure to perform corrective action because the violation was a "high" degree of seriousness, he

failed to comply for 36 months and he was deemed by the Department to be "negligent" or "reckless." (Ex. C-5)

48. The 36 month period was calculated beginning with June 30, 1995, which is the date by which a Commonwealth Court order required the Appellant to submit a site characterization. The Department estimated that at least some work was being done between June 21, 1996 through August 24, 1998 and did not include this period in the penalty assessment. The Appellant was then in a state of non-compliance from August 24, 1998 until August 24, 2000 when the penalty was calculated. (Ex. C-5; Sinding, N.T. 371-73; 384-85)

49. On June 5, 1996, the Appellant's consultant submitted a remedial action plan to the Department which was approved on June 18, 1996. (Ex. C-8)

50. On December 31, 1998, Poulson & Associates submitted an invoice to the Appellant's lessee for work done in connection with the July 1998 release during the period of December 6 through December 31. (Ex. A-10)

51. The Department also assessed a civil penalty for the 1993 release and the 1998 release. These violations of the Storage Tank Act were considered "high" in degree of seriousness. The Department did not increase the penalty by a liability factor for the 1993 release, but assigned a "negligent/reckless" factor of two for the 1998 release because leak detection was not being performed properly in spite of the Department's efforts to educate the Appellant. (Ex. C-5; Sinding, N.T. 340-41)

52. In late 1999 the Sweet Oil Company contacted the Department for information concerning the environmental conditions at the Market Street Facility and

submitted a proposal to upgrade the tank system and remove the contaminated soil at the site. (Exs. A-43(A)-(C); Payne, N.T. 236-38; 608-09)

53. The Department met with representatives of Sweet Oil in November, 1999. (Payne, N.T. 237)

54. The remediation proposal from Sweet Oil was rejected because it did not adequately address the remediation of off-site contamination, did not propose a sufficient number of off-site wells to adequately characterize the lateral extent of the contamination plume, and did not provide for the remediation of any additional contamination that might be discovered at the site. (Payne, N.T. 245-55; 623-24)

55. The Department suggested that Sweet Oil could perform investigative work at the site without its approval. (Payne, N.T. 609-10)

The Hook Road Facility

56. In addition to the Market Street Facility, the Appellant also owns another retail gasoline station located at the corner of Hook and Calcun Hook Roads in Sharon Hill, Delaware County. This facility is referred to as the "Hook Road Facility." (Ex. C-25)

57. There are four 10,000 gallon underground storage tanks at the Hook Road Facility. (Ex. C-25)

58. Many of the facts which established the Appellant's liability for enforcement action by the Department have been established by his failure to appeal an October 1999 civil penalty assessment issued by the Department. (Ex. C-25; *Graves v. DEP,* 2001 EHB 781)

59. Inspections by the Department revealed that leak detection was not being properly performed at the Hook Road Facility. (Sinding, N.T. 659-60)

60. Accordingly, the Department and the Appellant entered into a Commonwealth Court Consent Order in May 1995 which required the Appellant to submit leak detection records to the Department for a period of six months and to perform leak detection in accordance with the Department's regulations thereafter. (Sinding, N.T. 657-59; Ex. C-21)

61. The Department did receive leak detection records for the six-month period required by the Court's Order. (Nagle, N.T. 725-26)

62. However, the records did not demonstrate that the inventory control method of leak detection was being performed properly. Specifically:

a. Tightness testing was applied only to the tanks and not to the piping;

b. There were arithmetical errors;

c. Stick readings were not properly performed;

d. On several occasions the daily "over and short" was outside of the leak detection allowance that the reconciliation required.

(Nagle, N.T. 725-26)

63. If the arithmetical errors in the records were accepted by the Department, the leak detection records would indicate that there are suspected releases. (Nagle, N.T. 740-44)

64. Although some tightness testing has been performed at the Hook Road Facility, no suspected release investigation has been performed by the Appellant and reported to the Department. (Nagle, N.T. 746)

65. Additionally, during an inspection in January 1997, the Department found that the lines and leak detectors at the facility did not comply with the regulatory performance standards. (Sinding, N.T. 663-65; Ex. C-22)

66. In June 1997 and in March and September 1998, the Department sent letters to all underground storage tank owners reminding them of the upcoming December 22, 1998 deadline for upgrading storage tank systems. (Ex. C-25)

67. These upgrades were not completed by the Appellant until April 13, 1999. Their failure to meet the December 1998 upgrade deadline formed the basis for some of the civil penalties assessed in October 1999. (Ex. C-25)

68. The Department also inspected the Hook Road Facility twice in February 1999. The first inspection revealed that while some aspects of the tank system were in compliance, other aspects were not including some of the piping and spill-over protection. (Sinding, N.T. 663-65; Exs. C-23; C-24)

69. The attendant on duty at the time these inspections were performed was unable to produce leak detection records. (Sinding, N.T. 674)

70. The Department ordered that the facility be temporarily closed until it was brought into compliance with the regulations. (Ex. C-21)

71. A few days later the Department performed a follow-up inspection which revealed that the facility was not temporarily closed as required, and leak detection records could not be produced by the attendant. (Ex. C-21; Sinding, N.T. 678)

72. In March 1999 a consultant hired by the Appellant informed him that leak detectors at the facility had been removed for some period of time and recommended that certain testing be performed. (Nagle, N.T. 749-50; Ex. C-32)

73. The Department issued a civil penalty assessment on October 29, 1999. The penalty was based on the non-compliance of the tank system with upgrade requirements and the failure to produce leak detection records. (Sinding, N.T. 678-79; Ex. C-25)

74. This assessment was never appealed. (Sinding, N.T. 683-84; *Graves v. DEP*, 2000 EHB 781).

75. The facility was again inspected by the Department on March 28, 2000. The attendant was still unable to produce leak detection records. (Sinding, N.T. 690-92; Ex. C-28)

76. To date, the Department has not received proper leak detection records from the Appellant. The records that have been produced do not comply with the Department's regulations, and there is evidence that some of the stick readings are not the result of actual stick testing of the tank, but were instead back-calculated. (Nagle, N.T. 938-47)

77. The leak detection records produced from the automatic tank gauge system are also non-compliant because they relate only to a gross pass test instead of a .2 gallon per hour test as required by the regulations. (Nagle, N.T. 767-72)

78. The Department has repeatedly informed the Appellant how to perform proper leak detection. (E.g., Nagle, N.T. 817-19)

79. The Appellant during the time that he has owned and operated the facility has demonstrated an inability to comply with the applicable storage tank regulations, particularly with respect to leak detection and corrective action. (Nagle, N.T. 299-210; 314-20; Sinding, N.T. 331-32; 346)

80. In July 2000 the Department issued an order to the Appellant requiring the Hook Road Facility to be permanently closed. This order was issued based upon the

Department's conclusion that the Appellant was unable or unwilling to properly operate underground storage tanks at the Hook Road Facility. The order was also based upon the Department's considerable efforts to force the Appellant to bring the Market Street Facility into compliance. (Sinding, N.T. 862-63)

81. On November 13, 2000, the Commonwealth Court ordered the Appellant to cease tank operations at the facility, submit complete and proper leak detection records and to submit a work plan for a limited release investigation at the facility. (Ex. C-30)

82. No work plan for a limited release investigation has been received by the Department. (Nagle, N.T. 779)

Civil Penalty for Failure to Timely Install Stage II Vapor Recovery Systems

83. The Appellant admitted that the Stage II vapor recovery systems were not installed at the Hook Road or Market Street Facilities by November 15, 1993 as established by the regulations. (Notice of Appeal; *Graves v. DEP*, 2000 EHB 790; *see also* 25 Pa. Code § 129.82)

84. The civil penalty was calculated based on the number of gallons of gasoline that the Appellant dispensed through pumps without the required Stage II controls and a factor or economic benefit derived from non-compliance in accordance with the guidance from the U.S. Environmental Protection Agency. (Gasior, N.T. 794, 797, 804-05; Ex. C-67)

85. The number of gallons pumped was based on information provided by the Appellant to the Department, based on average monthly sales. (Gasior, N.T. 793-94; 799-800)

86. Specifically, the Department multiplied one cent per gallon for every gallon pumped without Stage II controls from November 15, 1993 until March 31, 1994, and three cents per gallon pumped without Stage II controls from April 1, 1994 until compliance was achieved. (Gasior, N.T. 793)

87. Stage II controls were installed by October 26, 1994 at the Market Street Facility, and by December 15, 1994 at the Hook Road Facility. (Notice of Appeal)

88. The average monthly gallons pumped at the Market Street Facility was 125,000 gallons. At Hook Road the average was 150,000. However, the Department revised its calculation of the gasoline throughput at the Hook Road Facility to 125,000. (Gasior, N.T. 793-94; 799-800; Ex. C-69)

89. The adjustment of the Hook Road throughput lowered the penalty at that facility from $42,544 to $35,016. (Gasior, N.T. 799-800)

90. Using the EPA computer model, the Department also calculated an economic benefit of noncompliance of $4,304 at the Hook Road Facility, and of $5,048 at the Market Street Facility, for a total of $9,352. (Gasior, N.T. 797-98)

91. The total penalty the Department is seeking is no longer $86,927 as provided in the September 2000 civil penalty assessment, but is now $78,927 on account of the adjustment in the monthly average at the Hook Road Facility. (Gasior, N.T. 800)

DISCUSSION

Burden of Proof

These orders of the Department revoke the underground storage tank permits for two facilities operated by the Appellant and assess civil penalties for his failures to comply with the Storage Tank Act, the Air Pollution Control Act and the accompanying

regulations. Accordingly, it is the Department which bears the burden of proving that the permit revocations and civil penalty assessments were appropriate.[13] In the case of the civil penalty assessments, unless otherwise established,[14] the Department must prove by a preponderance of the evidence that the Appellant (1) violated the applicable statute or regulation, and (2) the amount of the civil penalty assessed for the violation reflects an appropriate exercise of discretion.[15] In the event that the Board finds that the Department's assessment is not appropriate, we may substitute our discretion for that of the Department and modify a civil penalty assessment.[16]

The Department's burden for the permit revocations is to demonstrate that its action was an appropriate use of its enforcement authority. That is, it must prove that (1) it had legal authority for its action, and (2) the factual circumstances justified the revocation of the permits as being necessary to aid in the enforcement of the Storage Tank Act or its regulations.[17]

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[13] 25 Pa. Code § 1021.101(b).

[14] Many of the facts supporting the liability of the Appellant for enforcement action by the Department have either been admitted by the Appellant or are established by his failure to appeal earlier orders and civil penalty assessments by the Department. *See Graves v. DEP,* 2000 EHB 790, and *Graves v. DEP*, 2000 EHB 781.

[15] *202 Island Car Wash v. DEP*, 2000 EHB 679, 690; *see also Leeward Construction v. DEP*, 2001 EHB 870; *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796.

[16] *Pickelner Fuel Oil, Inc. v. DEP*, 1996 EHB 602.

[17] *Wagner v. DEP,* 2000 EHB 1032, *affirmed,* 2187 C.D. 2000 (Pa. Cmwlth. filed April 3, 2001). The Department contends that it need not prove that its order was necessary if it shows that the operator was incompetent within the meaning of Section 1302(2) of the Storage Tank Act, 35 P.S. § 6020.1302(2). We explore this contention below at pp. 28-29.

Market Street

Permit Revocation

The Department clearly has the authority under the Storage Tank Act to revoke an operator's permit.[18] The Department argues that the circumstances at the Market Street Facility fully justify its enforcement action. We wholeheartedly agree.

First, there have been at least two releases at the site, while it has been under the Appellant's ownership. Although the Appellant characterizes these spills as "minor," he also acknowledges that there is not much evidence concerning the scope of the contamination. Clearly the reason that there is not a lot of evidence concerning the scope of contamination is because the Appellant has yet to submit a complete site characterization report as required by orders of the Department and the Commonwealth Court. The fact that the site was contaminated when the Appellant purchased it is of no moment. It is his responsibility as the owner of the property to remediate the contamination, regardless of whether or not he caused it or whether it was caused by a previous owner.[19] Similarly, the fact that the facility was leased to another is not important for the purpose of examining the necessity of the permit revocation. Under the provisions of the Storage Tank Act, as the owner of the site, it is his responsibility to

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[18] E.g., 35 P.S. §§ 6020.1301, 6020.1309. *See also Wagner v. DEP,* 2000 EHB 1032, *affirmed,* 2187 C.D. 2000 (Pa. Cmwlth. filed April 3, 2001).

[19] 35 P.S. § 6021.1311; *Defense Logistics Agency v. DEP*, 2001 EHB 1215 (the appellant is responsible for remediating a contamination plume even though the source of the plume was undetermined because it is located on its property or within 2500 feet of its property).

perform the remediation regardless of any fault on his part in causing the releases and resulting contamination.[20]

The Appellant suggests that this contamination was caused by other sources but offers no evidence which supports that claim.[21] In fact, Stephan Brown testified at length that the contamination he investigated in May 1996 emanated from the Market Street Facility and not another source.[22] A tracer test performed in May 1998 indicated that at least two of the storage tanks were leaking product.[23] Therefore there is significant evidence in the record which indicates that the contamination in the area is coming from the Market Street property.

Furthermore, the Department has had to go to great lenghts in order to squeeze compliance with remedial action regulations from the Appellant. In the last seven years, the Commonwealth Court has issued at least 14 orders requiring the Appellant to comply with the Department's regulations at the Market Street Facility. Evidently that tribunal was also at its wits end in securing the Appellant's compliance. By order dated June 29, 1999, the Commonwealth Court ordered the Appellant to either enter into a lease with or sell the Market Street Facility to a financially responsible party who is capable of and committed to compliance with the applicable law or enter into a contract with a competent environmental contractor to perform corrective action, by October 6, 1999. To date, this order has not been complied with.

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[20] 35 P.S. § 1302(a).

[21] Under the Storage Tank Act, there is a rebuttable presumption that contamination within 2500 feet of the perimeter of the site is the responsibility of the landowner. 35 P.S. § 6021.1311. Therefore it is the Appellant's burden here to prove that the contamination at Market Street has other sources.

[22] Brown, N.T. 127; 144-45.

[23] Payne, N.T. 234; Nagle, N.T. 318-19; Ex. A-16.

Although the Appellant did make some efforts to comply with Department orders and did finance some of the site characterization and remediation work, his efforts have fallen short of demonstrating that he capable of operating the Market Street Facility within the confines of the law. The Department has expended considerable time and effort to secure his compliance to no avail.

The Appellant argues that the Department has sabotaged his efforts to find a responsible party to clean up the site by failing to support his efforts to lease the Market Street Facility to a company known as Sweet Oil. We find that there is no evidence that the Department acted unreasonably.

In late 1999 Sweet Oil contacted the Department for information concerning the environmental conditions at the Market Street Facility and submitted a proposal to upgrade the tank system and remove the contaminated soil at the site.[24] The Department met with representatives of Sweet Oil in November, 1999,[25] but ultimately rejected their proposal as an adequate site characterization and remedial action plan. Walter Payne testified that the proposal was rejected because it did not adequately address the remediation of off-site contamination, did not propose a sufficient number of off-site wells to properly characterize the lateral extent of the contamination plume, and did not provide for the remediation of any additional contamination that might be discovered at the site.[26] However, the Department suggested that Sweet Oil could perform investigative work at the site without its approval.[27]

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[24] Exs. A-43(A)-(C); Payne, N.T. 236-38; 608-09.
[25] Payne, N.T. 237.
[26] Payne, N.T. 245-55; 623-24.
[27] Payne, N.T. 609-10.

There is no evidence that the Department was unreasonable in its evaluation of the Sweet Oil proposal. Its position throughout this period was that further off-site investigation and remediation was necessary in order to adequately clean up the contamination caused by the Market Street Facility. This position remained unchanged when Walter Payne reviewed the sparse documentation submitted by Sweet Oil. Further, there is no evidence that the Department's position placed any impediment to further negotiation between Sweet Oil and the Appellant. Nor did the Department prevent Sweet Oil from further investigating conditions at the site in order to revise their proposal. In short, there was nothing improper or unreasonable in the Department's consideration of the plan from Sweet Oil.

Finally, in upholding the Department's permit revocation we are guided by our observation in *Wagner v. DEP*:

> [A]llowing the Appellant to continue to operate even though his lack of attention to detail and unwillingness to respond quickly and take control of the situation, would inhibit the Department's ability to enforce the Act against other similarly irresponsible operators.[28]

Therefore we held that the Department appropriately suspended Mr. Wagner's storage tank permits. We believe that the Appellant's operation of the Market Street Facility justifies a similar result.

Civil Penalty Assessment for Storage Tank Act Violations

The Storage Tank Act authorizes the Department to assess a civil penalty for a violation of the act or its regulations in an amount up to $10,000 per day of violation.[29] There are several factors that the Department must consider in calculating the amount of

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[28] 2000 EHB 1032, 1057.
[29] 35 P.S. § 6021.1307(a).

a penalty including the willfulness of the violation; damage to air, water, land or other natural resources; cost of restoration and abatement; savings to the violator in consequence of the violation; deterrence; and any other factors the Department may deem relevant.[30] In reviewing the Department's penalty assessment, it is not the Board's role to determine what amount we would assess, but rather to determine whether the penalty is reasonable for each violation.[31]

The Department assessed two civil penalties in connection with the Appellant's operation of the Market Street Facility. One penalty for the failure to perform corrective action as required by several provisions of the Department's regulations,[32] two orders of the Department, and numerous orders of the Commonwealth Court. This penalty was in the amount of $210,000. The second penalty was for two releases which occurred at the site, one in 1993 and the other in 1998, in the amount of $15,000. While we believe that most of the civil penalty amount is appropriate, we must nevertheless reduce the penalty as we explain below.

In determining the amount of civil penalty for the Appellant's failure to perform corrective action, the Department determined that the violation was a "high" level of seriousness, was 36 months in duration, and found the Appellant to be negligent or reckless.[33] The 36 month period was calculated beginning with June 30, 1995, which is the date by which a Commonwealth Court order required the Appellant to submit a site

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[30] *Id.*

[31] *202 Island Car Wash v. DEP*, 2000 EHB 679.

[32] 25 Pa. Code §§ 245.309-245.312.

[33] The Department multiplied $3,000 (high seriousness) x 36 months x 2 (negligent/reckless). Although this calculation comes to $216,000, the compliance specialist evidently made a math error and only charged the Appellant $210,000. (Ex. C-5)

characterization. The Department estimated that at least some work was being done between June 21, 1996 through August 24, 1998 and did not include this period in the penalty assessment. The Appellant was then in a state of non-compliance from August 24, 1998 until August 24, 2000 when the penalty was calculated.[34]

Reviewing the evidence from the hearing, it is evident that the Appellant did perform some remedial activity in addition to that for which he was given credit. There is no evidence in the record which explains why the Appellant only received "credit" for work done at the site from June 21, 1996 through August 24, 1998. If these dates coincide with a particular event, it was not explained.[35] On June 5, 1996 the Appellant's consultant, Powell-Harpstead, submitted a proposed interim remedial action plan to the Department.[36] This plan was approved by the Department on June 18, 1996.[37] Thereafter, invoices addressed either to the Appellant or to his lessee indicate that activity was performed by various consultants through the end of 1998.[38] Similarly, the Appellant solicited information in connection with the site characterization from another consultant during the end of May through the middle of June, 1999. He testified that at least the lab work in the proposal was performed by the consultant.[39] Giving credit for the periods when at least some work was done, the evidence supports a penalty calculation of 31 months in duration, rather than 36 months.

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[34] Ex. C-5; Sinding, N.T. 371-73; 384-85.

[35] The compliance specialist who calculated the penalty was not available for the hearing because she was in England.

[36] Ex. C-8.

[37] Ex. C-8.

[38] Ex. A-10.

[39] Exs. A-40; A-42; Graves N.T. 541-47; 551-52.

However, the record does support a finding that the Appellant was negligent in his failure to complete the site characterization work. We have defined the various levels of culpability in the context of civil penalty assessments:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.[40]

It is very clear that the Appellant was quite aware of what was required and had the ability to find consultants to complete the work. He received numerous orders telling him what reports had to be filed to avoid violating the Storage Tank regulations.

The Appellant spends a great deal of time in his brief detailing the number of consultants and the amount of money he spent on those consultants. In fact, he has been given credit for the time those consultants spent working on the project even though the Appellant admits that he did not have the funds to allow them to complete the work.[41] Nevertheless, his financial status is irrelevant to his obligation to clean up the contamination at the site and irrelevant to the fact that he failed to do so.

In sum, a civil penalty in the amount of $186,000 is reasonable for the Appellant's failure to perform corrective action. This penalty is a reduction of the Department's original calculation thereby giving credit for the periods when at least some work was done at the site.

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[40] *202 Island Car Wash v. DEP*, 2000 EHB 679, 694 (*quoting Phillips v. DER*, 1994 EHB 1266, *aff'd,* 2651 C.D. 1994) (Pa. Cmwlth. filed June 16, 1995).

[41] See Appellant's Post-Hearing Brief, Proposed Findings of Fact Nos. 43, 67, 68.

The Department also assessed a $15,000 penalty for two releases at the Market Street Facility on September 24, 1993 and October 19, 1998. The penalty for the first release was $5,000 based on a high degree of seriousness. The Department included no multiplier for the Appellant's state of mind. For the second release the Department also rated the seriousness as high and charged $5,000, but included a multiplier of two because it found the Appellant to be negligent or reckless. The Department used the multiplier for the second release because of the considerable effort it made to educate the Appellant concerning proper leak detection.[42]

We agree with the Department that the releases of gasoline at the Market Street Facility were serious matters. Indeed, Kathy Nagle testified that it was her belief that if leak detection had been performed properly, the releases would not have occurred.[43] At the time of the 1998 release the gas station was leased to Stop 'n Go Enterprises and was not operated directly by the Appellant. However, that does not relieve the Appellant of the responsibility for ensuring that leak detection was being performed properly.[44] Therefore, $15,000 is an appropriate penalty for the releases at the Market Street Facility.

In conclusion, while it is clear that a significant civil penalty is more than justified by the Appellant's conduct (or lack of conduct) at the Market Street Facility, we will reduce the Department's $225,000 assessment to $201,000.

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[42] Ex. C-5; Sinding, N.T. 340-41.

[43] Nagle. N.T. 303.

[44] The Appellant argued that he had an agreement with the lessee which relieved him of responsibility for leak detection under the Department's regulations. However, such an agreement only excuses a tank owner from financial responsibility. It *explicitly* does not relieve the owner of responsibility for corrective action or operational requirements such as leak detection. 25 Pa. Code § 245.703.

Hook Road

In addition to the action taken at the Appellant's Market Street Facility, the Department also revoked the storage tank permits for the Appellant's Hook Road Facility and ordered the station to be permanently closed. This action was taken based on the Department's conclusion that the Appellant was essentially unfit to operate his storage tanks in accordance with the law. It reached this conclusion because of its numerous attempts to obtain proper leak detection records from the Appellant,[45] the Appellant's failure to comply with orders of the Commonwealth Court,[46] an unappealed and unpaid civil penalty that was assessed for the Appellant's failure to perform proper leak detection[47] and his conduct with regard to the operation of the Market Street Facility.

We held in our summary judgment opinion that the facts relevant to the Appellant's liability for enforcement action by the Department was largely established by his failure to appeal an October 1999 civil penalty assessment.[48] Certainly the evidence adduced at the hearing supports the conclusion that the Appellant was in violation of the Department's regulations and that the Department had been no more successful in securing his compliance at Hook Road than it had been at Market Street. The Appellant's conduct is perhaps even more disturbing because he himself was the operator of the Hook Road Facility and had no lessees or tenants at that site.

The Department argues that in view of the Appellant's conduct it had the authority to revoke the storage tank permits and order the station closed pursuant to

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[45] *E.g.*, Nagle, N.T. 938-47.
[46] Sinding, N.T. 657-59; Ex. C-21.
[47] Ex. C-25.
[48] *Graves v. DEP*, 2001 EHB 781.

Section 1301 of the Storage Tank Act. The Department further contends that our reliance in our summary judgment opinion on Section 1309, requiring that orders of the Department be "necessary to aid in the enforcement of the act" was misplaced. While we agree that the Department has authority to revoke storage tank permits pursuant to Section 1301, it must still meet the "necessity" threshold of Section 1309.

Section 1309 of the Storage Tank Act provides the Department with authority to "issue such orders as are necessary to aid in the enforcement of the provisions of this act."[49] Such orders may include, among other things, orders suspending or revoking permits, and orders to "cease operation of an establishment which, in the course of its operation, is in violation of any provision of this act, rule or regulation promulgated hereunder . . . ."[50] This general language does not conflict with the specific authority found in Section 1301 which provides that the Department "may revoke any permit previously issued under this act, if it finds . . . that . . . the [permittee] has shown a lack of ability or intention to comply with any law, rule, regulation, permit or order of the department issued pursuant to this act as indicated by past or continuing violations."[51] It is a basic rule of statutory construction that two sections of a statute should be read to give effect to both.[52] That Section 1301 makes no specific reference to necessity or Section 1309 is not important.[53] And in fact, the order itself invokes the authority of both

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[49] 35 P.S. § 6021.1309.

[50] *Id.*

[51] 35 P.S. § 6021.1301(2).

[52] 1 Pa. C.S. § 1921; *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 590 A.2d 384 (Pa. Cmwlth. 1991)(the rules of statutory construction require that every statute be construed to give effect to all of its provisions).

[53] *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Beer & Pop Warehouse, Inc.*, 603 A.2d 284 (Pa. Cmwlth. 1992)(Sections of statute must be

of these sections of the Storage Tank Act.[54] Therefore, we will review the Department's order revoking the Appellant's permits because of his demonstrated lack of ability or intention to comply with the Storage Tank Act and determine whether it was necessary to aid in the enforcement of the Act.[55]

Clearly, the Department's order is necessary to aid in the enforcement of the provisions of the Storage Tank Act. The Appellant by his repeated failure to submit proper leak detection records and failure to perform a limited release investigation left the Department with no other avenue to ensure the safety of the environment. Leak detection is essential to the early detection of a release.[56] Obviously if the Appellant had produced *proper*[57] records it would be beyond dispute that his tank systems are tight and a limited release investigation would be unnecessary. Further, if the Appellant is unable to complete the remediation work at his Market Street Facility he is certainly in no position to take on additional remediation responsibilities in the event of a release at the Hook Road Facility. The Department has provided the Appellant with many opportunities to demonstrate his willingness and ability to operate his gasoline stations within the requirements of the law. We do not believe that the Department needs to wait for clear evidence of a significant release to occur at the Hook Road Facility before it may revoke the storage tank permits of a proven incapable operator.

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construed with reference to the entire statute, even if the particular statute or section makes no specific reference to another.)

[54] Ex. C-29 at 4.

[55] *See Wagner v. DEP*, 2000 EHB 1032, *affirmed,* 2187 C.D. 2000 (Pa. Cmwlth. filed April 3, 2001).

[56] *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679.

[57] Kathy Nagle testified at length that it was her belief that many of the records had been back-calculated and were not illustrative of actual stick readings. (N.T. 938-47)

Air Pollution Civil Penalty

The Appellant also appeals the assessment of a $78,927 civil penalty for his failure to timely install Stage II vapor recovery systems at both Market Street and Hook Road.[58] Since the Appellant admitted in his notice of appeal that he failed to install the systems by the deadline provided in the Air Pollution Control Act and the Department's regulations, the only issue for our review is the amount of the civil penalty.[59]

The Department utilized a civil penalty formula which it has used for virtually all of its civil penalties assessed for violation of the Stage II installation deadline. The penalty is based on the number of gallons pumped without the required vapor recovery equipment, taking into account the economic benefit a tank owner derives from not spending money to install the system. We have reviewed other cases in the past where this formula was used and found no error in its use.[60] In this case the Appellant offers no defense and no argument of significance which convinces us that the Department's penalty assessment in his case is unreasonable.

At the hearing the Appellant did testify that he had some difficulty in securing parts for the Stage II system. However, this falls short of any impossibility defense which would require a reduction of the civil penalty. We have rejected this excuse in the past

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[58] For a thorough discussion of the Stage II vapor control requirement see *American Auto Wash v. DEP*, 1997 EHB 1029, *affirmed*, 729 A.2d 175 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 743 A. 2d 923 (Pa. 1999).

[59] *Graves v. DEP,* 2001 EHB 790.

[60] *American Auto Wash v. DEP*, 1997 EHB 1029, *affirmed*, 729 A.2d 175 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 743 A. 2d 923 (Pa. 1999).

and see no reason to refrain from doing so now.[61] Accordingly we affirm the Department's civil penalty assessment of $78,927.

The Appellant offers a global defense to all the penalties that were assessed by contending that the penalties assessed by the Department are unconstitutionally excessive. This contention lacks merit. First, the Storage Tank Act authorizes civil penalties in the amount of $10,000 per day for each violation of the act or its regulations.[62] The penalties assessed against the Appellant are far less than that amount. Second, as we explained in great detail above, there is clearly a reasonable fit between the penalties as we have adjusted them and the violations of the Storage Tank Act and Air Pollution Control Act. We do not believe either the U.S. Constitution or the Pennsylvania Constitution require more. The U.S. Supreme Court case cited by the Appellant merely stands for the proposition that a forfeiture of property under particular provisions of federal law have the element of punishment as a criminal penalty; therefore the limitations of the Excessive Fines Clause of the Eighth Amendment, requiring the forfeiture to be "reasonable" would apply.[63] Similarly, the Pennsylvania Supreme Court has held that similar forfeiture provisions under Pennsylvania law may require an analysis of whether the forfeiture is excessive under the Pennsylvania constitution.[64] The court noted that whether a civil forfeiture is an excessive fine does not depend on the value of the thing forfeited, but rather on the relationship of the offense charged to the

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[61] *American Auto Wash v. DEP*, 1997 EHB 1029, *affirmed*, 729 A.2d 175 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 743 A. 2d 923 (Pa. 1999).

[62] 35 P.S. § 6021.1307(a).

[63] *Austin v. U.S.*, 509 U.S. 602 (1993).

[64] *Commonwealth v. Wingait Farms,* 690 A.2d 222 (Pa. 1997).

property which is forfeit.[65] Our analysis of the civil penalty assessment is based on the same principle: whether the penalty charged is a "reasonable fit" to the offenses committed.[66]

We make the following:

CONCLUSIONS OF LAW

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

2. The Department has the burden of proof in this appeal. 25 Pa. Code § 1021.101.

3. To sustain the burden of proof in the assessment of civil penalties, the Department must prove by a preponderance of the evidence that the Appellant (1) violated the applicable statute or regulation, and (2) the amount of the civil penalty assessed for the violation reflects an appropriate exercise of discretion. *202 Island Car Wash v. DEP*, 2000 EHB 679, 690; *see also Leeward Construction v. DEP*, 2001 EHB 870; *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796.

4. The Department's burden for the permit revocations is to demonstrate that its action was an appropriate use of its enforcement authority: it must prove that (1) it had legal authority for its action, and (2) the factual circumstances justified the revocation of the permits as being necessary to aid in the enforcement of the Storage Tank Act or its

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[65] *Id.*

[66] Obviously the permit revocation is not a forfeiture of "property" since, as we have held many times, permits such as those at issue here are not property and may be revoked as provided by law. *See Tri-State Transfer v. Department of Environmental Protection*, 722 A.2d 1129, 1132 n. 3. (Pa.Cmwlth. 1999).

regulations. *Wagner v. DEP,* 2000 EHB 1032, *affirmed,* 2187 C.D. 2000 (Pa. Cmwlth. filed April 3, 2001).

5. The Department sustained its burden of proving that the Appellant failed to perform corrective action required by the regulations by conducting a site characterization, preparing a site characterization report, preparing a remedial action plan, and implementing a remedial action plan. 25 Pa. Code §§ 245.309-245.312.

6. The Department sustained its burden of proving that two releases occurred at the Market Street Facility which constitutes a violation of Section 1310 of the Storage Tank Act. 35 P.S. § 6020.1310.

7. The Department was authorized to assess civil penalties for failing to perform corrective action and for the release of a polluting substance. 35 P.S. § 6020.1307.

8. A civil penalty of $186,000 is reasonable for the failure to perform corrective action at the Market Street Facility.

9. A civil penalty of $15,000 is reasonable for two releases at the Market Street Facility.

10. The Department is authorized to revoke storage tank permits when to do so is necessary for the enforcement of the Storage Tank Act. 35 P.S. § 6020.1309.

11. The Department is authorized to revoke storage tank permits where the tank owner or operator has demonstrated that he is unwilling or unable to comply with the provisions of the Storage Tank Act. 35 P.S. § 6020.1301(2).

12. The Appellant has demonstrated that he is unwilling or unable to comply with the provisions of the Storage Tank Act.

13. The Department sustained its burden of proving that the revocation of the Appellant's permits at the Market Street and Hook Road Facilities was necessary to aid in the enforcement of the Storage Tank Act. 35 P.S. § 6020.1309.

14. The Appellant admitted that he failed to install Stage II vapor recovery systems at the Market Street and Hook Road Facilities by November 15, 1993 as required by law. 25 Pa. Code § 129.82.

15. The Department is authorized to assess a civil penalty under the Air Pollution Control Act for the failure to install Stage II vapor recovery systems.

16. A civil penalty of $78,927 is reasonable for the Appellant's failure to timely install the Stage II vapor recovery systems by the deadline established by law.

We therefore enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KIM GRAVES	**: EHB Docket No. 2000-189-MG**
	: (consolidated with EHB Docket
v.	**: Nos. 2000-217-MG and**
	: 2000-219-MG)
COMMONWEALTH OF PENNSYLVANIA,	**:**
DEPARTMENT OF ENVIRONMENTAL	**:**
PROTECTION	**:**

ORDER

AND NOW, this 12th day of June, 2002, IT IS HEREBY ORDERED that:

1. The appeal of the Department of Environmental Protection's $225,000 civil penalty and permit revocation by Kim Graves relative to the Market Street Facility at EHB Docket No. 2000-217-MG is sustained in part with respect to the amount of the civil penalties assessed, consistent with the foregoing opinion. Kim Graves' appeal of the civil penalty assessment and permit revocation is **DISMISSED** in all other respects.

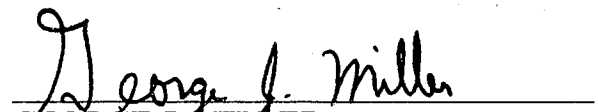
2. Kim Graves shall pay civil penalties in the amount of **$201,000** for violations at the Market Street Facility. The amount is due and payable immediately to the Storage Tank Fund.

3. The appeal of Kim Graves at EHB Docket No. 2000-189-MG which relates to the revocation of the tank permits and order for a release investigation at the Hook Road Facility is hereby **DISMISSED.**

4. The appeal of Kim Graves at EHB Docket No. 2000-219-MG relating to the failure of the requirement to install Stage II controls at both facilities is hereby **DISMISSED.**

5. Kim Graves shall pay civil penalties in the amount of **$78,927** for violations relating to the installation of Stage II controls.

ENVIRONMENTAL HEARING BOARD



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Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: June 12, 2002

EHB Docket No. 2000-189-MG
(consolidated with EHB Docket
Nos. 2000-217-MG and
2000-219-MG)

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

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SECRETARY TO THE BOAR

DONNY BEAVER and HIDDEN HOLLOW ENTERPRISES, INC., t/d/b/a, PARADISE OUTFITTERS	:	
v.	:	**EHB Docket No. 2002-096-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 13, 2002**

OPINION AND ORDER ON APPLICATION FOR TEMPORARY SUPERSEDEAS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants an application for temporary supersedeas from the Department's declaration and decree that the Little Juniata River is navigable pending the hearing on the Petition For Supersedeas inasmuch as the owner of a fly fishing business along a part of the River has sufficiently alleged that the action is causing irreparable harm, there is no danger of environmental harm from issuance of the temporary supersedeas, the public will not be injured by its granting, and the duration of the temporary supersedeas is brief.

Introduction

The ultimate issue between the Appellants, the Department, and others who are not even party to this case, is whether the Little Juniata River (River or Little Juniata River) is "navigable" or not. If it is, then the Commonwealth owns the riverbed, including those portions that lie within Appellants' private fly fishing facilities. If it is not navigable, then the Appellants own the riverbed at the sites they occupy and they can

exclude the general public from recreational use of those stretches of the River. [1] This particular case, however, presents an issue one or two steps before the ultimate issue. The issue presented on this appeal is whether the Department has the power to unilaterally declare or decree the Little Juniata River to be navigable and that the public has a right to fish in the portion of the river located within the boundaries of Appellants' facilities.

Factual and Procedural Background

Before us now is Appellants'/Petitioners' Application For Temporary Supersedeas which was filed on Friday, June 10, 2002. A telephone conference call was held among the Board and counsel for Petitioners and the Department on Tuesday, June

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[1] The basic law of Pennsylvania on this subject was summarized by Judge, now Justice, Eakin in *Pennsylvania Power & Light Company v. Maritime Management, Inc.*, 693 A.2d 592, 594 (Pa. Super. 1997) as follows,

> If a body of water is navigable, it is publicly owned and may only be regulated by the Commonwealth; ownership of the land beneath would not afford any right superior to that of the public to use the waterway. Conversely, if it is non-navigable, it is privately owned by those who own the lands beneath the water's surface and the lands abutting it, and may be regulated by them.

Id. at 593 (citing *Lakeside Park Co. v. Forsmark*, 396 Pa. 389, 153 A.2d 486 (1959); *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 A. 648 (1909)). This general issue, as it involves recreational fishing rights, has been somewhat prominent in the Commonwealth's Courts. The latest case of which we are aware is *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718 (Pa. Super. 1999). In that case the Fishing Club operated from leased land along the Lehigh River and it wanted to exclude Mr. Andrejewski from fishing on the portion of the River that ran through the leased property. The Fishing Club sought a declaration of the Lehigh County Common Pleas Court that the River was not navigable and that, therefore, Andrejewski could be excluded. The Common Pleas Court heard the evidence and held that the River was navigable and the Superior Court affirmed. *Lehigh Falls Fishing Club*, 735 A.2d at 722.

11, 2002 to discuss the Petitioners' Application For Temporary Supersedeas.[2] At that time the Board informed the parties that it would grant the Petition for Temporary Supersedeas. The reasons for our granting that Application are set forth herein.

This case arose as an appeal of a March 27, 2002 letter from Christine Martin, Deputy Secretary for Water Management to Mr. Donny Beaver, Proprietor of Paradise Outfitters which letter states as follows:

> RE: Public Ownership of the Little Juniata River and Associated Submerged Lands
> Spruce Creek Township Huntingdon County
>
> I am writing on behalf of the Commonwealth of Pennsylvania, Department of Environmental Protection (DEP) and Conservation and natural Resources (DCNR) and the Fish and Boat Commission (PFBC) to inform you that the Commonwealth owns the Little Juniata River, a navigable river of the Commonwealth and the associated submerged lands in the vicinity of the river's confluence with Spruce Creek, and holds them in trust for public use. Accordingly, the public has a right to fish and otherwise enjoy the use of the Little Juniata and associated submerged lands, so long as the public uses lawful access to the river and associated submerged lands.
>
> For some time the Commonwealth has had concerns that the public's rights were being denied. Recently, additional complaints have been brought to the Commonwealth's attention by the Citizens for Pennsylvania's Future (Penn Future) in a letter dated February 13, 2002, a copy of which is attached. Specifically, Penn Future, on behalf of several organizations and individuals, complains that your private fishing enterprise and its agents or employees are excluding or have engaged in activities with the intent of excluding the public from fishing the Little Juniata River in the vicinity of the confluence with Spruce Creek.

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[2] Also, the Petitioners filed a Petition For Supersedeas and the Department filed a Motion to Dismiss the appeal. By Order dated June 11, 2002, the Board scheduled a supersedeas trial for Monday, June 17 through Tuesday, June 18, 2002.

> As your predecessors were previously informed, ownership or other interest in lands adjacent a navigable river or stream held in trust by the Commonwealth does not vest rights in those adjacent waters. Pennsylvania Courts have confirmed that "the owners of land along the banks of navigable rivers in Pennsylvania do not have the exclusive right to fish in those rivers; that right is vested in the Commonwealth and open to the public." *Lehigh Falls Fishing Club v. Andrejewski,* 735 A.2d 718 (Pa. Super 1999).
>
> Attempts to interfere with the public's rights including efforts to exclude the public from fishing the Little Juniata River are unlawful if the public gains lawful access to the river and associated submerged lands. If attempts to interfere with public rights continue, the Commonwealth intends to initiate appreciated legal action to protect the public's rights.
>
> Should you have any questions concerning this matter, please contact Kenneth R. Reisinger, Division Chief, DEP Division of Waterways, Wetlands and Erosion Control at 717-783-8484 or Margaret O. Murphy, Assistant Counsel, DEP Bureau of Regulatory counsel at 717-787-7060.

(hereinafter referred to as the March 27, 2002 Letter or the Letter).[3]

Hidden Hollow Enterprises, Inc. (Hidden Hollow), which does business and trades under the name Paradise Outfitters, is engaged in the business of selling services

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[3] The Department's Motion to Dismiss was filed on Monday June 11, 2002 which was before the telephone conference call addressing the Application For Temporary Supersedeas. In general, the Motion argues that the March 27, 2002 Letter under appeal is not an appealable action because it merely sets forth the Commonwealth's position and is not therefore an "action" and, furthermore, that the Board has no jurisdiction in the case because the Board has no jurisdiction to finally resolve disputes over property interests or to finally determine the legal navigability of a stream. The Board read the Motion in full, all of its exhibits, and reviewed the cases upon which the Motion relies before the conference call. The Motion and the Department's arguments and contentions, as well as the relevant caselaw were discussed during the conference call. Although we, of course, are not deciding that Motion here, as it is not yet ripe for decision, we did consider the points and arguments raised therein in full as part of our deliberations regarding the Application For Temporary Supersedeas.

and opportunities for fly fishing and other outdoor recreational activities, including provision of professional fishing guides, lodging, meals and other amenities to members and individuals and companies. Mr. Beaver is the President and Chief Executive Officer and principle shareholder of Hidden Hollow. (Mr. Beaver, Hidden Hollow and Paradise Outfitters will be referred to collectively as Petitioners). The focal point of Petitioners' business is property along about a 1.3 mile stretch of the River, owned or controlled by Hidden Hollow and to which access is limited and controlled by Hidden Hollow, including private facilities and property located in Huntingdon County at the confluence of Spruce Creek and the Little Juniata River (River or Little Juniata River), which property is known or frequently referred to as the Espy Property or Camp Little J. Hidden Hollow also operates and sells memberships in fishing clubs to individuals who have continuous access to Hidden Hollow's facilities year round with the cost of such memberships ranging from $1,800 to $50,000.

Petitioners allege that the March 27, 2002 Letter has had an adverse impact on the business which amounts to irreparable harm. Mr. Beaver alleges *via* Affidavit that since the start of trout season, numerous persons have entered the Subject Property including the 1.3 mile stretch of the River without invitation and have disrupted Petitioner's operations. Beaver Affidavit, ¶ 8. Beaver alleges that since the March 27, 2002 Letter one customer has revoked a previous commitment to purchase a $50,000 membership in the Spring Ridge Club, bookings for Petitioners services and business has fallen off, customers have withheld purchases and he has experienced a "general decline in the business." Mr. Beaver states that he believes that "the decline" is directly attributable to

the Department's action. Beaver Affidavit ¶ 7.[4] Also, Mr. Beaver states that past and prospective customers have told him that they are concerned that their private use of the facilities will be either unavailable or disrupted by others who believe that the March 27, 2002 Letter constitutes an adjudication or a cease and desist order issued with full force and affect of the law. Beaver Affidavit ¶ 10. Beaver asserts that if normal operations are not resumed immediately the losses that are being experienced that he attributes to the March 27, 2002 Letter will result in the business being required to lay-off as many as 10 employees at its facilities.

Discussion

Board Rule 1021.79(e) governs the Board's issuance of a Temporary Supersedeas. It provides:

> (e) When determining whether it will grant an application for temporary supersedeas, the Board will consider:
>
> (1) The immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held.

[4] We note that Paragraph 7 of the Affidavit concludes by stating merely that Petitioner "believes" that "the decline" is directly attributable to the March 27, 2002 Letter. It is not totally clear how Mr. Beaver comes to that conclusion regarding the causal relationship nor whether his reference to "the decline" refers to everything mentioned in Paragraph 7 of the Affidavit or just the "general decline" referenced in the previous sentence or whether the reference to "general decline" is meant to encompass all the things mentioned in Paragraph 7 of the Affidavit. For example, it is not totally clear that the cancellation of the $50,000 membership is attributable to the March 27, 2002 Letter. Nor is it clear how Mr. Beaver knows that it is. Counsel for Mr. Beaver during the conference call on the Application and Motion to Dismiss stated that it was. For present purposes we will take the Affidavit to mean that it was. However, that will have to be cleared up at the hearing on the Supersedeas Petition. Also, we will have to hear evidence that the other matters testified to in Paragraph 7 of the Affidavit are detriments caused by the March 27, 2002 Letter.

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

25 Pa. Code § 1021.79(e).[5]

We are satisfied from Petitioners' Application papers that Petitioners have alleged sufficient ongoing irreparable harm in the nature of their loss of patronage, business and customers (or members) which they attribute, in their papers, to the March 27, 2002 Letter. As we mentioned, at the hearing, in order for a supersedeas to be granted, Petitioners will have to demonstrate with admissible and credible evidence that their allegations of irreparable harm are true and that the irreparable harm is attributable to or caused by the March 27, 2002 Letter.

There is no issue here, nor will there be at the supersedeas level, with respect to any supersedeas in this case potentially causing environmental harm. During the June 11, 2002 conference call the Department's counsel agreed that no supersedeas in this case would pose the specter of environmental harm and we cannot imagine any environmental harm which would result from issuing either a temporary supersedeas or a supersedeas. Likewise, we do not perceive at this stage that a temporary supersedeas would pose a threat of injury to the public. The Department contends that a temporary supersedeas

---

[5] We note that while likelihood of success on the merits is a factor in determining whether to grant a supersedeas it is not a factor in determining whether to grant a temporary supersedeas. *Compare* 25 Pa. Code § 1021.78 *with* 25 Pa. Code § 1021.79(e). Thus, we will not discuss that point here. However, the likelihood of Petitioners' prevailing on the merits of its appeal will have a role in our determining whether Petitioners' pending Petition For Supersedeas should be granted or denied.

might result in the public being excluded from fishing or otherwise entering the 1.3 miles of the Little Juniata River in dispute. However, as counsel for Petitioners pointed out during the conference call, the Commonwealth is blessed with an abundance of lakes, rivers and streams which the public may enjoy. Even the matter at issue here involves only 1.3 miles of the River and not any other portion of it. We conclude that the potential temporary exclusion of the general public from the 1.3 miles of river at issue will cause no significant injury to the public.

Finally, a supersedeas trial is scheduled to start on Monday June 17, and continue through Tuesday June 18, 2002, which is just four days from the date this opinion is issued. The temporary supersedeas, then, will be in effect for a short period of time.

Conclusion.

Based on the foregoing, we will grant the Application for Temporary Supersedeas. We will make the Temporary Supersedeas effective through the end of the hearing and we will entertain argument at the end of the hearing whether the Temporary Supersedeas should last until a decision is rendered on the Supersedeas.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONNY BEAVER and HIDDEN HOLLOW ENTERPRISES, INC., t/d/b/a, PARADISE OUTFITTERS	:	
v.	:	**EHB Docket No. 2002-096-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 13th day of June, 2002, upon consideration of the Appellant's Application For Temporary Supersedeas filed on Friday, June 7, 2002, the Department's Motion To Dismiss the appeal filed on Monday, June 10, 2002, and the conference telephone call held among the Board and counsel for both parties on Tuesday, June 11, 2002, the Application For Temporary Supersedeas from the Department's action outlined in the letter dated March 27, 2002 from Christine Martin, Deputy Secretary for Water Management to Mr. Donny Beaver, Proprietor of Paradise Outfitters, Paradise Outfitters/Fly Fish Paradise is hereby **GRANTED** and that action is **temporarily superseded**. This temporary supersedeas shall expire at 11:59 p.m. on Tuesday, June 18, 2002 but may be extended upon consideration of the testimony and argument at the hearing on the Petition For Supersedeas which is scheduled for Monday, June 17, 2002 and Tuesday, June 18, 2002.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: June 13, 2002
Service list on following page.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EDWARD P. DAVAILUS and SANDRA DAVAILUS, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE DAVAILUS and DAVAILUS ENTERPRISES, INC.	:	
v.	:	**EHB Docket No. 96-253-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIROMENTAL PROTECTION	:	**Issued: June 13, 2002**

OPINION AND ORDER ON
MOTION TO PRECLUDE ARGUMENT

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

Synopsis:

In response to a motion to preclude argument, the Board clarifies that the parties may not relitigate in this takings case the merits of a permit denial that was already the subject of a prior Board adjudication. The parties may, however, argue the legal meaning and consequences of the Board's prior findings and conclusions in this takings case.

OPINION

Edward P. Davailus and Sandra Davailus, Co-Executors of the Last Will and Testament of Pauline Davailus, and Davailus Enterprises, Inc. (the "Davailuses") are pursuing the instant takings claim against the Department of Environmental Protection (the "Department") because the Department denied the Davailuses a permit to extract peat from wetlands on their property in Covingtown Township, Lackawanna County in 1988. This Board previously addressed the merits of this permit denial in *Davailus v. DEP*, 1991 EHB 1191. (The Board affirmed the

denial.) The subject of the matter now before us in not a reexamination of whether the Department acted properly in denying the permit, but instead, whether that denial resulted in a taking of the Davailuses' property for which the Davailuses should be compensated by the Commonwealth.

The Davailuses have filed a motion, opposed by the Department, which asks the Board to preclude the Department from asserting that the Davailuses' peat operation would have constituted a nuisance. The motion is essentially a motion in limine. The motion was precipitated by the Department's prehearing memorandum, which argues that the permit denial could not have constituted a compensable taking because it would have constituted a nuisance or could have otherwise been abated or prohibited by the application of general principles of state property law.[1] The Davailuses' motion argues that the Department should not be permitted to pursue this so-called nuisance defense because the Department did not assert the defense in its pleadings, the Board prevented the Davailuses from conducting discovery on the issue, and the Davailuses were not otherwise able to prepare a response to the defense in light of the Department's actions and the Board's rulings.

The Davailuses' motion has some merit as it relates to the factual underpinnings of the Board's 1991 adjudication, and we take this opportunity to clarify the position that the Board will take at the upcoming hearing. The purpose of the immediate proceeding is not to relitigate the merits of the Department's permit denial. That issue has already been vigorously litigated, and that litigation resulted in the aforementioned Board adjudication in 1991. The legality of the proposed peat operation, whether it constituted a nuisance, and whether it could be abated or

[1] Cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the Pennsylvania Supreme Court's most recent holding in *Machipongo Land & Coal Co. v. Commonwealth*, 2002 Pa. LEXIS 1139 (May 30, 2002), state that there may be no compensable taking if the use in question would have constituted a nuisance or could have been abated or prohibited by the application of general principles of state property law.

prohibited by application of general principles of state property law were all questions that were part and parcel of the permit litigation. We will not accept new evidence on those questions here.

For example, the Board has previously concluded that the peat operation would have destroyed scarce and valuable wetland habitat. *Davailus*, 1991 EHB at 1196, 1205-1208. This conversion of wetlands would have constituted "an adverse environmental impact." *Id.* at 1208. On the other hand, the Board was not convinced that the operation would have caused water pollution beyond the destruction of the wetland habitat itself. *Id.* at 1194-1196, 1206. We view these matters as having been established and as being beyond collateral attack in this proceeding. Therefore, we will not receive evidence (e.g. expert testimony) now on whether the operation would have resulted in habitat destruction or other water pollution. We reaffirm our prior rulings in the instant matter that relitigation of such questions, and, therefore, discovery regarding such questions, is unnecessary and inappropriate.

Thus, we will not accept into evidence the Department's Record of Decision for the Permit Denial (referenced in paragraph 128 of its prehearing memorandum) to the extent that it is offered for purposes of proving the environmental impact of the proposed peat operation. Similarly, we will not accept into evidence the Davailuses' permit application or erosion and sedimentation control plan (referenced in paragraphs 57 and 58 of their prehearing memorandum) to the extent that they are offered for purposes of describing the environmental impact of the proposed operation. The environmental impact has already been decided.

That is not to say, however, that the parties are precluded from arguing the legal effect of the Board's prior findings and conclusions in this matter. To the contrary, the Board's prior findings are a given, but the legal meaning and consequences of those findings as they relate to

the takings question are wide open for debate.

The Board's prior adjudication is certainly open to interpretation. For example, although the Board found that the operation would have caused an adverse environmental impact, it did not expressly use the term "nuisance." In addition, the Board arguably suggested that the activity, although harmful, might have been permittable if the Davailuses had shown that the benefits of the project outweighed the harm. *Id.*, 1991 EHB at 1208-09. We look forward to a detailed exposition in the parties' briefs regarding how these various findings and interpretations interface with the *Machipongo* decision and other relevant takings law.

We do not believe the Davailuses can claim any surprise in the revelation that the legal effect of the Board's previous holding has central relevance to one aspect of this case. The Department has put the question at issue from the outset of the litigation. The Board's rulings have precluded and will continue to preclude a relitigation of the facts regarding environmental impact, but they have not and will not preclude argument regarding the meaning and consequences of the 1991 adjudication.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD P. DAVAILUS and SANDRA DAVAILUS, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE DAVAILUS and DAVAILUS ENTERPRISES, INC.	:	
v.	:	**EHB Docket No. 96-253-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIROMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of June, 2002, the Davailuses' motion to preclude argument is granted to the extent that the parties will not be permitted to relitigate the merits of the permit denial for the peat operation. The parties are not precluded, however, from presenting argument regarding the legal meaning and effect of the Board's prior findings and conclusions as they relate to the takings issue.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **June 13, 2002**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TOM RAKOCI	:	
	:	
v.	:	**EHB Docket No. 2001-116-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ATLAS RESOURCES, INC., Permittee	:	**Issued: June 13, 2002**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion to dismiss an appeal as moot is denied where it fails to demonstrate there is no effective relief that the Board can grant.

OPINION

This matter involves an appeal filed by Tom Rakoci, objecting to the Department of Environmental Protection's (Department) issuance of an oil/gas well permit to Atlas Resources, Inc. (Atlas). The permit authorizes Atlas to drill an oil and/or gas well on property adjacent to that of Mr. Rakoci.

On May 20, 2002, Atlas filed a motion to dismiss the appeal as moot. Mr. Rakoci filed no answer to the motion. Based on Mr. Rakoci's failure to respond, we may deem all properly-pleaded facts to be admitted pursuant to 25 Pa. Code § 1021.70(f).

Initially, we note that Atlas failed to file a supporting memorandum of law as required by 25 Pa. Code § 1021.73(c). A supporting memorandum would have been particularly helpful since the motion contains no citations to legal authority and consists of little more than a page. Although we could dismiss the motion on this basis pursuant to § 1021.73(c), we will consider its merits. According to the motion, the oil/gas well permit was issued on April 25, 2001. Mr. Rakoci filed his appeal within 30 days thereafter but at no point sought a supersedeas to prevent construction of the well. Atlas completed drilling and installation of the well on March 30, 2002 and, on that basis, contends that the appeal is now moot.

Even accepting the facts pled in the motion as true, we are not persuaded that this matter is moot. A matter becomes moot when an event occurs that deprives the Board of the ability to provide effective relief. *Alice Water Protection Assn. v. DEP*, 1997 EHB 447, 448. In the present case, although the well has been installed, if we were to find that the permit should not have been granted, the Board has the ability to order the permit revoked and require Atlas to cease operating the well. This is not a matter similar to *Alice Water, supra,* or *Brumage v. DEP*, EHB Docket No. 2001-212-R (Opinion and Order on Motion to Dismiss issued May 16, 2002), where an appeal of a coal mining permit was rendered moot by the completion of coal removal. Here, the well is operable.

Viewing the motion in the light most favorable to Mr. Rakoci as the non-moving party, *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995), we cannot find that Atlas has met its burden of demonstrating that the appeal should be dismissed as moot. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOM RAKOCI	:	
	:	
v.	:	**EHB Docket No. 2001-116-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ATLAS RESOURCES, INC., Permittee	:	

ORDER

AND NOW, this 13th day of June, 2002, the Motion to Dismiss filed by Atlas Resources, Inc. is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 13, 2002

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

ROBERT J. LEGGE	:	
	:	
v.	:	**EHB Docket No. 2001-108-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 20, 2002**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses the appeal of a tank installer from the determination by the Department that his Pennsylvania certification had expired and he was therefore required to reapply for certification and take a certification examination. The appellant allowed nearly three years to elapse before he sent in his renewal application. During that time he had been installing tanks in New Jersey and not Pennsylvania. Therefore the Department's determination that he was inactive was appropriate.

INTRODUCTION

This is an appeal of a letter dated April 9, 2001, from the Department which denied Robert Legge's (Appellant) application to renew his storage tank installer certificate. The Appellant filed a timely appeal from that letter on May 10, 2001. The Appellant's certification expired in 1998, yet he argues that he should not have to reapply for certification and retake the test as required by the Department's regulations.

A hearing was held for one day on February 7, 2002, before Administrative Law Judge George J. Miller. The Appellant represented himself during the proceedings. The record consists of a transcript of 60 pages and six exhibits. Both the Department and the Appellant filed post-hearing briefs which included proposed findings of fact, conclusions of law and legal analysis. After a full and complete review of these materials, we make the following:

FINDINGS OF FACT[1]

1. The appellant is Robert J. Legge, an employee of Fisher Tank Company of Chester, Pennsylvania.

2. Robert Legge has been employed by Fisher Tank as a foreman at the Coastal Refinery in Westville, New Jersey. (Ex. 5; J.Legge, N.T. 34)

3. The Department of Environmental Protection is the agency with the duty and the authority to enforce the Storage Tank and Spill Prevention Act (Tank Act)[2] and the regulations promulgated thereunder.

4. Larry P. Frey is the permitting and certification unit chief in the Department's storage tank program. (N.T. 35-36)

5. The Department initiated the installer and inspector certification program in 1991 under regulations adopted at that time. 25 Pa. Code §§ 245.101 – 245.141 (Subchapter B. Certification Program for Installers and Inspectors of Storage Tanks and Storage Tank Facilities). (Frey, N.T. 36-37)

6. In the initial phase of the certification program, DEP issued certification based solely upon a demonstration that the individual had a specified level of experience. 25 Pa. Code §

[1] The parties all agreed to use one set of exihibts, which are designated as "Ex. __." The notes of testimony are designated as "N.T."

245.103. (Frey, N.T. 36-37)

7. The Department issued temporary certification in the AFMX category (above ground field-constructed metallic storage tank – installation, modification and removal) after receiving a demonstration that the individual had three years of experience (two with a college degree) and had performed 20 installations or major modifications of above ground field constructed metallic storage tanks. 25 Pa. Code § 245.111.

8. On November 4, 1992, the Department issued a temporary certification to Robert Legge in the AFMX category. (Ex. 1; Frey, N.T. 42)

9. The individuals who achieved temporary certification were required to take an examination by September 21, 1994 in order to achieve "permanent" certification. (Frey, N.T. 37-38)

10. After passing the certification exam, Robert Legge was awarded AFMX certification on June 1, 1995. (Ex. 2; N.T. 10-11, 42-43)

11. Certification under the Tank Act is good for a term of three years. 25 Pa. Code § 245.114(a).

12. The certificate that the Department sent to Robert Legge stated both the issue date and the expiration date on its face. (Ex. 3; R.Legge, N.T. 12; Frey, N.T. 48)

13. The Department, as a matter of courtesy and practice, would send a letter and renewal application to certified individuals about five months prior to the certification expiration date, advising that they needed to file a renewal application. (Frey, N.T. 43, 48)

14. On January 12, 1998, the Department sent a letter and application for renewal to Robert Legge at his employer's address advising him that his certification would expire in June

---

[2] Act of July 6, 1989, P.L. 169, *as amended,* §§ 6021.101 – 6021.2104.

1998. His employer's address was the address listed on the certificate. (Ex. 3, 4; Frey, N.T. 43-44)

15. The January 12, 1998 letter was received by Fisher Tank Corporation, Robert Legge's employer, but was apparently never brought to Robert Legge's attention until several years had passed. (R.Legge, N.T. 13, 22)

16. Apparently Fisher Tank Corporation was having difficulty with its clerical staff during this time period. (R.Legge, N.T. 12-13)

17. Robert Legge was working in New Jersey during the timeframes relevant to this appeal. (R.Legge, N.T. 15; *see also* J.Legge, N. T. 34)

18. Robert Legge did not take any action when his certification expired. (R.Legge, N.T. 12)

19. Robert Legge assumed that his employer would handle all of the paperwork necessary to renew his certification. (R.Legge, N.T. 14-15)

20. The certification regulations require the submission of a renewal application at least 120 days prior to the expiration date as one of the conditions for renewal of certification. 25 Pa. Code § 245.114(a)(1). (Frey, N.T. 49)

21. Robert Legge did not file a renewal application prior to 120 days before the expiration of his certification. (R.Legge, N.T. 13; Ex. 5)

22. Although the certification regulations require the submission of a timely renewal application as a condition for renewal, the Department has as a matter of practice relaxed this requirement, accepting renewal applications if submitted within one year of the expiration date. This grace period was provided in order to accommodate tank installers who are out of the country for long periods of time. (Frey, N.T. 45-47)

23. However, where the renewal application was submitted more than one year after the expiration date, the Department would treat it as a new application, and require the individual to take the certification examination. (Frey, N.T. 45-46)

24. The Department takes the position that a certified individual who had allowed his certification to lapse for more than a year was inactive and out of touch with communications from the Department. (Frey, N.T. 46, 50-51)

25. Mr. John Legge, who is both the appellant's brother and boss, submitted a renewal application on behalf of Robert Legge on February 28, 2001. (Ex. 5; R.Legge, N.T. 14, 22; J. Legge, N.T. 31)

26. Subsequently, John Legge had two telephone conversations with John Steinrock of the Department's storage tank section about Robert Legge's renewal application. (J.Legge, N.T. 30-32)

27. John H. Steinrock is responsible for approving certifications for installers and inspectors of storage tanks for the Department. Larry Frey is his supervisor. (N.T. 25; Frey, N.T. 36)

28. Mr. Steinrock advised John Legge that the Department would reject Robert Legge's renewal application and would require the appellant to take the certification examination. (J. Legge, N.T. 32; Steinrock, N.T. 26)

29. The Department denied Robert Legge's application to renew his storage tank installer certification by a computer-generated letter dated April 9, 2001. (Ex. 6)

30. At the time John Legge had these conversations with Mr. Steinrock, neither Mr. Steinrock nor the Department's Larry Frey was aware that Robert Legge had failed the certification examination on his first attempt; and this was not a factor in the Department's

decision to require Robert Legge to retake the certification examination. (Frey, N.T. 47)

31. Robert Legge did not want to retake the certification examination because he believes he has difficulty taking tests. (R.Legge, N.T. 17)

32. Robert Legge was not performing tank installer activities under his certification in Pennsylvania for a number of years prior to 2001. (R.Legge, N.T. 15)

33. Although Mr. Legge has been engaged in tank installation activities in New Jersey, the Department still considers him to be inactive because he did not keep up-to-date with technical and administrative requirements in Pennsylvania. (Frey, N.T. 50-51)

DISCUSSION

In an appeal of the denial of a storage tank certification, it is the Appellant, Mr. Legge, who bears the burden of proof.[3] That is, he must demonstrate that the evidence produced at the hearing shows that the Department erred in its conclusion that he must reapply for his tank installer's certification and take the required examination. Our review of the Department's decision is *de novo*.[4] Therefore the Board will base its decision on the evidence adduced at the hearing, and not solely upon the facts which were considered by the Department.[5]

The Appellant argues that the Department erred by considering his certification "inactive" and requiring him to apply for a new certification rather than considering his application a renewal. Specifically, he contends that he has been actively involved in tank handling activities and has not, in fact, been inactive. The Department of course disagrees and takes the position that the Appellant's certification was long-expired and there is no place in the regulations which

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[3] 25 Pa. Code § 1021.101(c)(1).

[4] *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

[5] *Smedley v. DEP*, 2001 EHB 131.

would allow him to essentially reactivate it. By reviewing the regulations ourselves, we believe that the Department's interpretation is completely reasonable.

The relevant regulation concerning renewals of storage tank certifications can be found at 25 Pa. Code § 245.114:

> (a) Except as provided in § 245.103 (relating to phase-in from interim certification), certification shall be for 3 years from the date of issuance unless suspended or revoked. . . . An applicant for renewal shall:
>
> (1) Submit a completed application for renewal to the Department at least 120 days prior to the renewal date.
>
> (2) Successfully complete training programs which may be required by the Department. . . .
>
> (3) Have been actively involved in tank handling or inspection activities in each individually certified category during the previous 3-year period immediately prior to submitting the renewal application for certification or take the technical module examinations again for all inactive certification categories and achieve a passing grade . . . .

It has been the Department's practice to advise certificate holders by letter five months in advance, that their certification will expire.[6] Although the regulation requires certificate holders to apply for renewal 120 days prior to the expiration of a certificate, it is also the Department's practice to accept renewal applications up to one year after the expiration of the certification.[7] The Department contends that because the Appellant failed to renew within the 120 days explicitly required by the regulations and failed to submit his renewal within the "unofficial" one-year grace period, that it was proper for the Department to require the Appellant to submit a new application for certification. We believe that the regulatory requirements for the renewal of a

---

[6] N.T. 43-44.

storage tank installer certificate are clear on this point, and that the Department was correct in denying the Appellant's renewal application.

Although we can not condone the Department's practice of ignoring the plain language of the regulation,[8] its decision to consider the Appellant inactive after one year of the expiration of his certificate is reasonable. Section 245.114 sets forth three requirements in order for an individual to qualify for renewal of a certification. One of those requirements is that the application be submitted 120 days before the expiration of the certificate. The Appellant failed to submit the application 120 days before the expiration of the certificate. The Appellant failed to submit the application within one year of the expiration of the certificate. The Department did not receive the Appellant's application for renewal until almost *three years* after the expiration of the certificate. Having failed to meet all of the requirements for renewal, it was appropriate for the Department to deny the Appellant's renewal application.

The Appellant argues that because the Department allows for the renewal of lapsed certifications in some cases, it must do so in all cases. We disagree. We have held many times that lax enforcement of the regulations by the Department does not preclude it from properly applying the regulations thereafter.[9]

The Appellant argues that the regulations do not provide a specific requirement for re-testing individuals whose certification has expired. While there is not an explicit provision which addresses "re-testing" the regulations clearly contemplate that certifications have a fixed life span

---

[7] N.T. 45-47.

[8] *See Jefferson County Commissioners v. DEP*, EHB Docket No. 95-097-C (consolidated)(Adjudication issued February 28, 2002)(if a regulation sets forth a specific requirement, the Department is under an obligation to enforce it literally).

[9] *Lackawanna Refuse Removal, Inc. v. Department of Environmental Resources,* 442 A.2d 423 (Pa. Cmwlth. 1982); *Holbert v. DEP,* 2000 EHB 796.

of three years. In fact, subsection (3) requires a person to re-take at least the technical part of the examination for "inactive certification categories."[10] Although the Appellant has been engaged in storage tank installation activities, he has not been working within the state of Pennsylvania. In his post-hearing brief he admits that he has spent the last six years working solely in New Jersey.[11] For the purposes of certification in the state of Pennsylvania, failing to maintain his certification and working in another state which may have very different technical and administrative requirements, is certainly tantamount to being "inactive."[12] In fact, Larry Frey testified that an individual who had been out of touch with Pennsylvania for that period of time was not up-to-date with technological and administrative updates from the Department and is therefore considered "inactive."[13]

The Appellant further states that the Department erred in denying his renewal application because it did not notify him that his certification had expired. This argument is clearly without merit and not supported by the record. First, the Department has no affirmative obligation to inform the Appellant in any particular manner that his certification was about to expire. Both the certificate itself and the wallet-size card clearly had the expiration date printed upon it.[14] Second, although not required to do so, the Department did send a courtesy reminder to the address for the Appellant which was listed on the certificate.[15] The fact that the letter was lost by the administrative staff of the Appellant's employer can not be blamed upon the Department.

---

[10] 25 Pa. Code § 245.114(a)(3).

[11] Proposed Finding of Fact No. 15; *see also* N.T. 15.

[12] We do note that the regulations do provide for reciprocity if an applicant can demonstrate, among other things, that another jurisdiction has similar certification requirements. 25 Pa. Code § 245.107. In those cases an applicant is only required to pass the administrative portion of the examination. 25 Pa. Code § 245.107(a)(4).

[13] N.T. 46, 50-51.

[14] Ex. 3.

Finally, the Appellant contends that the Department improperly relied upon his testing history to deny his application. This is also contradicted by the record. Larry Frey testified that neither he nor his supervisor John Steinrock were aware that the Appellant had not passed the exam on his first try in 1995 and that this played no role in their decision to deny the Appellant's application.[16] The Appellant presented no evidence to discredit or dispute his testimony.

In sum, we find that the Department properly denied the Appellant's application to renew his storage tank installer's certification because he failed to submit it within the time required by the regulations.

CONCLUSIONS OF LAW

1. The Appellant bears the burden of proof. 25 Pa. Code § 1021.101.

2. The Appellant failed to comply with the requirements for the renewal of his storage tank installers certification by failing to submit his application for renewal in a timely manner. 25 Pa. Code § 245.114(a)(1).

3. The Department appropriately denied the Appellant's application for the renewal of his storage tank installers certification because he did not meet all of the requirements of 25 Pa. Code § 245.114(a).

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[15] Ex. 4.
[16] N.T. 47.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT J. LEGGE	:	
	:	
v.	:	**EHB Docket No. 2001-108-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of June, 2002, the appeal of Robert J. Legge in the above-captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: June 20, 2002

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

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

Appellant – *Pro Se*:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LTV STEEL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 26, 2002**

OPINION AND ORDER ON PETITION TO INTERVENE

By Thomas W. Renwand Administrative Law Judge

Synopsis:

A landowner's Petition to Intervene is granted in an Appeal by a steel company of a Department Order concerning the property owned by the petitioning landowner.

OPINION

Presently before the Board is the Petition For Leave to Intervene (Petition to Intervene or Petition) of Bet-Tech International, Inc., (Bet-Tech). This Appeal, filed by LTV Steel Company, Inc. (LTV), involves, *inter alia*, a Department Order regarding the Aliquippa Works. LTV previously operated a steel mill facility at the Aliquippa Works. According to the verified Petition to Intervene, Bet-Tech is now the owner of the site.[1]

Bet-Tech claims it should be allowed to intervene in this Appeal since its property could be directly affected by any decision rendered in the Appeal. The Department of Environmental

Protection does not oppose the Petition to Intervene. LTV opposes the Petition contending that allowing such intervention is tantamount to violating the automatic stay provision of the Bankruptcy Code.[2]

The legal standard for intervention in Appeals before the Board is set forth in Section 4(e) of the Environmental Hearing Board Act,[3] which states that "[a]ny interested party may intervene in any matter pending before the Board."[4] The Commonwealth Court has explained that, in the context of intervention, "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board."[5] The interest required must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination.[6]

A party may intervene in a Board proceeding if the party's interests are "substantial, direct and immediate."[7] For an interest to be considered "substantial," the interest must "surpass the common interest of all citizens seeking obedience to the law."[8] To be "direct" and "immediate" there must be a causal connection between the action at issue and the alleged harm.[9]

Applying these concepts here compels us to grant Bet-Tech's Petition to Intervene. Bet-

---

[1] Petition to Intervene, ¶ 5.
[2] 11 U.S.C. § 362.
[3] Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516.
[4] *Id.* at § 7514(e).
[5] *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Conners v. State Conservation Commission*, 1999 EHB 669, 670.
[6] *Jefferson County v. Department of Environmental Protection*; 703 A.2d 1063, 1065 n.2 (Pa, Cmwlth. 1997); *Khodara v. Department of Environmental Protection*, 2001 EHB 311, 312.
[7] *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992*), petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Conners*, 1999 EHB at 671.
[8] *Darlington Township Board of Supervisors v. Department of Environmental Protection*, 1997 EHB 934, 935.
[9] *Conners*, 1999 EHB at 671; *Orix-Woodmont Deer Creek* I *Venture L.P. v. Department of Environmental Protection*, 2001 EHB 82, 84.

Tech's interest is substantial. As the current owner of the Aliquippa Works, it has a very significant interest in how this proceeding is adjudicated. While mere ownership of property sometimes may not be enough to justify intervention, as noted in *Conners*, "it is certainly a start."[10] The fact that this Appeal involves a former steel-making site now owned by the petitioner affords Bet-Tech a very substantial interest in the Appeal.

Besides having a substantial interest, Bet-Tech also has a direct and immediate interest. Bet-Tech's property could be directly affected by the results of this Appeal; therefore in the interests of justice and fair play, it should be allowed to intervene.[11] To paraphrase Judge Labuskes in *Giordano v. Department of Environmental Protection*,[12] it is important to keep in mind that LTV's Appeal before the Board may be the only opportunity for a due process hearing addressing Departmental actions that affect Bet-Tech's rights. If, indeed, this is Bet-Tech's only opportunity to be heard, we are loath to bar them from participating in this Appeal.

We also fail to see how allowing the owner of the subject property to intervene in an Appeal filed by LTV somehow violates the automatic stay provisions of the United States Bankruptcy Code.[13] The action under consideration here is LTV's Appeal of the Department's Order. This is not a civil suit for money damages instituted by Bet-Tech. It is also not analogous to a cross-claim or a suit for contribution. As such we do not see how the intervention of Bet-Tech is inconsistent with the automatic stay of the Bankruptcy Code or the orders entered by the United States Bankruptcy Court for the Eastern District of Ohio sitting in Youngstown.

Accordingly, we issue the following Order:

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[10] *Conners*, 1999 EHB at 672.
[11] *Pennsburg Housing Partnership, L.P. v. Department of Environmental Protection*, 1999 EHB 1031; *Ainjar Trust v. Department of Environmental Protection*, 2000 EHB 75, 78-79.
[12] 2000 EHB 1154.
[13] 11 U.S.C. § 362.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LTV STEEL COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 2002-084-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of June, 2002, the Petition to Intervene is **granted**. It is ordered that the caption is amended as follows:

LTV STEEL COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 2002-084-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BET-TECH INTERNATIONAL, INC., Intervenor	:	

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 26, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

NAOMI R. DECKER	:	
	:	
v.	:	**EHB Docket No. 2001-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY	:	**Issued: July 9, 2002**

OPINION AND ORDER ON MOTIONS FOR NONSUIT

By Bernard A. Labuskes, Jr.

Synopsis:

The Board grants a motion for nonsuit where an appellant fails to present any evidence of record that she has standing after the question of standing is put at issue by the Department and the sewer authority.

OPINION

The Dillsburg Area Authority (the "Authority") is a municipal authority that operates a wastewater treatment plant that serves Dillsburg Borough and portions of Franklin Township, Franklintown Borough, and Carroll Township, all in York County (the "contributing municipalities"). (Decker Exhibit ("Ex.") 1.) The Authority's plant is in need of expansion. (Ex. 1.) On behalf of the contributing municipalities, the Authority prepared a Plant Expansion Special Study (the "Special Study") that evaluated alternatives for increasing the plant's capacity. The Special Study was intended to supplement the official sewage facilities plans for the contributing municipalities. (Ex. 1.)

By letter dated April 5, 2001, the Department of Environmental Protection (the "Department") advised the Authority that the Special Study is consistent with the planning requirements of the sewage facilities planning regulations. Naomi Decker appealed from that determination. Mrs. Decker is an individual with a Dillsburg address. (Ex. 17.) There is no other evidence in the record regarding Mrs. Decker. The Department and the Authority have long been on record as challenging Mrs. Decker's standing.

As the hearing approached, Mrs. Decker announced that she did not intend to present any testimonial evidence, either substantive or foundational. She did not intend to call either lay or expert witnesses. She did not intend to testify herself. Instead, she planned to submit her case based upon a series of documents. We warned Mrs. Decker repeatedly that it could be very difficult to prevail using such an approach. *See, e.g., Decker v. DEP*, EHB Docket No. 2001-107-L (Opinion and Order issued February 12, 2002) (denying motions for summary judgment and reserving resolution of the Department and the Authority's challenges to Mrs. Decker's standing until after the hearing on the merits).

At the prehearing conference, which we had transcribed, Mrs. Decker confirmed that she did not intend to call any witnesses. The parties then agreed to go through the list of Mrs. Decker's proposed documentary exhibits and have the presiding Board Member rule on which exhibits would be admitted as evidence of record. That process resulted in the following exhibits being admitted: Ex. 1, 5, 6, 8, 10, 14-17, 29-36, 39-43, 47, 51, and 55. At the conclusion of that process, Mrs. Decker repeated that she did not wish to introduce any additional evidence. These exhibits, therefore, constitute the entire existing record in this appeal. Following the admission of the exhibits, the Department and the Authority moved for a nonsuit. Under the circumstances, the presiding Board Member determined that it would be appropriate for the motions for nonsuit

to be briefed prior to the presentation of the Department and the Authority's cases. The matter has now been fully briefed.

The motions for nonsuit argue that Mrs. Decker has failed to present a prima facie case that (1) she has standing, and (2) the Department erred in approving the Special Study. Mrs. Decker has filed a brief in opposition to the motions, but the brief fails to show how she has standing to pursue this appeal. It fails to point to any evidence in the record to support her standing.

This Board has the authority to order a nonsuit. *Ron's Auto Service v. DEP*, 1992 EHB 711, 731. The Board may enter a nonsuit if the party with the burden of proof and the initial burden of proceeding fails to establish a cause of action. *Leone v. Com., Department of Transportation*, 780 A.2d 754, 756 (Pa. Cmwlth. 2001); *Delaware Environmental Action Coalition, et al. v. DEP*, 1994 EHB 1427, 1430; *City of Harrisburg v. DEP*, 1993 EHB 90, 91; *County of Schuylkill v. DEP*, 1991 EHB 1, 6. Of course, the initial party's case must be clearly insufficient, *Schuylkill*, 1991 EHB at 6, and the evidence and all reasonable inferences arising from that evidence must be considered in a light most favorable to the nonmoving party with all doubts resolved in favor of the nonmoving party, *Leone*, 780 A.2d at 756, *Nottingham Network of Neighbors v. DEP*, 1996 EHB 4, 6.

When presented with a motion for a nonsuit in Board proceedings at the end of the initial party's case, the presiding Board Member, acting in his or her capacity as an administrative law judge, does not have the authority to grant such a motion. 25 Pa. Code § 1021.86(a) (all final decisions must be by majority vote). Therefore, the Board Member must decide whether it would be more efficient or otherwise appropriate to recess the hearing to allow the full Board to consider the motion, or simply proceed with the hearing. If we proceed with the hearing, the

motion will almost always be either legally or practically moot.[1] Nevertheless, given the logistical problems and inconvenience usually associated with interrupting a hearing, coupled with the duty to deny such motions unless the question is altogether free from doubt, it is normally best to proceed with the hearing.

There are, however, exceptions. This case is rather unique in that Mrs. Decker opted not to present any testimony, instead relying upon a series of documentary exhibits. Once those exhibits were admitted into the record, Mrs. Decker rested. Under these circumstances, the presiding Board Member determined that a break in the proceedings to assess the Department and the Authority's motions for a nonsuit would be appropriate. We now proceed to a determination of the motions.

We discussed the general principles regarding standing in *Giordano v. DEP*, 2000 EHB 1184:

> In order to establish standing, appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way.... The second question focuses on the particular appellants to ensure that they are the appropriate parties to seek relief because they personally have something to gain or lose as a result of the Board's decision. The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial"), and there is a direct and immediate connection between the action under appeal and the appellants' harm (i.e. causation in fact and proximate cause).
>
> * * *
>
> The appropriate evidentiary standard of review in evaluating a standing challenge depends upon when standing is challenged....If the question is still contested after the evidentiary hearing, we determine whether the appellants have carried their burden of proving that they have standing by a preponderance of the evidence.

[1] For a rare exception, see *Schuylkill County v. DEP*, 1991 EHB 1.

2000 EHB at 1185-87. Thus, we must determine whether Mrs. Decker has proven by a preponderance of the evidence that there is an objectively reasonable threat that approval of the Special Study may cause (or already has caused) adverse effects, and that she is among those who have been (or will be) harmed by those effects in a substantial, direct, and immediate way.

There is no record evidence to support any of the criteria prerequisite to standing. In fact, although there have been various representations along the way about Mrs. Decker's connection to this matter, we have no *record* evidence that in any way describes her interest.[2] All that we know as a matter of record is that Mrs. Decker is an individual with a Dillsburg address. Beyond that, there is no evidence of the objectively reasonable threat or actual harm resulting from approval of the Special Study. There is no evidence that Mrs. Decker is among the class of persons substantially, directly, and immediately harmed. In the face of the Department and the Authority's continuing standing challenges, Mrs. Decker has failed to make out the requisite *prima facie* case that she has standing in this appeal.[3]

Accordingly, we issue the Order that follows.

---

[2] The record exhibits consist of such documents as the Special Study, documents relating to the preparation of the study and the contributing municipalities' participation in the approval of the Special Study, other facilities planning documents of the municipalities, Departmental publications, the Department's review and approval of the Special Study, a Department notice of violation, and wasteload management reports. The only document that pertains to Mrs. Decker is Exhibit 17, which is a letter from the Authority to Mrs. Decker responding to some questions she had regarding the project. The exhibit does not shed any meaningful light on Mrs. Decker's stake in this appeal.

[3] The Authority's pending motion in limine is moot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NAOMI R. DECKER	:	
	:	
v.	:	**EHB Docket No. 2001-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY	:	

ORDER

AND NOW, this 9th day of July, 2002, the motions for nonsuit filed by the Department and the Dillsburg Area Authority are **GRANTED** and this appeal is **DISMISSED.**

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **July 9, 2002**

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

JAMES KLEISSLER AND RYAN D. TALBOTT	:	
v.	:	**EHB Docket No. 2001-295-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA GENERAL ENERGY CORPORATION, Permittee	:	**Issued: July 9, 2002**

OPINION AND ORDER
ON MOTION IN LIMINE

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

Synopsis:

The Board refuses a request to preclude the use of an expert report that was filed after the applicable deadline. Preclusion would be too severe under the circumstances.

OPINION

The parties in this appeal were required by Board order to serve their expert reports and responses to expert interrogatories on or before May 13, 2002. On May 13, the Department of Environmental Protection (the "Department") submitted a "scope of work" that was prepared by one of its proposed experts. The "scope of work" does not set forth any conclusions. It simply states that an aquatic biology investigation will be conducted and describes some of the protocols that will be followed in performing the investigation. The "scope of work" cannot fairly be characterized as an expert report.

On May 17, 2002, the Department responded to expert interrogatories by, among other

things, identifying its proposed expert. The Department acknowledged that its expert report was incomplete, and it indicated that the full report would be served on or before June 6. The Department did not request an extension to file its expert discovery responses from this Board. There is no indication that it sought the other parties' concurrence in a late filing. It did not request an extension of any other prehearing deadlines as a result of its decision to file a late report.

The Department did not serve its expert report until June 20. The Permittee, Pennsylvania General Energy Corporation ("PGE"), immediately filed what it captioned a motion in limine.[1] PGE argues that it was prejudiced by the Department's service of the expert report two working days before the deadline for filing dispositive motions. It asserts that it had prepared its rather extensive summary judgment materials based upon the assumption that the Department did not intend to produce an expert report. It has asked this Board to preclude the introduction into evidence or any other use of the late expert report. It has also requested an opportunity to present oral argument in support of its motion.

In opposition to the motion in limine, the Department offered that it provided a "scope of work" and identified its expert by the deadline. It explained that a report would be forthcoming in its responses to interrogatories. It telephoned PGE on June 18 to describe the conclusions set forth in the forthcoming report. It noted that PGE could have objected to the late filing earlier or sought an extension of the dispositive motion deadline. PGE's experts and the Department's expert "were in the field conducting their field work at some of the same times." (Response ¶ 12.) The Department argues that PGE could not have been prejudiced in the preparation of its dispositive motion in light of these disclosures. Certainly, PGE should not have assumed that

[1] In that the motion relates to a violation of the discovery rules, the motion might more appropriately have been captioned as a motion for sanctions.

there would be no expert report.

The third-party appellants, James Kleissler and Ryan Talbot, have weighed in in support of one of their opponents in the case--the Department. Among other things, they suggest that parties on the same side of the case should not be able to claim prejudice as a result of each other's discovery abuses. They add that they would be severely prejudiced if the Board excluded the report because they do not have any experts of their own and they intend to rely heavily on the Department's expert. They argue that the sanction sought by PGE is too severe. Finally, they maintain that the true reason for PGE's motion is PGE's unhappiness with the conclusions in the report, not any prejudice suffered in preparing its motion for summary judgment.

We note that the parties telephoned the Board several weeks ago seeking clarification on whether Department employees must submit expert reports. There apparently has been some confusion regarding this issue of late but we fail to see why. If a Departmental employee is intended to be tendered as an expert witness, the rules of discovery regarding experts apply to that employee. We advised the parties accordingly. No party, however, has referenced that communication in connection with the motion in limine. Thus, it does not appear that any confusion that may have existed gave rise to the Department's late service of the report.

The Board has an independent interest in maintaining the integrity of the litigation process and respect for the Board by enforcing compliance with its orders and its rules. If a party's violations of those orders and rules interferes with the Board's ability to conduct orderly, efficient, and effective proceedings, it may be in the interest of the Board itself to impose sanctions. *Petchulis v. DEP*, 2001 EHB 673, 678.

Perhaps more fundamentally, however, the rules are designed to ensure that no one litigant obtains an unfair advantage. If a party's disregard for proper procedure gives it such an

unfair advantage, sanctions may be required to even out the playing field. The sanctions are not designed to punish the wrongdoer; they are aimed at relieving the unfair disadvantage (i.e. prejudice) suffered by the innocent party. Thus, in most cases, our analysis begins with a determination of whether there has been a violation, but it ends with an assessment of the harm caused to the innocent party. Whether sanctions must be imposed and the severity of the sanctions will in large measure depend upon what measures are necessary to alleviate the unfair disadvantage created by the transgressor's misconduct. *See generally, Township of Paradise v. DEP*, 2001 EHB 1005, 1007 (sanction must be appropriate given the magnitude of the violation); *ERSI v. DEP*, 2001 EHB 824, 829 (listing factors to consider when imposing sanctions for discovery violations).

In the final analysis, we cannot lose sight of the fact that our basic objective is to arrive at a proper resolution of the appeal *on its merits*. *ERSI*, 2001 EHB at 830. A sanction that is too severe can be just as detrimental to that objective as allowing violations to go unsanctioned. Ultimately, the ideal sanction will ensure fair treatment of the litigants and not in any way interfere with the most accurate, fully informed resolution of the case.[2]

There is no question here that the Department violated the rules. If it intended to file a late report, it should have sought an extension from the Board, preferably after having obtained the concurrence of the other parties. It should have been particularly sensitive to the expert discovery deadline given the imminent summary judgment deadline and the generally tight litigation schedule in this appeal. The question, then, becomes: What should we do about it?

---

[2] The sanction of precluding evidence will rarely be imposed where there has been no violation of a direct Board order. *Township of Paradise*, 2001 EHB at 1007 and 1009; *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133, 1140. In addition, preclusion of expert testimony is a particularly severe sanction. *Land Tech*, 2000 EHB at 1140.

The sanction requested by PGE is too severe under the circumstances.[3] It would deprive the Board of access to potentially important information regarding the effect of the project upon water quality. This is a central issue in the case. In order to justify such a significant adverse impact upon the Board's search for the correct result on the merits, PGE would need to show that it has suffered serious prejudice that cannot be alleviated any other way. *See Township of Paradise v. DEP*, 2001 EHB 1005, 1008 (evidence will not be precluded where less severe mechanisms are available to redress the discovery grievance). PGE has failed to make that showing here.

We are finding it difficult to accept PGE's averment that it prepared its summary judgment motion based upon the assumption that the Department would not be submitting *any* expert report. If nothing else, we are satisfied that the Department at least gave adequate notice that a report would eventually be forthcoming.

There is no indication that PGE will be hampered in its preparation for the hearing in November. *Township of Paradise*, 2001 EHB at 1008 (no sanction where discovery can be supplemented without undue delay in the scheduling of a hearing). To the extent that PGE needs to revise its own expert reports in response to the Department's late submittal, it may do so. The Board would also be receptive to any request by PGE to conduct additional discovery necessitated by the Department's conduct.

PGE's primary claim of prejudice relates to its motion for summary judgment, which has now been filed. PGE has not specified what sections might need to be changed as a result of the late report. Nevertheless, in light of the Department's conduct, we would be receptive to any

---

[3] PGE has, in part, asked the Board to preclude the report from being introduced into evidence. Expert reports are simply a discovery tool. They are a substitute for detailed, signed answers to expert interrogatories. Pa.R.C.P. 4003.5; *Land Tech Engineering*, 2000 EHB at 1138. At the hearing on the merits, they are hearsay, although they

request by PGE to supplement its motion in the immediate future if it believes that such changes are necessary.

In our view, these measures will be sufficient to return the parties to where they should have been had the Department complied with the rules. Exclusion of all of the Department's expert's work would simply go too far.[4] Accordingly, we issue the order that follows.

---

may be admitted by agreement of the parties if the Board consents or if an exception to the hearsay rule applies. We express no opinion here on the general admissibility of the Department's expert report.

[4] PGE's request for oral argument is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES KLEISSLER AND RYAN D. TALBOTT	:	
	:	
v.	:	**EHB Docket No. 2001-295-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA GENERAL ENERGY CORPORATION, Permittee	:	

ORDER

AND NOW, this 9th day of July, 2002, the Permittee's motion in limine is denied without prejudice to its right to seek more limited relief in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 9, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ERNEST LEE VAN TASSEL and KIMBERLY L. VAN TASSEL	:	
v.	:	**EHB Docket No. 2001-110-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GENESIS, INC. d/b/a MEADOW RUN GENESIS, INC., Permittee	:	**Issued: July 18, 2002**

OPINION AND ORDER ON MOTION FOR NONSUIT

By Thomas W. Renwand Administrative Law Judge

Synopsis:

The Board grants a nonsuit where the Appellants fail to make a *prima facie* case in their appeal of the Department's issuance of an underground mining permit.

OPINION

This matter involves a *pro se* appeal filed by Ernest and Kimberly Van Tassel (the Appellants), challenging the issuance of an underground coal mining permit (permit) by the Department of Environmental Protection (Department) to Genesis, Inc. (Genesis). The permit authorizes Genesis to mine the Genesis No. 17 mine. The Appellants own adjacent property on

which they live and operate a dairy farm.[1] According to the Subsidence Control Plan Map, a small portion of the Appellants' property falls within the subsidence control plan and permit boundary, but it is within the 500 foot barrier in which no mining will take place.[2]

The Appellants appealed the permit issuance, alleging as follows: 1) A former dewatering well located on the Appellants' property was not addressed in the mining plans; 2) No regional environmental impact studies were done under the federal Clean Water Act; and 3) An attempt may be made to profit from water pumped from the mine in violation of federal water rights law. All other objections are deemed waived. 25 Pa. Code § 1021.51(e).

A hearing in this matter was scheduled for March 14, 2002. Prior to the hearing, on February 28, 2002, Genesis filed a motion in limine seeking to exclude the expert testimony of individuals listed for the first time as experts in the Appellants' prehearing memorandum. The Appellants and the Department responded to the motion on March 5 and March 7, respectively. Based on the motion, but prior to any ruling from the Board, the Appellants failed to bring all of their proposed witnesses to the hearing. The hearing was held as scheduled, and following the presentation of the Appellants' case, Genesis moved for a nonsuit, in which the Department concurred. The Board suspended the hearing and gave the parties the opportunity to submit briefs on the question of whether the appeal should be dismissed based on the failure to make a *prima facie* case.

On May 2, 2002, the Department filed a written motion for a nonsuit and supporting brief, in which Genesis joined. The Appellants filed a response to the motion on June 4, 2002. The record in this matter consists of the transcript and seven exhibits introduced by the Appellants.

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[1] App. Ex. 2.

The Board may grant a motion for a nonsuit where the appellant fails to meet his or her burden of proof and fails to make a *prima facie* case. *Decker v. DEP*, EHB Docket No. 2001-107-L (Opinion and Order on Motion for Nonsuit issued July 9, 2002), p.3; *City of Harrisburg v. DER*, 1993 EHB 90, 91. In ruling on such a motion, the Board must view it in the light most favorable to the non-moving party. *Decker, supra*; *Nottingham Network of Neighbors v. DER*, 1996 EHB 4, 6. In this case, the Appellants have the burden of proving the allegations made in their notice of appeal and pre-hearing memorandum by a preponderance of the evidence. In other words, they must support their assertions with facts deduced at the hearing and not simply by speculation as to what might happen as a result of the permit issuance. They must present evidence to support their claim that the Department erred in issuing the permit. We find that they have failed to do so and, therefore, the Department and Genesis are entitled to a nonsuit.

Before turning to the merits of the Appellants' case, we note that the Appellants elected to appear *pro se* throughout this proceeding. In their response to the motion for a nonsuit, the Appellants state that they chose to appear *pro se* because they could not afford a qualified environmental lawyer. Both at the start of this appeal and prior to the hearing, the Board advised the Appellants that if they were unable to afford an attorney, they might qualify for *pro bono* legal representation through the Pennsylvania Bar Association Environmental, Mineral and Natural Resources Law Section (EMNRLS). The EMNRLS offers a program whereby individuals appearing in matters before the Environmental Hearing Board who meet certain financial qualifications may be provided with an attorney who will handle their case on a *pro bono* basis. In addition, at the start of the appeal, the Department informed the Appellants by letter that, while they were not required to seek counsel to proceed with their appeal, a lawyer could assist them in

[2] Appellants' Exhibit 2.

understanding the Board's rules of practice and procedure and directed them to Southern Alleghenies Legal Aid, Inc. Nevertheless, the Appellants elected to proceed *pro se*. As we have noted in the past, laypersons proceeding *pro se* assume the risk that their lack of legal expertise may prove their undoing. *Taylor v. DEP*, 1991 EHB 1926, 1929; *Welteroth v. DER*, 1989 EHB 1017.

Unfortunately, that is all too evident in this matter. At the start of the hearing, the Appellants stated they did not understand that the hearing was to be an adversarial proceeding. From the manner in which they conducted themselves at the hearing, it appeared that the Appellants believed it to be similar to a public meeting before the Department in which they could simply raise their concerns regarding the permit application. Likewise, the Appellants' response in opposition to the motion for nonsuit provides little in the way of support for their case. The response simply sets forth a series of alleged facts, most of which were not presented as evidence at the hearing, as well as a series of questions more appropriately addressed to the Department in the permit application phase.

The Appellants' first objection is that a former dewatering well located on their property within the permit boundary was not addressed in the mining application or permit. The Appellants have no personal knowledge of the well. They believe the well exists because they were told of the existence of boreholes by their neighbor from whom they purchased the property and Gene Carracino, their environmental consultant.[3] Mr. Van Tassel and Mr. Carracino searched for boreholes on the property but were unable to locate any.[4] At the hearing, the Appellants presented the testimony of Paul Parsons who stated that he found a map that showed the wells.[5]

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[3] T. 96
[4] *Id.*
[5] T. 30

The maps introduced by the Appellants at the hearing do show the existence of a former dewatering well identified as BH 10. However, BH 10 is located outside the boundary of the permit and the subsidence control plan. If BH 10 is the well to which the Appellants are referring, they offered no evidence to establish that it is hydrologically connected to the mine site or that the mining activities will adversely affect the well. The Appellants' main concern appears to be that the mining will cause them to lose their water. However, they presented no scientific evidence to support this claim.

The Appellants' second objection is that no regional environmental impact study was done under the Clean Water Act. The Appellants point to no requirement in the statutes or regulations requiring such a study. Section 89.35 of the mining regulations requires the mining company to prepare an operation plan that includes a prediction of the probable hydrologic consequences of the proposed underground mining activities on the quantity and quality of groundwater and surface water within the permit and surrounding areas.[6] The Appellants have not demonstrated or even alleged that the Department failed to require or Genesis failed to provide such information.

It is not clear what type of regional environmental impact study the Appellants believe should have been undertaken. If, as the Department surmises in its memorandum of law, the Appellants believe that an environmental impact statement should have been performed under the National Environmental Policy Act (NEPA), that statute is not applicable here. As the Department notes, NEPA applies to major federal actions involving federal agencies. That is not the case here.

The Appellants' final objection is that there may be an effort to profit from the water to

[6] 25 Pa. Code § 89.35

be pumped from the mining facilities. Mrs. Van Tassel testified that she had read newspaper articles regarding a pipeline that was proposed to pump water from their watershed to the Quemahoning Reservoir. Other than Mrs. Van Tassel's testimony, the record is devoid of any evidence regarding this alleged project. However, even if such a project has been proposed, the Appellants have failed to demonstrate that this is a basis for overturning the permit.

Finally, both at the hearing and in their memorandum, the Appellants pointed to areas where they felt the permit application was incomplete. Because this objection was not raised in a timely manner, it is deemed waived. *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986). However, even if we were to consider the Appellants' argument, this would pose no substantive barrier to the Department's issuing of the permit. The Appellants allege that there were inconsistencies between various maps introduced into evidence. However, the evidence does not support this allegation. The Appellants' environmental consultant, Gene Carracino, testified as follows: "In the legend, there seems to be minute deficiencies about specific locations. There's [sic] deletions of specific markings in the plans that pertain to the watering holes, access, the mines, there's no mention of it. In the literature retrospect according – responding to that, it deletes documentation of it."[7] When asked to point out the alleged inconsistencies, Mr. Carracino testified as follows:

> The equation has to fit together, the puzzle has to fit together, and having this same kind of piece of paper, of course there could be inconsistencies that come up there, but I could not find them, I did not find them in documentation. This could go on for nine days unless you enter the spectrum together to form conclusions.[8]

Even if we were to accept the Appellants' contention that there were inconsistencies in some of the maps introduced into evidence, these alleged defects appear to be minor in nature and

[7] T. 41

not a basis for overturning the permit. *Ziviello v. State Conservation Commn.*, 2001 EHB 1177, 1192; *Giordano v. DEP*, 2001 EHB 713.

In conclusion, based on the evidence before us, we find that the Appellants have failed to make a *prima facie* case; therefore, we enter the following order:

[8] T. 47-48

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ERNEST LEE VAN TASSEL and KIMBERLY L. VAN TASSEL	:	
v.	:	EHB Docket No. 2001-110-R
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GENESIS, INC. d/b/a MEADOW RUN GENESIS, INC., Permittee	:	

ORDER

AND NOW, this 18th day of July, 2002, Genesis, Inc. and the Department of Environmental Protection's Motion for a Nonsuit is granted. The appeal at Docket No. 2001-110-R is dismissed and the docket is marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2001-110-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATE: July 18, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

JAMES KLEISSLER AND RYAN D. TALBOTT	:	
v.	:	**EHB Docket No. 2001-295-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA GENERAL ENERGY CORPORATION, Permittee	:	**Issued: July 19, 2002**

OPINION AND ORDER ON
APPELLANTS' MOTION TO COMPEL

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

Synopsis:

The Board grants a motion to compel the permittee to provide information regarding previously permitted oil wells in an alleged common plan of development that includes the wells that are covered by the permits under appeal.

OPINION

James Kleissler and Ryan Talbott (hereinafter "Kleissler") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of three NPDES permits and ten oil well drilling permits to Pennsylvania General Energy Corporation ("PGE") for ten wells located on three contiguous warrants in Forest County. PGE has drilled numerous other wells in other contiguous warrants pursuant to previously issued permits that are not directly the subject of this appeal.

Among his other arguments, Kleissler argues that the Department did not give due

consideration to PGE's preexisting wells when it issued the permits that are the subject of this appeal. For example, Kleissler argues that some part of PGE's well field that is larger than only those wells located on a single warrant should be considered to be a "common plan of development" that should not be permitted by separate NPDES permits. This "common plan" eventually may be determined to encompass the three warrants directly at issue, or a larger area. Although this issue remains to be decided, we preliminarily concluded at a supersedeas hearing that Kleissler's position on this issue has some merit.

Kleissler served PGE with interrogatories on March 29, 2002. PGE objected to many of the interrogatories (although it provided several substantive responses notwithstanding its objections). Kleissler has filed a motion to compel more complete answers to fourteen of the interrogatories, which PGE opposes. The positions in support of and opposed to the motion have been supplemented in accordance with this Board's Order. The Department has not weighed in on this particular dispute.

The overriding question at issue is whether PGE must answer the fourteen interrogatories with respect to the "Tionesta Development," which Kleissler has defined as follows:

> "Tionesta Development" shall be interpreted to mean the full extent of Pennsylvania General Energy's Development within the lower Tionesta Creek Drainage. This development shall be construed to include the entirety of areas visibly shown on Exhibits 4, 8, and 13 to Appellants' "APPLICATION for temporary supersedeas, PETITION FOR SUPERSEDEAS, and memorandum of law in support thereof." The Tionesta Development includes, but is not limited to the following Warrants and Tracts: Clapp Tract, Lot 28, Lot 737, Scofield Tract, Tract 59, and Warrants 2735, 2991, 3179, 3181, 3186, 3188A, 3188X, 3192, 3193, 3197, 3198, 4790, 4821, 5101, 5102, 5103, 5104, 5105, 5106, 5107, 5110, 5129, 5135, 5136, 5137, 5138, 5139, 5140, 5144, 5155, 5156, 5266, and 5282.

PGE has refused to answer the interrogatories to the extent requested. It objects to Kleissler's definition of "Tionesta Development" "insofar as it purports to encompass 'the full extent of [PGE's] Development within the lower Tionesta Creek Drainage.'" PGE answered the

interrogatories only with respect to the three warrants that encompass the permits under appeal.

We reject PGE's objection. Although PGE is correct in asserting that Kleissler is administratively precluded from challenging previously issued permits in this appeal, given Kleissler's legitimate arguments regarding the alleged common plan of development and the cumulative impacts of the well field, the facts and circumstances regarding the wells and appurtenances previously permitted are certainly relevant to our determination of whether the wells directly at issue should have been permitted. In light of the extensive list of wells of potential relevance, PGE may at its option make its records available to Kleissler for review and copying in lieu of providing written responses. If PGE chooses this approach, it should be reasonably specific in directing Kleissler's attention to relevant documentation. *See Allegheny County Department of Aviation v. DEP*, 2000 EHB 1255, 1258; *Brush Wellman, Inc. v. DEP*, 1999 EHB 388, 392 (interrogatory responses adequate where number of records referred to are reasonably limited).

Along the same lines, PGE has objected to providing any information regarding future wells within the "Tionesta Development." To the extent that future expansion is purely speculative, the objection has merit. On the other hand, to the extent that reasonably firm plans have been formulated, Kleissler is entitled to the information. Kleissler has made a colorable claim[1] that the Department erred in considering the permits under appeal in isolation from past as well as future parts of what is alleged to be the same overall project. *See Khodara v. DEP*, 2001 EHB 855, 857 ("relevance" for discovery purposes is to be construed broadly: "[I]t is enough that the evidence sought *might be* relevant."); *Valley Creek Coalition v. DEP*, 2000 EHB 970,

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[1] *See Valley Creek Coalition v. DEP*, 2000 EHB 970, 973 (discovery permitted regarding objection in a notice of appeal that was "not completely baseless."); *Allegheny County*, 2000 EHB at 1257 (matters raised in notice of appeal are relevant subjects of inquiry for purposes of discovery).

972 ("For the purposes of discovery, it is not a ground for objection that the information sought would be inadmissible at hearing, so long as it is reasonably likely that the information will lead to admissible evidence."). Moving beyond this generic discussion, we will now address the specific interrogatories at issue.

Interrogatories 19 and 20. Kleissler seeks information regarding persons who have "a stake or interest" in the Tionesta Development. For such persons, he asks PGE to identify the "extent of their workforce." He explains that he needs this information to assess the effect of the development on the local economy. He fails to explain, however, why the effect of the development on the local economy is relevant to a determination on the merits of whether the permits should have been issued. Accordingly, PGE's objections to these interrogatories are sustained.

Interrogatories 21-26. PGE is required to answer these interrogatories for the reasons discussed above regarding the "Tionesta Development."

Interrogatory 29. Kleissler asks PGE to explain its contention at the supersedeas proceeding that stopping the development would harm PGE. PEG's objection to this interrogatory is sustained because Kleissler has failed to explain how this information would be relevant to the determination of the appeal on the merits as distinguished from the resolution of the supersedeas petition.

Interrogatories 31, 32, 34, and 35. PGE's responses to these interrogatories are sufficient.

Interrogatory 37. PGE is required to answer this interrogatory for the reasons discussed above.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES KLEISSLER AND RYAN D. TALBOTT	:	
	:	
v.	:	**EHB Docket No. 2001-295-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA GENERAL ENERGY CORPORATION, Permittee	:	

ORDER

AND NOW, this 19th day of July, 2002, in consideration of the Appellants' motion to compel and the Permittee's opposition thereto, it is hereby ordered that the motion is granted in part, and that PGE shall on or before **August 6, 2002** provide answers to Interrogatories 21 through 26 and 37 in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 19, 2002

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

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Northwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

KEVIN J. SMITH and SHERY K. SMITH	:	
	:	
v.	:	**EHB Docket No. 2001-284-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 24, 2002**

OPINION AND ORDER ON MOTION FOR LEAVE TO APPEAL NUNC PRO TUNC

By Thomas W. Renwand Administrative Law Judge

Synopsis:

The Appellants' motion for leave to file their appeal nunc pro tunc is granted. Where the Department letter being appealed contained conditional language indicating that the Appellants could submit additional information in support of their claim and where it further failed to contain a notice of appeal rights, the Appellants were not negligent in believing the letter was not a final action.

OPINION

This matter stems from the Department of Environmental Protection's (Department) denial of a mine subsidence insurance claim made by Kevin J. and Shery K. Smith (Appellants). According to their appeal, the Appellants received notice of the Department's denial letter on September 29, 2001. They did not file their appeal until December 13, 2001, well beyond the

thirty-day appeal period allowed by 25 Pa. Code § 1021.52.

Currently before the Board is the Appellants' motion for leave to file their appeal nunc pro tunc. The Board's rules allow the filing of appeals nunc pro tunc for good cause.[1] This includes fraud or a breakdown in the Board's administrative operation or where unique and compelling factual circumstances establish a non-negligent failure to file the appeal within thirty days. *West Caln Township v. Department of Environmental Resources*, 595 A.2d 702, 704 (Pa. Cmwlth. 1991); *Hopwood v. DEP*, 2001 EHB 1254, 1259-60

The Appellants' explanation for their failure to file a timely appeal is that the Department's letter did not state that it was a final decision and did not contain a notice of appeal rights. Based on these omissions, the Appellants contend they did not understand the Department's letter to be a final, appealable action.

We note initially that a Department letter need not state that it is a final decision or contain a notice of appeal rights in order to constitute a final, appealable action. *Exeter Township v. DEP*, 2001 EHB 542, 549; *Olympic Foundry, Inc. v. DEP*, 1998 EHB 1046, 1051-52; *Franklin Township. Municipal Sanitary Authority v. DEP*, 1996 EHB 942, 946, n. 1. As the Board held in *Franklin Township*, "[T]he lack of specific language advising a person of his right to appeal does not, *per se*, prevent a Department letter from being a final, appealable action; rather, it is the content of the letter which determines whether it is an appealable action." *Id. See also, Olympic Foundry, supra* at 1051-52 (The lack of specific language does not affect the appealability of a Department letter.)

The Department's letter states as follows: "We find that damages claimed and listed on your "Damage Claim Notice"...are not covered by the terms of the Insuring Agreements."

[1] 25 Pa. Code § 1021.53(f).

However, the Appellants focus on the last sentence of the letter, which states as follows: "We will review any new information that may affect the disposition of this claim." Based on this last sentence, the Appellants state that they believed they could supplement the record and that the Department's decision was not final. The letter also advises the Appellants to contact the Department's McMurray office if they have questions regarding the decision.

In *Lehigh Township v. Department of Environmental Resources*, 624 A.2d 693 (Pa. Cmwlth. 1993), the Commonwealth Court held that conditional language, coupled with the lack of a notice of appeal rights, was an indication that a Department action was not final. In that case, the Department letter in question concluded by advising the Township of the name of an individual within the Department whom it should contact if it had any questions. The Court considered the letter's closing to be equivocal; this coupled with the fact that the letter contained no notice of appeal rights led the Court to conclude that the letter was not a final action. In reaching this decision, the Court noted as follows:

> The Township correctly notes that requiring parties to treat all correspondence from DER as final decisions would result in unnecessary litigation of negotiable disputes that could be settled without needlessly consuming taxpayer resources. *If DER considers an internal decision final and non-negotiable, it is incumbent upon it to clearly and definitively so inform the affected parties.*

Id. at 696 (emphasis added).

We find the language of the Department's letter in the present case to be even more equivocal than that considered by the Court in *Lehigh Township*. The letter invites the Appellants to submit more information and advises them that such information could affect the disposition of their claim. Based on this, it is certainly not clear that the letter was a final determination. Therefore, the Appellants were not negligent in believing the letter was not a

final, appealable action.

We note, however, that the Department is now taking the position that the letter is a final determination of the Appellants' claim. Based on this, we will allow the Appellants to file their appeal of the letter nunc pro tunc. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN J. SMITH and SHERY K. SMITH	:	
	:	
v.	:	**EHB Docket No. 2001-284-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th day of July, 2002, the Appellants' Motion for Leave to File Appeal Nunc Pro Tunc is granted.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: July 24, 2002

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

For the Commonwealth, DEP:
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Southwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

JOHN D. LIGHT	:	
	:	
v.	:	**EHB Docket No. 2001-290-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 25, 2002**

OPINION AND ORDER
DISMISSING THE APPEAL

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

Synopsis:

The Board dismisses an appeal where the appellant has signaled his intention not to pursue the appeal and the appellant has failed to comply with several Board orders.

OPINION

The Department of Environmental Protection (the "Department") issued a compliance order to John D. Light ("Light") on November 20, 2001. The order cited Light for the unpermitted dumping of solid waste, operating an unpermitted waste storage and disposal facility, creating a public nuisance, and hindering and obstructing a Department agent in the performance of his duties at the site of the alleged dumping in Swatara and Bethel Townships, Lebanon County. The order essentially directed Light to cease accepting waste and clean up the site. Light, appearing *pro se*, filed this appeal from the order on December 19, 2001. The Board issued its standard Pre-Hearing Order No. 1, which directed that all discovery in the appeal was to be completed by March 19, 2002.

On May 2, 2002, the Department filed a motion to compel Light to serve responses to

interrogatories and requests for production of documents, attend a deposition, and reimburse the Department for an appearance fee charged by a reporting service for a previously scheduled deposition. The motion averred that Light failed to respond to the Department's written discovery requests. The motion also averred that the Department on February 13, 2002 properly noticed Light's deposition for March 19, 2002. Light did not respond to the notice and did not attend the deposition. The Department had a short transcript prepared of the deposition, which noted that "[t]he parties met on February 22, 2002, at the Department's offices at 909 Elmerton to discuss the appeal. During the course of that meeting, we discussed the deposition that was scheduled for today and the Appellant and his attorney indicated that they were aware of the deposition and planned to attend." The reporting service charged the Department an appearance fee of $175.00. (Exhibit G to the motion.)

Light did not respond to the Department's motion. On May 21, 2002, we granted the Department's unopposed motion and issued an order that provided as follows:

> 1. Appellant shall serve its responses to the Department's outstanding written discovery requests, and file a copy of its certificate of service with the Board, on or before **June 3, 2002**.
> 2. Assuming Appellant has served its responses to written discovery in accordance with the preceding paragraph, Appellant shall attend a deposition at the offices of the Department beginning at 10:00 a.m. on **June 10, 2002.**
> 3. On or before **June 10, 2002**, Appellant shall reimburse the Department $175.00 for the court reporter fee resulting from Appellant's unexcused failure to appear at the previously scheduled deposition.
>
> Appellant is advised that an unexcused failure to comply with this Order could result in the imposition of sanctions, including dismissal of the appeal.

On June 18, 2002, the Department filed a motion to quash and for sanctions. The motion was supported by an affidavit. According to the motion, the parties (without the Board's consent) changed the date of Light's deposition from June 10 to June 17. Light attended that deposition.

Light did not, however, serve any responses to the Department's written discovery and did not reimburse the Department for the appearance fee.

At the June 17 deposition, Don Bailey an attorney who indicated that he represented Light, handed Department counsel two subpoenas for depositions of Departmental employees to be conducted on June 25. The Department in its motion asked the Board to quash the subpoenas because (1) they were served without permission well past the Board's discovery deadline of March 19, (2) no attendance fees were tendered, (3) Light had not complied with his own discovery obligations or this Board's orders, and (4) they were prepared and served by an attorney who had not entered an appearance in this matter as required by the Board's rules.

On June 20, we entered an Order and Rule to Show Cause. We quashed the subpoenas without prejudice. We also issued the following Rule:

> It is further ordered that a rule is hereby issued to the Appellant to show cause on or before close of business on **July 3, 2002** why his appeal should not be dismissed or other sanctions imposed for failure to comply with this Board's Order of May 21, 2002.

Light did not comply with the Order and Rule by July 3. Don Bailey, however, did enter an appearance on July 3. Then, on July 8, Light, through his attorney, filed an uncaptioned document that appeared to be a response to the Department's motion to quash. He also filed an answer to the rule to show cause. The essence of Light's responses is that he is suffering "a totally out of control form of legalized harassment" because he forced the Department inspector to obtain a search warrant to enter his property. He indicated that he is trying to comply with the Department's order. He argued that it would be pointless to supply written discovery responses or produce documents. He did not address his failure to reimburse the appearance fee.

The Board held a conference call on July 8. Both parties were represented by counsel. We

asked Mr. Bailey to explain why the appearance fee had not been paid. Mr. Bailey argued that the $175.00 fee was too high and that he intended to "appeal" it. After discussion, however, which included a declaration by this Board that the time for challenging the amount of the fee had long since passed, Mr. Bailey indicated that he would see that the fee was paid the next day. Mr. Bailey also indicated that responses to the written discovery would be supplied. Over the Department's objection, we granted Light's oral motion to depose the Departmental witnesses. We also granted the Department's request to continue Light's deposition following receipt of the written discovery responses. (The original deposition had been left open due to Light's failure to provide documents and responses.) Finally, we scheduled deadlines for remaining discovery, prehearing filings, and the hearing on the merits. We indicated that the rule to show cause would be discharged upon Light's compliance with our order.

We issued an order to memorialize the conference call on July 9, 2002. Among other things, we ordered the following:

> The Appellant shall comply with Paragraphs 1 and 3 of the Board's May 21, 2002 Order on or before **July 19, 2002**. He shall ensure that his responses and payment are received by the Department before the close of business on July 19 with a copy of the certificates of service only to the Board. The Department shall notify the Board by letter if it does not receive written responses and payment. The Appellant's compliance with this Order will discharge the rule to show cause. *Failure to comply with this Order will signify an intent not to pursue this appeal.* (emphasis added).

In accordance with our order, the Department certified in a letter dated July 19 that Light has failed to reimburse the appearance fee or supply discovery responses. We agree with the Department that Light's refusal to comply with our orders signifies his intent not to pursue this appeal. In the alternative, Light's repeated and unexcused failure to comply with this Board's rules and orders justifies a dismissal of his appeal as a sanction pursuant to 25 Pa. Code § 1021.161 (formerly

1021.125). *See Potts Contracting Company v. DEP*, 1999 EHB 958 (dismissing appeal as a sanction for multiple violations of the Board's rules and orders). We are quite satisfied that no sanction short of dismissal is likely to be meaningful or effective under the circumstances presented here.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN D. LIGHT	:	
	:	
v.	:	**EHB Docket No. 2001-290-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of July, 2002, this appeal is hereby **DISMISSED.** The hearing previously scheduled to begin on February 10, 2003 is cancelled.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: July 25, 2002

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

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Mary Martha Truschel, Esquire
Southcentral Regional Counsel

For Appellant:
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Court Reporter:
Archive Reporting Service

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEFFERSON COUNTY COMMISSIONERS, et. al	:	
	:	
	:	**EHB Docket No. 96-061-MG**
v.	:	**(Consolidated with 96-063-MG,**
	:	**96-065-MG and 96-066-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAGLE ENVIRONMENTAL, Permittee	:	**Issued: July 29, 2002**

OPINION AND ORDER ON RULE TO SHOW CAUSE

By George J. Miller, Administrative Law Judge

Synopsis

Although all the Board's upholding of the Department's suspension of the permit also involved in this appeal has finally been resolved by the denial of a petition for review in the Pennsylvania Supreme Court, the Board will not dismiss a third-party appeal of the permit as moot in order to avoid any prejudice to the parties that might result from the Board's disposition of a related appeal currently pending before the Board. The Board also will not grant the motion to sustain the appeal because the issues resolved in the suspension appeal upholding the Department's suspension order were not identical to those raised in this permit appeal.

OPINION

On June 13, 2002, the Board issued a rule to show cause why this appeal of a solid waste permit should not be dismissed in view of the Pennsylvania Supreme Court's

denial of a petition for allowance of appeal on the appeal from the Department's suspension of that permit. The Jefferson County Solid Waste Authority, the Clearfield-Jefferson Counties Regional Airport Authority and the Jefferson County Commissioners (collectively, Jefferson County), responded by filing a motion to sustain the appeal.[1] The Board initiated a conference call with the parties on July 2, 2002, and discussed the merits of dismissing the appeal as moot versus sustaining the appeal. The parties were permitted to file any additional papers explicating their various positions on or before July 19, 2002. After consideration of all the filings and the conference call discussion, we out of an abundance of caution and to avoid prejudice to any of the parties in a related appeal currently pending before the Board, we will not dismiss this appeal as moot at this time.

The legal history of this and the related appeals involving the Happy Landings Landfill is lengthy. In early 1996, the Department issued a series of permits for the operation of the landfill which was to be located in Washington Township, Jefferson County. These permits were issued to Eagle Environmental, L.P., and included a solid waste permit, an air plan approval, a NPDES permit and a permit to encroach upon certain wetlands located in the vicinity of the landfill. The Board received 7 appeals of these permits, filed by the Jefferson County appellants, several organizations and many individual residents (Permit Appeals).[2] While some of the individuals objected to the permits on the general ground that construction of the landfill would cause violations of

---

[1] This motion was joined by certain individual appellants.

[2] Some of these appeals were later dismissed for reasons not important here.

the Clean Streams Law, Jefferson County specifically charged that the Department had failed to investigate the full extent of the wetlands on the site.

Not content to rely only on the permit appeal, Jefferson County hired its own consultant to investigate the wetlands and the waterways on the site. The Pennsylvania Fish and Boat Commission also conducted its own investigation of the streams in the area to determine whether or not these streams were home to naturally reproducing brook trout populations. The Fish Commission concluded that at least three waterways were such "wild trout streams" and so informed the Department. The implication of this conclusion was that some of the wetland areas where Eagle Environmental intended to build disposal cells were now considered "exceptional value wetlands" as defined by Section 105.17 of the Department's regulations so that the wetlands could not be filled or otherwise used.[3] Accordingly, on September 25, 1996, the Department issued an order which suspended the solid waste permit in order to give Eagle an opportunity to redesign the landfill to avoid encroachment upon the wetland areas. The letter also suspended the NPDES permit, air plan approval and encroachment permit[4] which had been issued for construction of Happy Landings. Not surprisingly, Eagle Environmental appealed the September 1996 letter to the Board (Suspension Appeal).[5]

After consultation with the parties in both the Permit Appeals and the Suspension Appeal, it was agreed that the Board would stay its consideration of the Permit Appeals until final resolution of the Suspension Appeal. After a lengthy hearing, the Board

---

[3] 25 Pa. Code § 105.17

[4] The portion of the encroachment permit which authorized the filling of the exceptional value wetlands was revoked. *See Eagle Environmental, L.P. v. DEP*, 1998 EHB 896, 903.

[5] EHB Docket No. 96-215-MG.

denied Eagle's appeal of the suspension and revocation of its permits, based on evidence adduced at the hearing that relevant waterways supported naturally reproducing populations of brook trout, thereby making some of the wetland areas exceptional value wetlands.[6] Predictably, Eagle appealed this decision to the Commonwealth Court. That court ultimately affirmed the Board in an *en banc* decision on October 19, 2001.[7] Thereafter, Eagle sought permission to appeal from the Pennsylvania Supreme Court which denied its petition on June 12, 2002, putting the question of whether the waterways are in fact wild trout streams finally to rest.[8]

Before either of the resolutions by the courts, the Department, in February, 2001, sent a letter to Eagle stating that its solid waste permit was void as a matter of law because of a regulatory requirement and permit condition that landfill construction must commence within five years of the issuance of a permit or the permit is void. That determination was appealed to the Board (Khodara Appeal).[9] That matter has been scheduled for hearing on the merits before Judge Labuskes on September 4, 2002.

First, we will deny Jefferson County's motion to sustain the appeal.[10] Jefferson County filed a similar motion in 1999. We denied that motion:

---

[6] *Eagle Environmental, L.P. v. DEP*, 1998 EHB 896.

[7] *Eagle Environmental, L.P. v. Department of Environmental Protection,* No. 2704 C.D. 1998 (Pa. Cmwlth. filed October 19, 2001).

[8] *Eagle Environmental, L.P. v. Department of Environmental Protection,* 951 MAL 2001 (Pa. filed June 12, 2002)(*per curiam*).

[9] *Eagle Environmental, L.P. v. DEP*, EHB Docket No. 2001-046-L. This appeal was originally captioned as *Khodara v. DEP*, and was recently changed by order of the Board dated July 10, 2002. For the purposes of this opinion and for the sake of clarity, we will refer to it as the Khodara Appeal.

[10] A motion to sustain an appeal is in the nature of a motion for summary judgment and is reviewed in accordance with Pa. R.C.P. No. 1035.2. *Jefferson County Commissioners v. DEP,* 1999 EHB 601, 603.

> We do not believe that the wetlands issue in the appeal of the permit is identical to the wetlands issue we resolved in the appeal of the suspension of the permit. The question in the suspension hearing was whether the Department abused its discretion by suspending the solid waste permit based upon the evidence acquired in July and September, 1996, *after* the permit was initially issued, which led to the conclusion that certain wetlands were exceptional value wetlands and could not be filled. This is a slightly different question than the one we would answer concerning the issuance of the permit in the first instance. Therefore we would need to determine whether the permit application was so defective that the Department was on notice that there was a question concerning the status of the wetlands and failed to conduct an appropriate investigation. We have heard no evidence concerning the execution of any duty of the Department and the Permittee to investigate the extent and quality of the wetlands in a solid waste permit application. It may very well be that both the Department and the Permittee made a reasonable and adequate investigation, to determine whether or not exceptional value wetlands would have to be filled because of the characteristics of nearby streams. In that event, the Board might reasonably find that the Department acted properly in issuing the permit. *Compare North Pocono Taxpayer's Ass'n v. DEP,* 1994 EHB 449 (events which occurred after the issuance of a permit do not demonstrate that the Department abused its discretion in issuing the permit), *with Oley [sic] v. DEP*, 1996 EHB 1058 (holding that the Department abused its discretion in ignoring the presence of wetland indicators when it issued a Safe Drinking Water Act permit where there were obvious indications of the presence of wetlands).[11]

We do not believe the finality of the litigation in the wetland appeal changes our earlier analysis. Therefore sustaining the appeal would be inappropriate.

We next turn to the question of whether or not the Permit Appeals are moot because there is no meaningful relief that the Board can grant inasmuch as the landfill can not be constructed as it is currently designed. In response to the Board's Rule to Show Cause, Eagle expressed concern that our dismissal of the Permit Appeal may adversely affect its ability to seek a modification of the permit by redesigning Happy Landings to avoid encroachment upon the exceptional value wetlands as it was invited to

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[11] *Jefferson County Commissioners v. DEP*, 1999 EHB 601, 605-606.

do in order to earn reinstatement of the permits for construction of the landfill. It is difficult to foresee whether or not Eagle might be prejudices. However, in order to avoid any possible prejudice to Eagle or any other party that might result from the dismissal of this appeal now, we will transfer the Permit Appeals to Judge Labuskes so that they may be consolidated or otherwise dealt with in connection to the Khodara Appeal which will decide the propriety of the Department's February 9, 2001 letter voiding the solid waste permit.[12]

Accordingly, we enter the following order:

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[12] *Khodara v. DEP*, EHB Docket No. 2001-046-L.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFFERSON COUNTY COMMISSIONERS, et. al	:	
	:	**EHB Docket No. 96-061-MG**
v.	:	**(Consolidated with 96-063-MG, 96-065-MG and 96-066-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAGLE ENVIRONMENTAL, Permittee	:	

ORDER

AND NOW, this 29th day of July, 2002, IT IS HEREBY ORDERED as follows:

1. The Rule to Show Cause is hereby **DISCHARGED**.
2. The motion to sustain appeal filed by the Appellants in the above-captioned matter is hereby **DENIED**.
3. The above-captioned appeals are transferred to the Honorable Bernard A. Labuskes, Jr. for primary handling.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 29, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COLT RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-090-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 31, 2002**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand Administrative Law Judge

Synopsis:

Pursuant to the Commonwealth Court's holding in *Kent Coal Mining Co. v. Department of Environmental Resources,* a party who appeals a civil penalty assessment issued under Section 18.4 of the Surface Mining Act may challenge both the amount of the penalty as well as the fact of the underlying violation, even where that party has not appealed the compliance order giving rise to the civil penalty.

OPINION

Colt Resources, Inc. (Colt Resources) is the permittee of a surface mine located in Perry Township, Jefferson County, known as the Valier Mine. On December 14, 2001, the Department of Environmental Protection (Department) issued a compliance order to Colt Resources for mine drainage discharges at the Valier Mine. Colt Resources did not appeal the compliance order.

Subsequently, on March 19, 2002, the Department imposed a civil penalty of $500 for alleged violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; the Surface Mining Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 – 1396.31; and the regulations thereunder. Colt Resources appealed the civil penalty assessment, and, in doing so, challenged the violations cited in the earlier compliance order.

Currently before the Board is a motion filed by the Department for partial summary judgment, in which the Department asserts that Colt Resources may not challenge the facts or legality of the violations cited in the compliance order since the order was not appealed. In other words, the Department contends that Colt Resources may not dispute the mine drainage discharges cited in the compliance order. On July 30, 2002, Colt Resources filed a response asking the Board to deny the motion.

Section 18.4 of the Surface Mining Act, dealing with civil penalties, states in relevant part as follows:

> The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty *or the fact of the violation,* forward the proposed amount to the secretary for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty....

52 P.S. § 1396.18d (emphasis added). Likewise, the regulations state that "[t]he person charged with the violation may contest the penalty assessment *or the fact of the violation* by filing an appeal with the Environmental Hearing Board...." 25 Pa. Code § 86.202(a) (emphasis).

In *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988), the Commonwealth Court held that, based on the aforesaid language in the

Surface Mining Act, a party could challenge the fact of the violation as well as the amount of the fine in an appeal of a civil penalty assessment, even though the party did not appeal the earlier compliance order arising from the same violation. The Court recognized that a civil penalty assessment may not be made until months after a compliance order has been issued and would thereby force a person charged with a violation to take a cautionary appeal of any compliance order in the event that a large civil penalty were to ensue. The Court noted as follows:

> The statute recognizes that, where DER issues a compliance order charging a particular violation and then later assesses a civil penalty based on the same alleged violation, the two actions together constitute a single "order" in terms of their effect on the alleged violator. Therefore, the statute permits the alleged violator to challenge "the fact of the violation" when he or she challenges "the amount of the penalty" – that is, when the full order has been issued.

Id. at 281.

As Judge Krancer explained in *Carl L. Kresge & Sons, Inc. v. DEP*, 2000 EHB 30, the effect of the language of Section 18.4 of the Surface Mining Act and Section 86.202(a) of the regulations is to statutorily alter the doctrine of administrative finality.[1] *See also, F.R. & S., Inc. v. DEP*, 1998 EHB 336; *Berwick Township. v. DEP*, 1998 EHB 487; and *Booher v. DER*, 1990 EHB 285 (applying the *Kent Coal* doctrine under other statutes containing similar language).

Based on the *Kent Coal* holding, we find that Colt Resources may challenge both the amount of the civil penalty as well as the underlying violations set forth in the earlier compliance order. We, therefore, enter the following order:

[1] For a thorough discussion of the *Kent Coal* analysis see *Kresge, supra* at 53 – 65.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COLT RESOURCES, INC.	:	
	:	
v.	:	EHB Docket No. 2002-090-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of July, 2002, the Department of Environmental Protection's Motion for Partial Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: July 31, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COLT RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-090-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of August, 2002, after consideration of the Department of Environmental Protection's (Department) Petition for Reconsideration, and upon consideration of the fact that the Department did not have an opportunity to file a Reply to Colt Resources, Inc.'s Response to the Department's Motion for Partial Summary Judgment, the Department's Petition for Reconsideration is **granted**. The Board's Opinion and Order of July 31, 2002 is ***vacated***. The Department shall file its Reply on or before **August 30, 2002**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: August 20, 2002

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

DONNY BEAVER and HIDDEN HOLLOW ENTERPRISES, INC., t/d/b/a, PARADISE OUTFITTERS	:	
v.	:	**EHB Docket No. 2002-096-K**
	:	**EHB Docket No. 2002-151-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 8, 2002**

OPINION AND ORDER ON MOTIONS TO DISMISS

By the Board

Synopsis:

The Board grants a Department Motion to Dismiss the appeal of a Department letter (Dkt. No. 2002-096-K) which asserted the Commonwealth's legal position that it owns the riverbed of the Little Juniata River and that the public has a right to lawfully access a portion of the river adjacent to Appellants' land. The letter is not an appealable agency action within the Board's jurisdiction. The Board also grants a Department Motion to Dismiss a second appeal from a subsequent letter to Appellants (Dkt. No. 2002-151-K). The second letter merely reiterates the legal positions outlined in the original letter and similarly does not constitute an appealable action.

I. Introduction

These appeals concern two letters, dated March 27, 2002 and June 17, 2002, sent by the Department of Environmental Protection (DEP) to Appellants Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters (Hidden Hollow). The underlying dispute between

the parties involves a controversy over whether the Commonwealth owns the riverbed of the Little Juniata River or, conversely, Appellants can lawfully claim ownership over a portion of the riverbed lying adjacent to their land. In short, the parties are engaged in a property dispute.

Presently before the Board are: (1) DEP's Motion to Dismiss the appeal at No. 2002-096-K, filed on June 11, 2002, seeking dismissal for lack of jurisdiction over DEP's action of issuing the March 27, 2002 letter; and, (2) DEP's Motion to Dismiss the appeal at No. 2002-151-K, filed July 2, 2002, similarly requesting dismissal of an appeal of the June 17th letter. After careful consideration, we will grant these two Motions and dismiss the appeals.

II. Factual and Procedural Background

Hidden Hollow sells services for fly fishing and other outdoor recreational activities in various streams within the Commonwealth renowned for their excellent fly-fishing opportunities. Such services include the provision of professional fishing guides, lodging, and other amenities to individuals and companies. According to Appellants, an integral part of Hidden Hollow's business is their ability to provide opportunities to fish in exclusive private waters to which access is limited and controlled by Hidden Hollow or its affiliates.

Appellants own or control facilities and real property located in Huntingdon County at the confluence of Spruce Creek and the Little Juniata River (the "Espy Property"). As part of its business, Hidden Hollow offers fly fishing and other recreational services in a 1.3 mile segment of the Little Juniata River adjacent to the Espy Property (the "Disputed Property"). For some time, Appellants have advertised the Disputed Property as a private stretch of the Little Juniata River accessible only to their customers, and they have apparently attempted to exclude the public from fishing in those allegedly private waters.

DEP contends that for at least the past ten years the Commonwealth has been concerned

that the public's right to use the Little Juniata River was being improperly denied.[1] Recently, in February 2002, DEP received a detailed complaint from a public interest organization called Citizens for Pennsylvania's Future, filed on behalf of itself, the Pennsylvania Federation of Sportsmen's Clubs, Inc., and Pennsylvania Trout. The complaint alleged that the public was being excluded from the Disputed Property by proprietors of the Espy Property, and requested that the Commonwealth take action to defend both its claim of ownership to the bed of the Little Juniata River and the consequent right of the public to enter and peaceably use that river. *See* DEP Motion (filed 6/11/02), at Exhibit B.

Shortly thereafter, DEP's Deputy Secretary of Water Management (writing on behalf of the Commonwealth, the Department of Conservation and Natural Resources, DEP, and the PFBC) sent a letter dated March 27, 2002 to Appellants (the "March 27th Letter"). The March 27th Letter states in pertinent part:

> I am writing . . . to inform you that the Commonwealth owns the Little Juniata River, a navigable river of the Commonwealth and the associated submerged lands in the vicinity of the river's confluence with Spruce Creek, and holds them in trust for public use. Accordingly, the public has a right to fish and otherwise enjoy the use of the Little Juniata and associated submerged lands, so long as the public uses lawful access to the river and associated submerged lands.
>
> For some time the Commonwealth has had concerns that the public's rights were being denied. Recently, additional complaints have been brought to the Commonwealth's attention by the Citizens for Pennsylvania's Future (Penn Future) in a letter dated February 13, 2002, a copy of which is attached. Specifically, Penn Future, on behalf of several organizations and individuals, complains that your private fishing enterprise and its agents or employees are

[1] As evidence of this longstanding concern, DEP attached to its motion papers a letter sent in February 1992 from Chief Counsel for the Pennsylvania Fish and Boat Commission (PFBC) to attorneys for the then-owners of the Espy Property. *See* DEP Motion to Dismiss (filed 6/11/02), at Exhibit A. The 1992 PFBC letter states in part that the "Little Juniata River is one of the navigable waters of the Commonwealth," and explains that, as a navigable waterway, title to the land below the low water line is vested in the Commonwealth in trust for the people of Pennsylvania and the public has a consequent absolute right to fish in such waters. The 1992 letter states further that it had come to PFBC's attention that the owners of the Espy Property intended to close a portion of the Little Juniata River to public fishing and establish a private fishing club, and the letter advised that PFBC believed that the Espy Property owners had no right to impede free public fishing, wading, boating and paddling in the segment of the Little Juniata River abutting the Espy Property. *Id.*

> excluding or have engaged in activities with the intent of excluding the public from fishing the Little Juniata River in the vicinity of the confluence with Spruce Creek.
>
> As your predecessors were previously informed, ownership or other interest in lands adjacent a navigable river or stream held in trust by the Commonwealth does not vest rights in those adjacent waters. Pennsylvania Courts have confirmed that "the owners of land along the banks of navigable rivers in Pennsylvania do not have the exclusive right to fish in those rivers; that right is vested in the Commonwealth and open to the public." *Lehigh Falls Fishing Club v. Andrejewski,* 735 A.2d 718 (Pa. Super. 1999).
>
> Attempts to interfere with the public's rights including efforts to exclude the public from fishing the Little Juniata River are unlawful if the public gains lawful access to the river and associated submerged lands. If attempts to interfere with public rights continue, the Commonwealth intends to initiate appropriate legal action to protect the public's rights.

See DEP Motion to Dismiss (filed 6/11/02), at Exhibit C.

Appellants filed an appeal of the March 27th Letter in which they assert that DEP's action of sending the letter was *ultra vires* and an abuse of discretion. Approximately six weeks later, on June 10, 2002, Appellants filed a Petition for Supersedeas and an Application for Temporary Supersedeas, alleging that their business had experienced adverse impacts as a direct result of DEP's March 27th Letter. In particular, they alleged that customer contracts for the use of Appellants' facilities at the Espy Property had been cancelled due to confusion and concern created by the March 27th Letter over Appellants' ability to provide private and exclusive access to the Disputed Property. They also alleged that widespread dissemination of the content of the March 27th Letter has resulted in persons entering upon the Disputed Property without invitation, thereby disrupting Appellants' ongoing business operations. Following a conference call with counsel regarding the application, the Board granted a temporary supersedeas and scheduled a supersedeas hearing to commence on June 17, 2002. *See Beaver v. DEP*, EHB Dkt. No. 2002-096-K (Opinion issued June 13, 2002).

As part of its opposition to the supersedeas petition, DEP filed a Motion to Dismiss the

entire appeal, generally contending that the March 27th Letter is not an appealable action over which the Board may lawfully exercise its jurisdiction. Appellants timely filed opposition, and DEP filed a reply brief in further support of its Motion.

On June 17, 2002, at the start of the hearing on the supersedeas petition, DEP informed the Board that the agency had issued a second letter to Appellants (the "June 17th Letter").[2] The June 17th Letter, also signed by Christine Martin, states in pertinent part:

> I am writing on behalf of the Commonwealth of Pennsylvania, Department of Environmental Protection (DEP), Department of Conservation and Natural Resources (DCNR) and the [PFBC]. In light of the confusion over the nature of our earlier letter to you of March 27, 2002, this letter supersedes and rescinds that letter.
>
> It remains the collective position of the three agencies that the Little Juniata River is navigable, and therefore we believe that the public has the right to use and access the Little Juniata River and associated submerged lands. This position is based upon our understanding of the history of use of the Little Juniata River, the public highway declarations of the General Assembly, applicable case law and the Department's longstanding experience in implementing Section 15 of the Dam Safety and Encroachments Act and related Submerged Land License Agreement Program.
>
> Our collective position is not and never was a final determination concerning the issue of navigability because the question of navigability is ultimately a question of property law, which we can not resolve unilaterally. As trustees for the public resources we believe that we have the authority to assert Commonwealth property claims.
>
> Likewise we believe private landowners lack authority to unilaterally decide the question of navigability and to simply declare waters nonnavigable. Landowners who believe they hold title to property claimed by the Commonwealth may seek a remedy before the Pennsylvania Board of Property. It is unfortunate that you have not chosen to resolve this issue in the Board of Property or in another appropriate civil forum. We remain willing to discuss our position on navigability with you and to hear from you on this issue as we offered in our earlier letter. This letter serves as notice that the Commonwealth agencies may need to initiate appropriate legal action to resolve the issue of navigability of

[2] The June 17th Letter, in part, purported to rescind and supersede the March 27th Letter. DEP indicated at the supersedeas hearing that, in consequence of the purported rescission of the earlier letter, DEP was filing a motion to dismiss the appeal at No. 2002-096-K based on mootness, arguing that the June 27th Letter rendered nugatory any appeal of DEP's March 27th Letter. A copy of the June 27th Letter was presented to the Board for its immediate consideration prior to taking any testimony on the supersedeas petition.

the Little Juniata River if it remains in dispute.

See Motion to Dismiss (filed 7/2/02), at Exhibit B.[3]

Appellants filed an appeal of the June 17th Letter, docketed at EHB Dkt. No. 2002-051-K. On July 2, 2002, DEP filed a Motion to Dismiss the appeal of the June 17th Letter, arguing that the Board lacks jurisdiction over the second letter because it also is not an appealable action. Appellants filed opposition to DEP's Motion to Dismiss the second appeal, and DEP duly filed a Reply Brief in further support of its second Motion.

III. Discussion

We will address DEP's two motions to dismiss simultaneously in this opinion because of the identity of issues and arguments raised by each motion.

A. Standard of Review

The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Ainjar Trust v. DEP*, 2000 EHB 505, 507; *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282.[4]

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[3] The Board temporarily recessed the supersedeas hearing to consider the June 17th Letter, and after holding a conference with counsel at which an agreement between the parties was reached, the Board ordered that the hearing on Appellants' supersedeas petition would be recessed and the temporary supersedeas entered by the Board on June 13, 2002 would be continued until further Order of the Board.

[4] As a matter of practice the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction is in issue. *Florence Township and Donald Mobley v. DEP*, 1996 EHB 282, 301-03; *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421 n.7; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("Where there are no facts at issue that touch jurisdiction, a motion to quash may be decided on the facts of record without a hearing."). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' pleadings when resolving these Motions to Dismiss.

B. The Board Does Not Have Jurisdiction Over These Two Appeals

DEP argues that the Board lacks jurisdiction over these appeals because the content of the letters is limited to informing Appellants of DEP's legal position and advising them of potential future legal proceedings. The letters do not impose any obligation or require compliance with any specific course of conduct; consequently, neither letter is an appealable action. DEP also contends that the Board does not have jurisdiction over the resolution of property disputes between individuals and the Commonwealth. Because the two letters merely assert the Commonwealth's claim of ownership over the Disputed Property, DEP argues that Appellants' challenge to the validity of the letters in these two appeals is simply part of an ongoing property dispute which does not come within the scope of the Board's jurisdiction.

Appellants counter that the letters are more than the statement of a legal position; they argue that the agency has decided their property rights and has ordered them to cease excluding persons who lawfully access the Little Juniata River. They also emphasize their allegation that publication of DEP's letters has had a deleterious effect on their business. Appellants controvert DEP's characterization of the appeals as a property dispute by asking the Board to draw a very fine distinction. They insist they are only seeking a declaration that DEP has no legal authority—pursuant to statute or constitutional provision—to declare that the Little Juniata River is navigable and the Commonwealth owns the river. They argue that the Board can grant the limited remedy they seek without becoming involved in the underlying property dispute.

The outlines of the Board's jurisdiction are set forth in the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, as amended, 35 P.S. §§ 7511 *et seq.* (the EHB Act). Pursuant to the EHB Act: "The board has the power and duty to hold hearings and issue adjudications under [the provisions of the Administrative Agency Law relating to practice and procedure of Commonwealth agencies, 2 Pa.C.S. § 501 *et seq.*] on orders, permits, licenses or

decisions of [DEP]." 35 P.S. § 7514(a). The EHB Act also provides that "no action of the [DEP] 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 . . . ." 35 P.S. § 7514(c). The Board's regulations implementing the EHB Act define "action" to mean: "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). Thus, the EHB Act expressly grants the Board jurisdiction over DEP's "orders, permits, licenses or decisions," 35 P.S. §7514(a), as well as any DEP action "adversely affecting" a person's "personal or property rights, privileges, immunities, duties, liabilities or obligations." 35 P.S. §§ 7514(c); 25 Pa. Code § 1021.2(a).[5]

A review of the caselaw reveals certain principles which guide the determination of whether a particular DEP action is appealable. Although formulation of a strict rule is not possible and the "determination must be made on a case-by-case basis," *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent, the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. *See Borough of Kutztown*, 2001 EHB at 1121-24.

In particular, the Board has distinguished between descriptive and prescriptive communications—*i.e.* those which merely observe conditions, inform the recipient of alleged violations, or advise of the agency's interpretation of applicable law, and, those which direct the recipient to perform a specific course of conduct, or impose an obligation which subjects the

[5] The fact that DEP's action was in the form of a letter is irrelevant to the issue of appealability. *See, e.g., Bethlehem Steel Corporation v. DER*, 390 A.2d 1383, 1388 (Pa. Cmwlth. 1978). Rather, "the appealability of a Departmental communication turns on the substance of the communication, and not merely its title." *Goetz v. DEP*, 2001 EHB 1127, 1137.

recipient to liability or changes the status quo to the detriment of personal or property rights. Thus, for example notices of violation which merely list the violations observed, advise of the possibility of future enforcement action, or inform the recipient of the procedures necessary to achieve compliance, are not appealable actions. *See, e.g., Fiore v. DER*, 510 A.2d 880, 882-84 (Pa. Cmwlth. 1986); *Sunbeam Coal Corporation v. DER*, 304 A.2d 169, 170-71 (Pa. Cmwlth. 1973); *Lower Providence Tp. Municipal Authority v. DEP*, 1996 EHB 1139, 1140-41; *M.W. Farmer Company v. DER*, 1995 EHB 29, 30; *The Oxford Corporation v. DER*, 1993 EHB 332, 333-34. But a notice of violation which orders the recipient to take some specific action affecting its personal or property rights has been held appealable. *See, e.g., S.H. Bell Company v. DER*, 1991 EHB 587, 588-90.

We have applied the prescriptive/descriptive distinction to inspection reports, *see, e.g., Goetz*, 2001 EHB at 1137-38 (report that merely recorded inspector's observation of progress of reclamation activities was not appealable); *cf. Harriman Coal Corporation v. DEP*, 2000 EHB 1295, 1300-01 (report which reinstated earlier compliance order and directed appellant to cease all mining activity and begin reclamation was an appealable action). The same analysis applies to DEP letters. *See, e.g., 202 Island Car Wash, L.P. v. DEP*, 1999 EHB 10, 13 (portions of DEP letter that merely advised recipient of agency's interpretation of the law were not appealable); *Eagle Enterprises, Inc. v. DEP*, 1996 EHB 1048, 1049-50 (DEP letters which require no specific action on the part of appellants are not final actions over which Board has jurisdiction); *cf. Borough of Edinboro v. DEP*, 2000 EHB 835, 835-37 (letter which declared borough's sewage system hydraulically overloaded and effectively required borough to prohibit new connections, identify steps to correct perceived problems and participate in joint submission of sewage plan revision was appealable); *Medusa Aggregates Company v. DER*, 1995 EHB 414, 418-21 (letter

that effectively ordered recipient to cease mining in a certain area was appealable action).

We are persuaded that the letters at issue are not appealable actions. An examination of the substance of the two letters demonstrates that the communications are confined to a statement of the agency's legal position with respect to ownership of the Little Juniata River, and an advisory that future legal proceedings to resolve the property dispute may be initiated. The first and third paragraphs of the March 27th Letter simply contain a statement of the agency's legal position concerning ownership of the Disputed Property ("I am writing . . . *to inform you* that the Commonwealth owns the Little Juniata River, a navigable river of the Commonwealth, and the associated submerged lands in the vicinity of the river's confluence with Spruce Creek"), and an explanation of the agency's understanding of applicable property law (the Commonwealth holds such lands "in trust for public use" and "[a]ccordingly, the public has a right to fish and otherwise enjoy the use of the Little Juniata and associated submerged lands").[6]

The second paragraph of the March 27th Letter merely informs Appellants that DEP has received complaints regarding exclusion of the public from the Disputed Property, and notes concern that the public's rights are being denied. Finally, the letter advises Appellants that the Commonwealth intends to initiate appropriate legal action if attempts to interfere with the public's right to lawfully access the Little Juniata River continue. At most, these paragraphs

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[6] Indeed, the first and third paragraphs of the March 27th Letter do little more than reiterate the Superior Court's explanation in *Pennsylvania Power & Light Company v. Maritime Management, Inc.*, 693 A.2d 592 (Pa. Super. 1997):

> If a body of water is navigable, it is publicly owned and may only be regulated by the Commonwealth; ownership of the land beneath would not afford any right superior to that of the public to use the waterway. Conversely, if it is non-navigable, it is privately owned by those who own the lands beneath the water's surface and the lands abutting it, and may be regulated by them.

Id. at 593 (citing *Lakeside Park Co. v. Forsmark*, 396 Pa. 389, 153 A.2d 486 (1959); *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 A. 648 (1909)). The third paragraph of the March 27th Letter offers a legal interpretation by quoting from, and citing to, a Superior Court opinion. *See Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718 (Pa. Super. 1999) (affirming trial court's determination that Lehigh River is a navigable waterway and therefore owned by the Commonwealth and held in trust for public use).

contain a further statement of the agency's legal position with respect to Commonwealth ownership and right of public access, describe alleged violations of law by Appellants, and advise of the possibility of future legal proceedings being commenced. Thus, we can discern no material difference between the substantive content of the March 27th Letter and notices of violation which merely list violations and advise of possible future enforcement action, or between DEP letters that simply inform the recipient of the agency's interpretation of the law.

A similar analysis applies to the content of the June 17th Letter. The language of the second letter reiterates the agency's legal position ("it remains the collective position of the three agencies that the Little Juniata River is navigable, and therefore we believe that that public has the right use and access the Little Juniata River and associated submerged lands"). Like the March 17th Letter, there are no mandates to perform a specific course of conduct, no imposition of obligations which subject the Appellants to liability, and no directives changing the status quo. Moreover, neither letter displays any apparent finality. *Cf. Highridge Water Authority v. DEP*, 1999 EHB 1, 3-6 (letter permitting plan to sell and purchase additional water without requiring modification of existing water allocation permits was appealable). Rather, the two letters merely assert a claim in a property dispute that awaits resolution in a proper judicial or administrative forum. Indeed, in the June 17th Letter DEP explicitly states that their position "is not and never was a final determination concerning the issue of navigability because the question of navigability is ultimately a question of property law, which we can not resolve unilaterally."

Clearly, the context of the two letters is an ongoing property dispute—a controversy related to ownership of the Little Juniata River and the Disputed Property in particular—as opposed to a regulation or statute being enforced by the agency against Appellants. The two letters amount to nothing more than an assertion of the Commonwealth's ownership of the

Disputed Property; the Appellant's challenge to the validity of the letters, in practical effect, is thus no more than a challenge to the Commonwealth's claim of ownership.[7]

Moreover, to grant the relief sought by Appellants in these appeals would have no practical effect for Appellants' personal or property rights. Appellants argue that they seek only an adjudication that DEP has no legal authority to declare that the Little Juniata River is navigable and the Commonwealth owns the river.[8] But if the Board were to decide that the declarations in the two letters were unauthorized by statute or constitutional provision, the parties would remain in the same position they are now—in the midst of an unresolved dispute over title to certain lands with claims of ownership by the Commonwealth on one side and contrary claims by Appellants on the other. The Board does not have jurisdiction to declare the precise nature or extent of the estate in land that a party holds. *See Empire Coal Mining & Development, Inc. v. DER*, 678 A.2d 1218 (Pa. Cmwlth. 1996).[9] Thus, the distinction Appellants are asking the Board

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[7] Although we make no determination on the issue, jurisdiction over such cases would appear to lie in the Board of Property—a departmental administrative board within the Department of Community and Economic Development. *See* 71 P.S. §§ 1709.901, 1709.1104. Pursuant to statute, the Board of Property "shall also have jurisdiction to hear and determine cases involving the title to land or interest therein brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth." 71 P.S. § 337. The Commonwealth Court has "consistently held that that language [in 71 P.S. § 337] vests in the Board of Property exclusive jurisdiction to determine the title to real estate or to remove a cloud on title to such real estate where private property owners and the Commonwealth claim an interest in the same land." *McCullough v. Department of Transportation*, 541 A.2d 430, 431 (Pa. Cmwlth. 1988); *see also Krulac v. Pennsylvania Game Commission*, 702 A.2d 621, 623-24 (Pa. Cmwlth. 1997); *Kister v. Pennsylvania Fish Commission*, 465 A.2d 1333 (Pa. Cmwlth. 1983); *Stair v. Pennsylvania Game Commission*, 368 A.2d 1347 (Pa. Cmwlth. 1977). Notably, in *Hoyman v. DER*, 370 A.2d 753 (Pa. Cmwlth. 1977), the Commonwealth Court transferred an action to quiet title brought "against the Commonwealth of Pennsylvania, acting by and through the Department of Environmental Resources" to the Board of Property for determination.

[8] *Cf. Department of Transportation v. Beam*, 788 A.2d 357 (Pa. 2002) (holding that enabling statute implicitly conferred on agency the capacity to seek injunctive relief in a judicial forum in order to restrain operation of an unlicensed airport); *DER v. Butler County Mushroom Farm*, 499 Pa. 509, 513 (1982) (holding that statute impliedly authorized the issuance of administrative compliance orders by the agency).

[9] In the *Empire Coal* case, Commonwealth Court made a careful distinction between the interpretation of title documents for the purpose of determining compliance with surface mining permit regulations relating to right of entry, and the determination of the nature of actual estates in land. 678 A.2d at 1222-24. The regulation at issue, 25 Pa. Code § 86.64, required submission of a document by the permit applicant that expressly granted or reserved a right to the applicant to surface mine. The court held that the EHB, pursuant to its authority under 35 P.S. § 7514(a), "has jurisdiction to determine whether a particular document expressly grants or reserves the right to surface mine" as required by the regulation; however, an "applicant with a doubtful grant" should "seek a declaration in common

to make is of no practical import. *See Borough of Kutztown*, 2001 EHB at 1124 ("Board review is unnecessary and inappropriate in academic disputes" or in cases where person has nothing material at stake; the Board does not issue advisory opinions).

Finally, the allegation of harm to Appellants' business operations allegedly resulting from publication of the content of the two letters is irrelevant to the jurisdictional question. *See Lower Providence Tp. Municipal Authority*, 1996 EHB at 1140-41 (press conferences regarding DEP inspection of appellant's facility and resulting NOV were irrelevant to question of whether NOV was an appealable action). Even assuming the two letters were an impetus for some of Appellants' customers to cancel their contracts, or that members of the public have been emboldened by DEP's declarations to exercise their perceived right of access to all segments of the Little Juniata River, Appellants' remedy is to remove the cloud from their alleged title to the Disputed Property through a quiet title or other similar action in the forum appropriate for resolving the parties' property dispute.

Accordingly, we enter the following Order.

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pleas court concerning the precise nature of the estate that it holds." *Empire Coal*, 678 A.2d at 1223. *See also Coolspring Stone Supply, Inc. v. DEP*, 1998 EHB 209, 212 (Board has the "authority and duty to evaluate property-related issues and contracts for the purpose of determining compliance with regulations and statutes").

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONNY BEAVER and HIDDEN HOLLOW ENTERPRISES, INC., t/d/b/a, PARADISE OUTFITTERS	:	**EHB Docket No. 2002-096-K**
	:	**EHB Docket No. 2002-151-K**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 8th day of August, 2002, it is hereby ORDERED as follows:

1. The temporary supersedeas issued in EHB Dkt. No. 2002-096-K by Opinion and Order dated June 13, 2002 and continued until further order of the Board by Order dated June 18, 2002, is hereby dissolved;

2. The Board, *sua sponte*, consolidates EHB Dkt. No. 2002-096-K and EHB Dkt. No. 2002-151-K for purposes of resolving the Motions to Dismiss for lack of jurisdiction filed by DEP in each of the respective appeals;

3. DEP's Motion to Dismiss the appeal docketed at EHB Dkt. No. 2002-096-K, filed on June 11, 2002 is hereby granted, and the docket will be marked closed and discontinued; and

4. DEP's Motion to Dismiss the appeal docketed at EHB Dkt. No. 2002-151-K, filed on June 17, 2002 is hereby granted, and the docket will be marked closed and discontinued

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Dkt. No. 2002-096-K
EHB Dkt. No. 2002-151-K

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: August 8, 2002

The concurring opinion of Administrative Law Judge Bernard A. Labuskes, Jr. and the dissenting opinion of Administrative Law Judge Michael L. Krancer are attached.

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONNY BEAVER and HIDDEN HOLLOW ENTERPRISES, INC., t/d/b/a, PARADISE OUTFITTERS	:	
v.	:	**EHB Docket No. 2002-096-K**
	:	**EHB Docket No. 2002-151-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION CONCURRING IN THE RESULT

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

I concur in the result. In response to the Department's motions to dismiss, the Appellants state that "the only legal issue raised by the Appellants' appeal is whether DEP has acted unlawfully and beyond its authority in proceeding to make a determination as to the ownership of that portion of the Little Juniata River located within the Subject Property." (Answer to Motion, ¶¶ 12, 13, 15.) They assert that the Department does not have "the power to turn private land into public land by bureaucratic fiat." (Answer, ¶ 6.) The Appellants describe the relief that they seek from this Board as follows:

> By issuing an order and accompanying opinion which informs DEP, the original complainants and their constituents, that DEP acted without and lacked the authority to "rule" on the "complaint" filed by the Penn Future, the Board can grant Appellants effective relief.

(Appellants' Brief, p. 6.) The Appellants are careful not to ask us to actually decide whether the river is navigable, or who owns the riverbed; they merely seek a ruling from us that the Department is also precluded from making such a binding legal determination. The Appellants were concerned that they were forced to file these appeals to avoid a later claim that any subsequent challenge to the Department's "determination" (quotes original) would be precluded

by administrative finality. (Brief, p. 4.)

I am having difficulty seeing where the dispute is here. The Department clearly acknowledges in its filings that the letters were never intended to "rule" on who owns the riverbed. The Department concedes that the letters have no legal or binding effect. They are nothing more than a "notice of a *claim* of ownership." (emphasis added) (*See, e.g.*, Memorandum, p. 7.) Lest there be any doubt, the Department concedes precisely the point that the Appellants would have us set forth in a ruling: "The Department agrees that it does not have the authority to make final determinations regarding property rights either." (Memorandum, p. 4.) It is obvious to me that the letters are an expression of the Department's position in a property dispute, nothing more. Even if I assume for purposes of argument that the Department intended to do more in the letters, it is now bound by its judicial admissions in these appeals that the letters have no binding or preclusive effect. *Bituminous Processing Co., Inc. v. DEP*, 2001 EHB 489, 497 (parties are bound by their judicial admissions). Therefore, it appears to me that all of the parties in these appeals acknowledge that a binding "ruling" on who owns the riverbed will need to be made by a court or other tribunal with appropriate jurisdiction.

Thus, because the Department concedes that it has done nothing more than express its opinion and threaten a future property action, there is no meaningful relief that this Board can award. We certainly are not in a position to hold that the Department is not entitled to express its opinion on property ownership. We cannot preclude the Department from threatening to sue, or from suing for that matter. We have nothing else to offer the Appellants in the way of meaningful relief. On this basis, I agree that the appeals should be dismissed. *See Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124 ("Board review is unnecessary and inappropriate in academic disputes" or in cases where person has nothing material at stake; the Board does not

issue advisory opinions).

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: August 8, 2002

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONNY BEAVER and HIDDEN HOLLOW ENTERPRISES, INC., t/d/b/a, PARADISE OUTFITTERS	:	**EHB Docket No. 2002-096-K**
	:	**EHB Docket No. 2002-151-K**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION

By: Michael L. Krancer, Administrative Law Judge

I respectfully dissent. Let us not forget that we are dealing with two motions to dismiss. I believe that this matter should not be dismissed as the Department has not shown beyond doubt that Appellants could not be entitled to maintain this case here and that it is clearly entitled to judgment of dismissal as a matter of law. The majority has discussed the basic factual background of this case and that has also been discussed in the undersigned's Opinion and Order dated June 13, 2002 granting Appellants' Petition For Temporary Supersedeas. *See Beaver v. DEP*, EHB Docket No. 2002-096-K (Opinion issued June 13, 2002).

Appealability of the March 27th Letter

The EHB Act provides that "no *action* of the [DEP] 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..." 35 P.S. § 7514(c) (emphasis added). The Board's jurisdiction covers "*orders, permits, licenses or decisions* of [DEP]." 35 P.S. § 7514(a) (emphasis added). The Board's regulations implementing the EHB Act define "action" to mean: "An *order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties,*

liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a) (emphasis added). Thus, our jurisdiction covers orders permits, licenses or decisions which adversely affect a person's "personal or property rights, privileges, immunities, duties, liabilities or obligations." 35 P.S. §§ 7514(c); 25 Pa. Code § 1021.2(a).

The March 27th Letter is clearly within that description, or, at least it cannot be concluded conclusively now that it is not. The most recent case on the subject of appealability of a Department letter is *Borough of Kutztown v. DEP*, 2001 EHB 1115. Under the analysis in that case I think that the March 27th Letter is appealable. First, the specific wording of the letter goes well beyond merely advising Appellants of the Commonwealth's position as the Department contends. The Letter states that "this is to inform you that the Commonwealth owns the Little Juniata River" and that, "[a]ccordingly, the public has a right to fish and otherwise enjoy the use of the Little Juniata and associated submerged lands, so long as the public uses lawful access to the river and associated submerged lands". This language is unqualified and definitive and not couched in terms of being the Department's contentions or assertions. The letter declares in no uncertain terms that the Little Juniata River is "navigable"—a factual determination which has not been previously adjudicated. It is a *decree, decision, determination or ruling* that the Little Juniata River is navigable. Moreover, the Letter states that, "[a]ttempts to interfere with the public's rights, including efforts to exclude the public from fishing the Little Juniata River *are* unlawful if the public gains lawful access to the river and associated submerged lands". Again, this wording is an unqualified *decree, decision, determination or ruling* that actions which Appellants have undertaken *are*—not may be or are contended to be—but *are* unlawful. Finally, the Letter states that, "[I]f attempts to interfere with public rights continue, the Commonwealth

intends to initiate appropriate legal action to protect the public's rights". To paraphrase from the *Borough of Kutztown* decision, the Department, in this part of the letter, is not saying to Appellants that they might want to think about stopping restricting access or that doing so would be a good idea, the Department is telling Appellants to stop restricting access. *Borough of Kutztown*, *supra* at 1122. Viewed in this manner, the March 27th Letter is both a *decree, decision, determination or ruling* of the Department and one which requires that action be taken or that action which may have been ongoing be ceased.

The wording of the March 27th Letter clearly is intended to result in action or cessation of action from Appellants and perhaps even others. Appellants have even presented evidence in their Supersedeas Petition that such action, at least on the part of others, has indeed happened. The background behind the March 27, 2002 Letter further demonstrates that it falls on the appealable side of the line. The Letter was spurred by a February 19, 2002 letter with legal memorandum to Secretary of the Department Hess from Kurt J. Weist, Senior Attorney of PennFuture. This letter sets forth at length the history of the conflict over use of the Little Juniata River and details the position of PennFuture that the Little Juniata River is, in fact, a navigable river under the law of Pennsylvania. The memorandum culminates in a section captioned, "The Commonwealth Must Act To Defend The Title To Its Property, And To Guarantee Public Access To Public Resources". This section states that, the Commonwealth should itself claim title to the submerged lands under the River, and consistent with its claim of ownership, "the Commonwealth also should *demand* that [Appellants] *immediately desist* from, among other things, excluding anyone from any portion of the bed of the Little Juniata or interfering in any way with the peaceable use and enjoyment of the River by anyone." (emphasis added). The memorandum then states that, "[b]y itself, this kind of "*definitive statement*" of the

Commonwealth's position and intention "*might be enough to produce a change in behavior—or better yet an agreement to respect the public's right to use the [R]iver*—that would obviate any court proceedings. But if the confrontations and exclusions continue, the Commonwealth must be willing to institute a court action to defend its title to the bed of the Little Juniata." (emphasis added).

Clearly, then, the March 27, 2002 letter was intended *ad initio* to be much more than merely a mere "statement of position" as suggested by the Department. The letter was designed to be a "definitive statement" and to constitute a "demand" upon Appellants that they "immediately desist" from a certain course of behavior. Also, the Letter was intended to "produce a change in behavior . . . or an agreement" from Appellants. As I have discussed, Appellants have alleged and even submitted evidence in their Supersedeas Petition indicating that the March 27th Letter has indeed been received by at least some of its clientele as a "definitive statement" and has been construed by them to be a legally binding cease and desist order. Moreover, Appellants have produced evidence that the March 27th Letter, although not having its intended effect of changing Appellants' behavior, has had the effect of changing the behavior of some of its clientele. Given the background of the generation of the Letter this is not surprising.

For all these reasons, I do not think that the Department has sustained its heavy burden on a motion to dismiss to show that the March 27th Letter is not an appealable action.

The Empire Mining Case.

DEP argues that the Board has no jurisdiction or authority "to finally resolve disputes over property interests or to finally determine the legal navigability of a stream" and that under *Empire Mining & Development v. DER*, 678 A.2d 1218 (Pa. Cmwlth. 1996), this case must be

dismissed. The Appellants retort by pointing out that DEP's citation to *Empire Mining* is a red herring because, as Appellants have pointed out repeatedly, the issue raised in their appeal is whether DEP's actions are without statutory authority *per se* and, thus, the Board will not be required to determine who owns the Little Juniata River bed.

Given the difficult burden on sustaining a motion to dismiss, I do not agree that the *Empire Mining* case clearly establishes DEP's right to dismissal. Along the lines of Appellants' argument, I think that there is at least the potential that this case could be resolved by a determination that DEP's action under review was without statutory authority *ad initio* and, thus, the Board will not have to delve into the navigability issue. There is certainly caselaw which supports the proposition that not even the Legislature can decree that a particular waterway is navigable. *Pennsylvania Power & Light Company v. Maritime Management, Inc.*, 693 A.2d 592, 595-96 (Pa. Super. 1997) *citing Commonwealth v. Foster*, 36 Pa. Super. 433 n.2 (1908) ("[i]f a stream is not in fact navigable it cannot be made so by the mere passage of an act of assembly"). The question of whether a waterway is navigable is a factual determination to be made in an adjudicative forum. As Judge, now Justice, Eakin put it in *Pennsylvania Power & Light*:

> The Court in *Conneaut* stated the test for navigability this way:
>
> > The use to which the body of water may be put, is the true criterion. If the body of water is sufficiently large and deep to serve the public in providing transportation to any considerable extent upon its bosom, it is sufficient to give the public an easement therein, for the purpose of transportation and commercial intercourse.
>
> *Conneaut, 225 Pa. at 610, 74 A. at* [ ].
>
> In *Forsmark, supra,* our Supreme Court stated that the rule for determining the navigability of rivers is whether they are "'used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.'" *Forsmark, 396 Pa. at 391-92, 153 A.2d at 487* (quoting

Cleveland & Pittsburgh Railroad Co. v. Pittsburgh Coal Co., 317 Pa. 395, 397, 176 A. 7, 9 (1935)). The Court went on to state:

> We think that the concept of navigability should not be limited alone by lake or river, or by commercial use; or by the size of the water or its capacity to float a boat. Rather it should depend upon whether the water is used or usable as a broad highroad for commerce and the transport in quantity of goods and people, which is the rule naturally applicable to rivers and to large lakes, or whether with all of the mentioned factors counted in the water remains a local focus of attraction, which is the rule sensibly applicable to shallow streams and to small lakes and ponds. The basic difference is that between a trade--route [sic] and a point of interest. The first is a public use and the second private.

Id. at 396, 153 A.2d at 489 (emphasis added).

Pennsylvania Power & Light Company, *supra*, at 595.

Thus there is some credence to the Appellants' argument that to the extent the Department has decreed the Little Juniata River to be navigable such action would be *ultra vires ad initio* and that the Board would not have to face the navigability or supposed property rights issue. If that is the case, then the *Empire Mining* case, instead of refuting, would actually *demonstrate* the proposition that the Board has jurisdiction. *Empire Mining* involved the provision in the surface mining regulations which require a permit applicant to demonstrate that it has the right of entry on the property on which it intends to conduct surface mining activities. *Empire Mining*, *supra*, at 1222; 25 Pa. Code § 86.64. The DER denied the permit on the basis of Empire's failure to so demonstrate and an appeal ensued to the Board. After a remand back to the Board upon Empire's successful appeal of the Board's summary judgment to the Department, the Board concluded, after reviewing property interest documents and evidence and extensively discussing same, that the permittee had not demonstrated a right to enter the site on which it proposed to conduct surface mining. *Empire Mining & Development, Inc. v. DER*, 1995 EHB 944, *Empire Mining*, *supra*, at 1221. Empire appealed to the Commonwealth Court and part of

its argument there was simply that the Board lacked *any* jurisdiction to interpret in any fashion title documents and to make any determinations based on its review of rights in estates in land and that that power is reserved exclusively for the courts of common pleas. *Empire Mining*, *supra*, at 1222. The Commonwealth Court however, in upholding the Board's decision, noted first that the regulation requires that the permittee submit documentation that "expressly" grants or reserves a right to surface mine. Then, the Court noted that the EHB, pursuant to its statutory authority under Section 4(a) of the Environmental Hearing Board Act to hold hearings and issue adjudications on DER actions, has jurisdiction to determine whether a particular document expressly grants or reserves that right to surface mine. *Id.* at 1223. The Court concluded by observing that since the question is whether the documentation offered by the applicant shows an *express* grant, the issue of a *questionable* grant would not arise before the Board, and that an applicant with a grant which was less than express is free to seek a declaration in common pleas court which, presumably, would be able to delineate the exact nature of the property interest the applicant holds. *Id.*

If Appellants are correct in their *ultra vires* argument, then here, as in *Empire Mining*, the question of navigability and/or the exact extent and nature of property rights would not arise before the Board. Even if the Appellants had not countered the *Empire Mining* case argument with their *ultra vires* argument the way they did, I would still not be convinced that the appeal should be dismissed. The *Empire Mining* case, of course, has nothing to do with whether a stream is or is not navigable. In addition, as my description of the *Empire Mining* case makes clear, it does not even stand for the proposition that the Board cannot deal with questions which involve an analysis, on some level, of interests in property.

I have an even more fundamental problem with DEP's argument on this subject and the

majority's disposition of it. I think that neither litigant nor the majority has posited, briefed, or answered the question that I see in a manner completely satisfactorily at this point. Based on the briefing so far and my own research and consideration, I am not at all convinced at this point that the Board is without jurisdiction or authority to address the navigability question. Both parties' formulation of the question is conclusorily compound and/or conceptually truncated. DEP says that the Board has no authority to finally resolve disputes over property *or* to finally determine the legal navigability of a stream. Likewise, Appellants say that *Empire* stands for the proposition that the Board does not finally resolve property disputes and that the Board, in this case, will not be required to determine who owns the 1.3 mile stretch of the Little Juniata riverbed. Both formulations presume an intellectual identity or unity of navigability and property ownership. I do not accept at this point, based on my analysis and Commonwealth Court precedent which I will discuss, that the question is either necessarily logically unitary or one only of property law. I see the matters as potentially analytically distinct. Instead of being unitary, I perceive a very creditable possibility that a determination of navigability is *a factor* which, in turn, effects the property ownership question. In other words, I see the heart of the issue, as it would or could arise later in this case, as being a question of *navigability*, *i.e.*, is the stream navigable or non-navigable. Likewise, I do not necessarily accept DEP's formulation that "the question of navigability is ultimately a question of property law" as being the only possible formulation of the question. Instead, I see another formulation of the question as being—is the waterway navigable? The answer to this question is ultimately a question of fact, as those facts are found by an adjudicative body, to be applied, by that adjudicative body, against the collective jurisprudence on the subject of navigability law—not property law. *See Pennsylvania Power & Light Company*, *supra*, at 545 (outlining the test for whether a waterway is or is not navigable).

The Commonwealth Court has embraced the analytical approach that I have just outlined in a line of cases which is remarkably similar to the situation here in the area of claims by insurance policy holders under the Commonwealth sponsored Mine Subsidence Insurance Fund. The Commonwealth Court held in a three judge panel decision in *DER v. Burr*, 557 A.2d 462 (Pa. Cmwlth. 1989), and again in an *en banc* opinion in *Phillips v. DER*, 577 A.2d 935 (Pa. Cmwlth. 1989), that *the Board* had jurisdiction to hear claims from the denial of benefits under their policies even though the Board of Claims, pursuant to its enabling statute, is vested with *exclusive* jurisdiction to hear and determine any and all claims against the Commonwealth arising from contracts entered into with the Commonwealth.

In *Burr* and *Phillips* the Commonwealth Court was faced with the apparent overlap between the jurisdiction of the Act of May 20, 1937, P.L. 728, as amended, 72 P.S. §§ 4651-1 – 4651-10, establishing the Board of Claims, which provides to it exclusive jurisdiction to hear any and all claims relating to contracts in which the Commonwealth is a party, on the one hand, and the provision of the Mine Subsidence Insurance Fund Act, 52 P.S. § 3224.1, which states that any party aggrieved by an action of the Mine Subsidence Insurance Board shall have the right to appeal to the Environmental Hearing Board, on the other. Obviously, the ultimate conclusion of the *Burr* and *Phillips* Courts that the Board has jurisdiction to hear the cases of the disappointed claimants is significant in its own right but the rationale the Courts used is also very instructive on a number of fronts. In both cases, the Courts pointed out that the nature of these cases was not merely contractual but contained discrete analytical components. The *Burr* Court noted as follows:

> Finally, Appellees argue that their claims are not simply contract actions, in that they involve a threshold determination of whether or not subsidence has actually occurred. This determination involves technical issues within the EHB's expertise and is the reason, Appellees submit, for EHB jurisdiction over these sorts of

> claims. As Appellees note, this Court typically defers to the EHB on matters which involve application of its technical expertise. [citations omitted]. DER does not deny that these cases involve issues which are outside the realm of pure contract law and, indeed, admits in its brief that Appellees' arguments are 'entirely reasonable.' (Brief, p. 16). When this factor of technical expertise is considered in conjunction with the explicit language of 52 P.S. § 3224.1, we are convinced that jurisdiction over these claims properly lies in the EHB.

Burr, *supra*, at 464. The *Phillips* decision carries this analysis through. The *Phillips* Court commented that:

> At the heart of this dispute is a question concerning whether mine subsidence caused the damage to Petitioners' home. This is not purely a contractual issue. We held in Burr that the EHB has the expertise to effectively deal with such technical matters and concluded that 'when this factor of technical expertise is considered in conjunction with the explicit language of 52 P.S. § 3224.1, we are convinced that jurisdiction over these claims properly lies in the EHB.

Phillips, *supra*, at 937.

Our case here does not involve the Board of Claims or its authorizing statute. However, we have heard reference from the parties in conference, in the Department's June 17th Letter (although not in either of the motions or any briefing by the parties), and now in the majority opinion, to the Board of Property. The Board of Property is to disputes involving real property what the Board of Claims is to disputes involving contracts. The Board of Property is established by Pennsylvania law and vested with jurisdiction to hear and determine cases involving title to land or interest therein brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth. 71 P.S. § 337. The Board of Property is a departmental administrative board in the Department of Community and Economic Development and consists of three members: (1) the Secretary of Commonwealth who is the Chairperson; (2) the Secretary of Community and Economic Development; and (3) the General Counsel to the Governor. 71 P.S. §§ 1709.901, 1709.1104.

Interestingly the enabling statute for the Board of Property, unlike that for the Board of

Claims, does not specifically provide that the Board of Property has exclusive jurisdiction over such claims. Compare 72 P.S. §§ 4651-4 (the Board of Claims shall have exclusive jurisdiction to hear and resolve contract claims involving the Commonwealth) *with* 71 P.S. § 337 (the Board of Property shall have hear and determine and have jurisdiction over claims involving lands occupied or claimed by the Commonwealth). The Commonwealth Court, though, has stated that the jurisdiction of the Board of Property over claims involving lands occupied or claimed by the Commonwealth is exclusive. *Krulac v. Commonwealth of Pennsylvania Game Commission*, 702 A.2d 621, 623-624 (Pa. Cmwlth. 1997); *McCullough v. Department of Transportation*, 541 A.2d 430, 431 (Pa. Cmwlth. 1988). In any event, the apparent exclusivity of the jurisdiction in the Board of Property is not the end of the inquiry since, as the Commonwealth Court noted in *Beltrami Enterprises v. DER*, 632 A.2d 989 (Pa. Cmwlth. 1993), that in *Burr* and *Phillips* it had held that "despite the exclusivity language [specifically contained in] the Board of Claims Act we concluded that the EHB did have jurisdiction to hear the appeal [of denials of mine subsidence insurance policy claims]." *Id.* at 993. Indeed, there is a weaker case for exclusive jurisdiction for the Board of Property than for the Board of Claims since the Board of Claims' enabling statute specifically recites that it is to have exclusive jurisdiction while the enabling statute for the Board of Claims does not.

The *Beltrami* case is also very instructive on the question we may face here. In that case, the Commonwealth Court dealt with the overlapping jurisdiction between Section 4 of the Environmental Hearing Board Act and the Eminent Domain Code and resolved the matter by deciding that the Board had jurisdiction over determining whether a regulatory taking has occurred by an action of the Department. *Beltrami Enterprises v. DER*, 632 A.2d 989 (Pa. Cmwlth. 1993). Certainly, the question of whether a regulatory taking has occurred is essentially

a property question and it would be finally resolved by the Board's determination thereof.

Having reviewed and considered the holdings, conclusions and rationales of *Burr, Phillips* and *Beltrami*, I am not sure at this point that the Board would be without jurisdiction to determine the navigability issue if that issue were to be presented to us and needed to be decided in the context of a case over which we otherwise had jurisdiction pursuant to Section 4 of the Environmental Hearing Board Act. There seems to be a potential overlap between the jurisdiction conferred on this Board by Section 4 of the Environmental Hearing Board Act and that conferred upon the Board of Property by 71 P.S. § 337 similar to the statutory jurisdiction overlap which the Commonwealth Court analyzed in *Burr* and *Phillips*.

I am not yet convinced, based on my reading of *Burr* and *Phillips*, that the issue which may be presented here is a pure or unitary property ownership issue. It may very well be accurate to state here that at the heart of the dispute is a question whether the Little Juniata River is navigable or not and that this is not purely a property ownership issue. The question whether a stream is navigable or non-navigable is clearly one which can arise within the common scope of our jurisdiction *via* Section 4 of the Environmental Hearing Board Act and is within our area of expertise. For example, under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 *et seq.*, and its regulations, the general requirement that an encroachment of a waterway be permitted is waived in the case of an aerial crossing of a non-navigable stream by electric, telephone or communications lines. 25 Pa. Code § 105.12(a)(3). Likewise the permit requirement is waived for certain existing structures including a dam not exceeding five feet in height in a non-navigable stream operated and maintained for water supply purposes and a fill not located on a navigable lakes and navigable rivers. 25 Pa. Code §§ 105(b)(1), (3). No-one would dispute that any Department action which

is based on the premise that a particular waterway is navigable or non-navigable, and which action is appealed to the Board and that premise challenged, would involve our determination of whether the watercourse at issue were navigable or non-navigable. Even whether airspace is navigable is a question which is within the Board's purview. The regulations under the Solid Waste Management Act provide that landfills are prohibited to be sited within a certain proximity of the conical area of navigable airspace of airports. 25 Pa. Code § 273.202(a)(16). Indeed, the Board has dealt with this particular genre of regulation in *Jefferson County Commissioners, et al. v. DEP*, 1996 EHB 997; *Jefferson County Commissioners, et al. v. DEP*, EHB Docket No. 95-097 (Adjudication issued February 28, 2002).

In addition, the question of whether a particular waterway is navigable or non-navigable is for the most part a factual question, as I have already established, and the Board acts as a finder of facts. *Pennsylvania Power & Light Company*, *supra*, 693 A.2d at 595 (the determinative question is whether the waterway is navigable in fact, if navigable in fact it is so in law); *Birdsboro et al. v. DEP*, 795 A.2d 444, 447 (Pa. Cmwlth. 2000) (Environmental Hearing Board is a finder of fact based on evidence presented to it and Commonwealth Court does not reevaluate evidence presented to the Board and credibility determinations made by the Board). Moreover, the type of evidence that would be presented is predominantly not of the nature of title and deed or other grantor/grantee type materials but, on the contrary, would be more in the nature of the historical use of the particular waterway and whether it has historically served as a physical passageway for persons and/or commerce. *Pennsylvania Power & Light Company*, *supra*, at 595-96.

In any event, these cases are very instructive and the parties did not have an opportunity to brief these cases in full before the majority dismissed the appeal. In my view that prematurely

prevented Appellants, and the Department, from allowing the Board to draw satisfactorily definitive conclusions about what impact, if any, they have on this case.

For all of these reasons I cannot conclude at this stage of the proceedings that the Department is entitled to dismissal of this case based on the *Empire Mining* case.

DEP's Second Motion to Dismiss for Mootness

It is clear that the twin cases of *Borough of Edinboro*, 2000 EHB 835 (*Edinboro I*) and *Borough of Edinboro*, 2000 EHB 1067 (*Edinboro II*) are the focus of our analysis of whether the appeal of the March 27th Letter is rendered moot by the June 17th Letter. In fact, in its Reply Brief, DEP states the issue succinctly that the success or failure of DEP's second Motion to Dismiss "turns on the efficacy of the rescission in the Second Letter." DEP Reply Brief, at 1. In *Edinboro I*, the Department sent a letter to the appellants which stated that the Department expected the Borough to prohibit new sewer connections in certain areas and that it was requiring the full participation by the Borough in the development and submission of a Sewage Facilities Plan update together with another municipality. The Borough appealed. Then, the Department sent a second letter which stated that,

> This letter is being sent . . . to clarify the [previous letter]. Please be advised that the [first letter] only intended to inform you of your obligations under Pennsylvania Law. To the extent that a portion of the [first letter] can be construed to require anything beyond what Pennsylvania statutes or regulations require, that was not intended and that portion of the [first letter] is hereby withdrawn.

Id. at 836. The Department argued that the first letter was not appealable but, in any event the second letter rendered the matter moot. The Board held that the first letter was appealable and, importantly for the present analysis, that the second letter did not render the appeal moot. The Board reasoned as follows:

> The [second letter] does not withdraw the duties imposed by the [first letter]. It does not advise Edinboro that it is no longer required to institute a connection

> ban, submit a report that describes how overloading will be addressed, or participate in a joint planning effort with Washington Township. It is merely an attempt to characterize the earlier letter as a nonappealable action. It is irrelevant.

Id. at 837-38.[10]

Then, in response to the Board's decision denying its first motion to dismiss, the Department issued a third letter to Edinboro. According to the description of that third letter by the Board in its opinion and order on the second Department motion to dismiss which was based the third letter, that letter "specifically withdrew the original letter 'in its entirety' and stated that Edinboro was not required to take any action." *Edinboro II*, *supra* at 1068. This time the Board granted DEP's motion to dismiss because the third letter "explicitly" and "completely" withdrew the first letter and had, thus, rendered the appeal of the first letter moot. *Id.*

I believe, viewing the matter in the light most favorable to Appellants as we ought to be doing, that the situation here is not so clearly within the ambit of *Edinboro II* as to require dismissal. Here, the second letter has a bit of a split personality or double message as evidenced by both parties' ability to point to language therein which supports the position that the second letter does withdraw the first and to language which supports the position that the second letter restates important parts of the first one. It is true that the June 17th Letter says that it "supersedes and rescinds" the first letter. But the June 17th Letter does not end there as it goes on to say that "it remains the collective position of the three agencies that the Little Juniata River is navigable", and "we believe that the public has the right to use and access the Little Juniata River and associated submerged lands". I do not agree with Appellants' argument that in order to be effective, a subsequent letter would have to say that the earlier action had been unlawful, but I

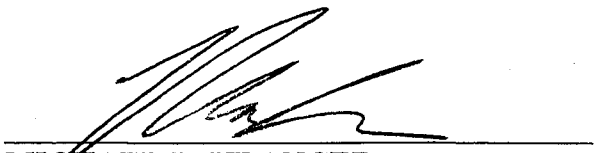
[10] Judge Labuskes's injunction that the second letter analyzed in *Edinboro I* was "merely an attempt to characterize the earlier letter as a nonappealable action" hits the nail on the head why I do not put as much stock as does the concurring opinion in the notion that "DEP clearly acknowledges in its filings that the letters do not 'rule' on who owns the riverbed in question. The DEP concedes that the letters have no legal or binding effect. They are nothing more than 'notice of a claim of ownership.'" The litigants' characterization of their action under appeal, especially when the question is whether the case is appealable or not, should not be dispositive.

cannot say, on a motion to dismiss, in which we view the matter in the light most favorable to Appellants, that this June 17th Letter is an "explicit and complete" withdrawal of the first letter.

Conclusion

Based on the foregoing I would deny DEP's first and second motions to dismiss.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: August 8, 2002