Environmental Hearing Board

Adjudications

and

Opinions

1990

Volume I

PAGES 1-606

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1990

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Member ....ROBERT D. MYERS

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Secretary..............M. DIANE SMITH

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FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1990.

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

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SECRETARY TO THE BOA

LUZERNE COAL CORPORATION et al.	:	
	:	
v.	:	**EHB Docket No. 87-481-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 2, 1990**

OPINION AND ORDER

Synopsis

DER's Motion in Limine to shift the burden of proof and burden of proceeding to National and Luzerne in this consolidated appeal, pursuant to 25 Pa.Code §21.101(d), is well taken. The appellants do not dispute the existence of environmental harm under 25 Pa.Code §21.101(d)(1). Neither National nor Luzerne dispute the facts showing their substantial continuing involvement with this property and both their information on these discharges and their past ability to gather information on them and their causes. Luzerne did not elect to even dispute the Motion and National's disagreement with same is strictly limited to whether DER interprets Section 21.101(d) correctly according to Hepburnia Coal Company v. DER, 1986 EHB 563. DER did interpret this section properly; these two burdens properly belong to Luzerne and National.

OPINION

The instant consolidated appeal arises from an Order issued jointly to National Mines Corporation ("National") and Luzerne Coal Corporation ("Luzerne") by the Department of Environmental Resources ("DER") assigning liability to them under authority of Sections 315 and 316 (amongst others) of The Clean Streams Law, the Act of June 22, 1987, P.L. 1987, as amended for certain discharges, and the appeals therefrom by Luzerne and National. The Order addresses the need for collection and treatment of what it identifies as several groups of discharges. Of these groups the Flume Discharges are found by the Order to be wholly the responsibility of National while the remainder (collectively the Valley Fill Discharges and Hillside Discharges) are found to be the joint responsibility of Luzerne and National. Luzerne's involvement arises from its surface coal mine known as the Broadwater Mine, located on land owned by National. In addition to National's ownership of this land it operated its underground coal mine known as the Isabella Mine and a preparation plant in this area and disposed of coal refuse on top of the area affected by Luzerne's stripping operations.

The main thrust of National's Notice of Appeal is that the Valley Fill and Hillside discharge are Luzerne's responsibility, whereas the Flume discharge is a joint responsibility. Luzerne's Notice of Appeal takes the opposite position with emphasis on National's responsibility for all of the discharges. In due course in this appeal process, on November 20, 1989, a conference telephone conversation was held between the Board member assigned to conduct the hearing on the merits of this case and counsel for each of the parties in this proceeding. The initial purpose of this conference call was to schedule this matter for hearing on its merits on a mutually satisfactory

date. The trial was scheduled for January 10, 11, 12, 16, 17 and 18, 1990. During this call, counsel for DER indicated that DER desired to file a motion concerning shifting the burden of proof in this matter to National and Luzerne, pursuant to 25 Pa.Code §21.101(d). Accordingly, DER was directed to file its motion by December 8, 1989 and counsel for both National and Luzerne were directed to file responses thereto by December 22, 1989, so that a decision on this motion could be made before the scheduled hearing. These deadlines are memorialized in our Pre-Hearing Order No. 2 dated November 20, 1989.

Thereafter DER's instant Motion in Limine was filed.[1] By letter dated December 12 we acknowledged receipt of DER's Motion and reminded counsel for Luzerne and National to file their responses by December 22, 1989 as specified in Pre-Hearing Order No. 2. A response thereto was filed by National. No timely response of any type was filed by Luzerne.[2]

25 Pa.Code §21.101(d) provides:

> (d) When the Department issues an order requiring abatement of alleged environmental damage, the private

---

[1] DER's Motion was joined alternatively with its Motion for Summary Judgment. The Board has given Luzerne and National until December 28, 1989 to file their responses to the Motion for Summary Judgment because DER had not previously indicated it would file such a motion and the nature of same required that additional time be given to Luzerne and National to reply thereto. No ruling thereon is thus made by virtue of this Opinion and Order.

[2] On January 2, 1990 we received Luzerne's Answer to DER's Motion for Summary Judgment and Brief in support thereof, which also contained Luzerne's response to the Motion in Limine and Brief thereon. No explanation of this untimely filing or request for leave to file nunc pro tunc accompanied it. No extension of that December 22, 1989 deadline was sought by Luzerne. By January 2, 1990 this Opinion was already prepared except for this note to reflect receipt of this document. Luzerne's untimely response has not been considered in writing this Opinion.

party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:

(1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie is made that a law or regulation is being violated; and

(2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

National's "Brief of National Mines Corporation in Response to the Department's Motion in Limine" concedes that under 25 Pa.Code §21.101(d) the first prong of the two-pronged test (found in §21.101(d)(1)) for granting DER's Motion is met.

According to the Department's Motion, its attachments and answers by Luzerne and National to DER's Interrogatories, the discharges known as the Hillside Discharges and the Valley Fill Discharges all arise on National's property and have characteristics of acid mine drainage. National's Isabella coal refuse disposal operation is on this same land and these two groups of discharges are within the coal refuse permit's boundaries. The two groups of discharges are also located immediately adjacent to the boundaries of Luzerne's surface mine and the Hillside discharges eminate from the toe of Luzerne's mine's spoil.

25 Pa.Code §21.101(d)(2) says that for a shift in the burden of proof from DER to National and/or Luzerne, in addition to the environmental damage prong,

"... the party alleged to be responsible for the environmental damage is in possession of the facts relating to the environ mental damage or should be in possession of them."

This is the second prong of the two-prong test.

In support of its claim that it meets this prong of the test as to

Luzerne, DER's motion states that

1. Luzerne conducted mining operations under Mining Permits 750-2 and 750-7 and under a lease with National during the period from 1972 to 1976 and remained liable under its bonds posted as to these permits at least until 1981.

2. Luzerne had people at its mine site throughout the 1972 to 1976 period while it was mining and reclaiming. Commencing in 1980, it had people at the site covered by Permit 750-7 because of litigation between it and the Pennsylvania Fish Commission over discharges from this permit's area (other than those which are the subject of this proceeding) and because of negotiations with DER over the treatment of same. The negotiations with DER produced a Consent Order and Agreement between Luzerne and DER under which Luzerne would collect and treat these discharges. DER says these other discharges arise within 2000 feet of the Valley Fill Discharges.

DER's Motion also states:

> [3] In addition to the fact that Luzerne and National had more personnel on site on a more regular basis than did the Department, they had frequent negotiations and discussions with one another. Luzerne and National negotiated various agreements regarding their respective uses of the property on which their mining facilities are located. These include the November 9, 1971 lease agreement (Exhibit D), a January 29, 1975 agreement concerning discharges from Mining Permit 750-2 (National's Supplemental Answer to Luzerne's Interrogatory No. 24), an October 8, 1973 agreement concerning use of a haul road (agreement attached as "Exhibit J"), and a January 22, 1980 agreement by which National accepted responsibility for revegetating those portions of Mining Permits 750-2 and 750-7 which it was reaffecting by the placement of refuse.
>
> [4] On or about 1972, Luzerne caused and allowed an unauthorized discharge of mine drainage from that portion of the Broadwater Mine subject to Mining Permit 750-2. Sometime prior to 1975, Luzerne took some action to abate this discharge. On or about 1976, Luzerne caused and

> allowed an unauthorized discharge of mine drainage from that portion of the Broadwater Mine subject to Mining Permit 750-7. Sometime prior to 1981, Luzerne took some action to abate this discharge. The Department does not know what abatement action was taken in either instance.

DER also states it has limited pre-1982 knowledge of the discharges which are the subject of this proceeding.

Luzerne is the miner, it monitored its discharges to the degree it felt necessary. It better than anyone at DER could observe the mine's stratigraphy, the quality and quantity of the groundwater encountered, the seams mined or spoiled, and where and how it disposed of spoils during reclamation. Moreover, Luzerne was involved in litigation over discharges from this mine with the Fish Commission, and negotiations with DER over treatment of same. Obviously this had to cause it to watch the site's water closely in this period. Moreover in today's regulatory climate a miner cannot ignore such matters during coal mining because of potential liability for post-mining discharges. Finally, Luzerne abated two separate discharges from its mine prior to 1981 and, as between it and DER, knows or should know how it accomplished same and what the impact of this action, if any, was on the remainder of its mine.

In Hepburnia, supra, we said:

> ... we do not imply that the quote supra from Hawk Contracting lists all of the types of observations a mine operator reasonably should be expected to make. On the other hand DER has given us little reason to conclude that, at the time of mining, Hepburnia should have made whatever observations were needed to decide the key issues of this appeal.
>
> 1986 EHB 563 at 583

Under the circumstances stated here, we are not troubled by holding the burden of proof and proceeding shifts to Luzerne under 25 Pa.Code §21.101(d). Luzerne has or should have the evidence available to it which allows it to

prove its "innocence" as to these discharges. Hepburnia Coal Company v. DER, 1986 EHB 563, Hawk Contracting et al. v. DER, 1981 EHB 150.

The situation with regard to National is slightly different, in part because National's activity on the site's surface followed Luzerne's reclamation and in part because National placed its coal refuse on the top of a portion of Luzerne's mine. DER's Motion does not suggest National remined the Broadwater mine.

National's knowledge of this site and the discharges is or should be clearly superior to DER's knowledge of same. National importantly does not dispute the validity of any of the assertions in DER's Motion concerning this site, its operations thereon, or the discharges therefrom and offers no facts rebutting or minimizing DER's assertions. It only disputes whether 25 Pa.Code §21.101(d) and Hepburnia Coal, supra, are properly interpreted by DER in its Motion.

DER's undisputed factual assertions vis a vis National and this Motion are, according to the Motion:

> 1. From the time period of 1972 to 1981, during which time...National conducted the majority of its mining activities at the Isabella Refuse Area, the Department conducted only sporadic inspections of these areas.
>
> 2. During the time period of 1972 to 1984, National would have maintained personnel on site at the Isabella Refuse Area on a regular basis because it was conducting active coal mining activities in this area. Additionally, commencing in 1976 and continuing until 1979 National's principal employee in charge of environmental matters inspected the Isabella Refuse Area approximately four times a year. From the time period of 1979 to 1984, this employee inspected the area on a monthly basis.
>
> 3. In addition to the fact that Luzerne and National had more personnel on site on a more regular basis than did the Department, they had frequent negotiations and discussions with one another. Luzerne and National negotiated various agreements regarding their respective

uses of the property on which their mining facilities are located. These include the November 9, 1971 lease agreement (Exhibit D), a January 29, 1975 agreement concerning discharges from Mining Permit 750-2 (National's Supplemental Answer to Luzerne's Interrogatory No. 24), an October 8, 1973 agreement concerning use of a haul road (agreement attached as "Exhibit J"), and a January 22, 1980 agreement by which National accepted responsibility for revegetating those portions of Mining Permits 750-2 and 750-7 which it was reaffecting by the placement of refuse.

4. National first became aware of pollutional discharges from Luzerne's surface mining in May of 1973. Commencing in 1974, National conducted periodic sampling of discharges from Luzerne's surface mine. Additionally, National first became aware of the Hillside Discharges in 1978 or 1979 as a result of OSM regulation of the site.

As to the Flume discharges, which DER's Order attributes solely to National, we believe National is indeed in the position to know what has occurred and when, concerning how they came into existence. Neither DER's Motion nor National's response contends that Luzerne had any responsibility for same. Here it is solely National's daily operation which is alleged to be the cause and there is no dispute as to the discharge's occurrence. Here as to refuse placement and this discharge, the who, what, when, where, why and how is indeed peculiarly within National's sphere of control and the information is or should be in its possession. As to these Flume Discharges, the burdens of proof and of proceeding are most properly on National, pursuant to 25 Pa.Code §21.101(d). Even if we buy National's statement in its Notice of Appeal that the Flume Discharges are jointly the responsibility of National and Luzerne (not conceded in Luzerne's Notice of Appeal or DER's Motion), National still has the position as the party placing these wastes and conducting these inspections to know what is going on here.

These two burdens also shift from DER to National jointly with Luzerne as to the Valley Fill and Hillside Discharges, pursuant to Section

21.101(d). Not only has National monitored conditions on the land leased to Luzerne, it has monitored Luzerne's discharges on a regular basis, conducted internal environmental inspections of its own operations on a regular basis (at least on a monthly basis for parts of six years according to DER's Motion) and had operating personnel disposing of coal refuse on this site on what appears to be a routine basis.

Here also National is more than merely another coal permittee. National also owns the land which Luzerne was mining and reclaiming under a lease with National. This is the same land on which National is placing its refuse. National is thus land user and landowner. To suggest in this latter role a lack of interest in the land when mining and refuse disposal cease, is to ignore a reality of real property ownership in this country. It also requires us to ignore Section 316 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, which authorizes DER to impose water pollution abatement duties on National as either a landowner or a land occupier and requires us, without foundation, to assume National was unaware of potential Section 316 landowner liability.

This shifting of burdens to Luzerne and to National is only _vis a vis_ DER. It is also a shifting which, we emphasize, occurs because of the facts peculiar to this case. We are not deciding questions of burden of proof between Luzerne and National or even whether we have jurisdiction to decide their degrees of liability or nonliability as between each other. The DER Order says that as to the Hillside and Valley Fill Discharges, Luzerne and National will jointly take the outlined steps to collect and treat same. This Order's validity, rather than which of these companies has which proportionate share of liability, is the issue. As to the Flume discharges, of course the

question of order validity only applies as to National. In both situations in this case, however, in light of the facts now before us, under Hepburnia Coal, supra, and Hawk Contracting, supra, 25 Pa.Code §21.101(d) properly shifts the burdens of proof and proceeding to Luzerne and National.

O R D E R

AND NOW, this 2nd day of January, 1990, the Motion in Limine as to Allocation of Burdens of Proof and of Proceeding filed on behalf of DER is granted. Pursuant to 25 Pa.Code §21.101(d), the burdens of proof and of proceeding are shifted to Luzerne and National as to their appeals from DER's Order.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 2, 1990

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M. DIANE SMIT
SECRETARY TO THE BO

LUZERNE COAL CORPORATION et al.	:	
	:	
v.	:	**EHB Docket No. 87-481-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 2, 1990**

OPINION AND ORDER
SUR LUZERNE COAL CORPORATION'S
MOTION IN LIMINE TO EXCLUDE
INTRODUCTION OF CERTAIN EVIDENCE
AS SCIENTIFICALLY UNRELIABLE

Synopsis

Luzerne Coal Corporation has filed a Motion in Limine seeking to prevent National Mines Corporation from offering certain evidence because National has failed to show the general acceptance within its scientific field of the test procedures from which its expert will opine. The burden is on National to show that the "leaching" test of overburden or mine spoil is sufficiently well accepted within the scientific community to permit expert testimony based thereon. Showing that DER will accept such information in evaluating whether to issue a permit is not a sufficient showing in the instant appeal from a DER compliance order directing collection and treatment of discharges of acid mine drainage, nor is showing use of such leachate tests in prior cases, where the tests were not challenged on this basis.

OPINION

The above captioned consolidated appeal represents the consolidation of separate appeals by Luzerne Coal Corporation ("Luzerne") and National Mines Corporation ("National") from an Order issued to both of them by the Commonwealth's Department of Environmental Resources ("DER") to jointly collect and treat a series of discharges from a site for which DER contends they are both responsible.

In due course in this appeal's process before this Board, through a conference call amongst the parties and the Board, this matter was scheduled for trial on January 10, 11, 12 and 16, 17 and 18, 1990. Thereafter, on December 8, 1989, Luzerne filed the instant Motion to prohibit National from introducing and using the results of a "leaching" or artificial weathering test conducted on mine spoil and coal refuse for National (through expert testimony based thereon) because this leaching test does not meet the "Frye" standard for admissibility.

The "Frye" test arises from the case of Frye v. United States, 54 App.DC 46, 293 F. 1011 (1923) wherein the Court said:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Both Luzerne and National agree that the Frye test has been adopted in Pennsylvania as the test for admissibility of scientific evidence. See Commonwealth v. Middleton, 379 Pa.Super 502, 550 A.2d 561 (1988) and

Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277 (1977)[1]

National has filed both a Response to Luzerne's Motion and a Brief thereon which oppose the Motion. In turn, Luzerne has filed a Reply to National's Response.

In support of its Motion, Luzerne offers portions of the transcript of depositions in this case of Nancy Pointon and Mike Smith, hydrogeologists for DER, and James Brahosky, DER's District Mining Manager, all of whom testify that in their opinions the leaching test is generally not considered highly reliable. Brahosky and Pointon also appear to testify that scientific literature does not support its reliability as yet either.

To counter this, National cited one study reportedly concluding that in the circumstances which National says exist here, this evidence is more reliable than the results of acid based accounting tests used by Luzerne. The study was not attached to National's filings. National offers no literature as to the scientific reliability of this test and cites no testimony as to its general acceptance for accuracy within the portion of the scientific community which is familiar with same.

National also offers DER's Overburden Sampling and Testing Manual, which National concludes means that this leaching test is a DER accepted test method. To counter this, Luzerne replies that DER's acceptance of such information as part of a permit application does not mean the "Frye test is met. Luzerne argues that DER must "accept" material in an application for permit which may not constitute admissible evidence in litigation over a

---

[1] DER advised the Board it would file no response to Luzerne's Motion in Limine and it has not taken any position in this case on this dispute between the appellants.

compliance order. Thus Luzerne argues this acceptance of such information for review of a permit does not equal to general acceptance of the test in the scientific community, especially since the standards for what can be considered in a permit review verses what is admissible evidence in a hearing in litigation over a compliance order do not equate. We agree.

Moreover Luzerne says, and we believe properly, that the burden is on National to show the admissibility of expert testimony based on its leaching tests, Commonwealth v. Miller, 367 Pa.Super. 359, 532 A.2d 1186 (1987). If National wants expert testimony based in part on this test, of record before us, it must show us the leaching test has been "Fryed." It has not done so to this point.

National's Brief also raises the fact that leaching test data has been admitted in three prior cases before the Board. This is true. In Penns Woods West Chapter of Trout Unlimited v. DER, 1977 EHB 48, however, we characterized the leaching test run by DER's geologist as a method not "generally accepted by DER or the geology profession." In Lucas v. DER, 1979 EHB 114, the leaching test was objected to also, but because of the methodology used in the leaching rather than on the base of Frye, supra. In Magnum Minerals v. DER, 1988 EHB 867, we again were not asked to rule on this leaching test based on Frye, supra. This being so, the fact that the evidence was admitted in those cases without facing a "Frye" objection does not mean it can pass this test when Frye is first raised against its admission.

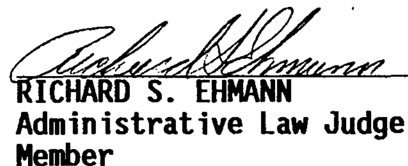
Nevertheless we are reluctant to enter an Order barring testimony based in part on these tests. While at this time National has not shown us

that we should allow this evidence into the record, and it must do so or Luzerne's motion will be granted, it may yet be able to do so. Accordingly we have entered the following order.

O R D E R

AND NOW, this 2nd day of January, 1990, a decision on Luzerne Coal Corporation's Motion in Limine to bar evidence to be offered by National Coal Corporation based upon leaching tests of coal refuse and mine spoil, is postponed until the date of the first hearings on the merits of this matter, currently set for 9:00 A.M. on January 10, 1990. At that time and prior to the commencement of the hearing on the merits of these appeals, a hearing shall be held at which National shall be allowed to offer such evidence as is available to it to show that leaching test has gained general acceptance within the portion of the scientific community which utilizes overburden analysis. In turn at that hearing Luzerne and DER shall be given an opportunity to provide us any further information available to either of them suggesting the lack of such acceptance. A ruling on this Motion shall be made at the conclusion of this hearing.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 2, 1990

cc: See next page

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M. DIANE SMITH
SECRETARY TO THE BOAR

MARK AND ELAINE MENDELSON	:	
	:	
V.	:	**EHB Docket No. 88-336-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 5, 1990
and McNEIL CONSUMER PRODUCTS CO.,	:	
Permittee	:	

OPINION AND ORDER
SUR
RULE TO SHOW CAUSE

__Synopsis__

A request for an additional 270 days to prepare their case, filed by Appellants in response to a Rule to Show Cause why that appeal should not be dismissed for failure to prosecute, will be denied when Appellants have already had 15 months to complete discovery and file a pre-hearing memorandum. A request for an award of costs to enable Appellants to prepare their case will be denied when there is no statutory authority to make such an award. Appellants are ordered to file a pre-hearing memorandum by January 26, 1990, or suffer this immediate dismissal of their appeal.

__OPINION__

This appeal was filed by Mark and Elaine Mendelson (Appellants) on August 29, 1988, challenging the issuance by the Department of Environmental Resources (DER) to McNeil Consumer Products Company (Permittee) of permits for an incinerator unit to be used to burn plant trash, pharmaceutical waste and dewatered sludge in Whitemarsh Township, Montgomery County. The permits were issued under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 __et seq__.; the Clean Streams Law (CSL), Act

of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq.

Pre-Hearing Order No. 1, issued September 19, 1988, required the parties to complete discovery within 75 days and required Appellants to file their pre-hearing memorandum on or before December 5, 1988. As a result of several requests, these deadlines eventually were extended to May 1, 1989 and May 15, 1989, respectively. In the meantime, on February 15, 1989, the Board dismissed as untimely that portion of the appeal contesting the issuance of a National Pollutant Discharge Elimination System (NPDES) permit under the CSL.

On May 3, 1989, Appellants' legal counsel (Leonard, Tillery & Davison) filed a Petition for Leave to Withdraw because of Appellants' alleged failure to cooperate or communicate. This Petition was granted on May 10, 1989, by a Board Order that also extended all deadlines to July 14, 1989, in order to enable Appellants to obtain new legal counsel. On July 25, 1989, Permittee filed a Motion to Dismiss the appeal because of Appellants' failure to obtain new legal counsel and to file their pre-hearing memorandum.

In response to this Motion, the law firm of Funt, Rothman, Weinstein & Schwartz sent a letter dated August 17, 1989, advising the Board that Appellants had asked them for legal representation (which they were considering) and requesting additional time. A Board Order dated August 30, 1989, denied Permittee's Motion to Dismiss; extended the discovery deadline to September 21, 1989; and extended the pre-hearing memorandum deadline to September 28, 1989.

No appearance was entered by Funt, Rothman, Weinstein & Schwartz and no pre-hearing memorandum was filed by the due date. A default letter, dated October 12, 1989, gave Appellants to November 6, 1989, to comply and warned

them that sanctions (including dismissal of the appeal) authorized by 25 Pa. Code §21.124 would be imposed if they remained in default. In response to this default letter, the law firm of Klehr, Harrison, Harvey, Branzburg & Ellers sent a letter dated November 7, 1989, advising the Board that Appellants had asked them for legal representation (which they were considering) and requesting additional time.[1]

On November 14, 1989, the Board issued a Rule to Show Cause, directing Appellants to show cause on or before November 30, 1989, why their appeal should not be dismissed for lack of prosecution and for failure to obey Board Orders. On November 30, 1989, the law firm of Klehr, Harrison, Harvey, Branzburg & Ellers filed an Answer to the Rule to Show Cause, requesting an additional 270 days for discovery and for filing of a pre-hearing memorandum, and requesting an award of costs to enable Appellants to prepare their case. Permittee has opposed this latest request and has urged dismissal of the appeal. DER has stated its support for Permittee's position.

Prior to the withdrawal of their first legal counsel, Appellants had 254 days for discovery and preparation of a pre-hearing memorandum. We know that they took advantage of the discovery opportunities and know that they retained the services of an engineering firm, RHG, which provided them with a preliminary review on December 13, 1988. From the date when their legal counsel withdrew until November 30, 1989, Appellants have had an additional 204 days to retain replacement counsel, conclude discovery and file a pre-hearing memorandum. They have accomplished none of these things.[2]

---

[1] Permittee consistently has opposed every time extension requested on behalf of the Appellants since May 3, 1989.

[2] Two law firms have corresponded with the Board on Appellants' behalf, but neither firm has entered an appearance.

Appellants' request for another 270 days is grossly unreasonable and reflects the same lack of diligence in prosecuting this appeal that has characterized their actions over the past seven months.

Appellants also request an award of costs to enable them to prepare their case. They make no reference to any statutory provision authorizing us to make such an award and we know of none. While costs provisions do occur in some of the statutes which we interpret,[3] all of them limit awards to prevailing parties after a proceeding has become final. None of them provides for the making of awards "pendente lite." Moreover, none of the environmental statutes cited in footnote 3 is involved in this appeal. The only issue involving the CSL was dismissed earlier. And in order for the Costs Act to apply, the proceedings would have to be adversary proceedings brought against Appellants by DER, not the reverse.

Finding no justification for granting Appellants further delays, we will enter the following:

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[3] See, for example, section 307(b) of the CSL, 35 P.S. §691.307; section 4(b) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4; section 5 of the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966 (1966, Sp. Sess. No. 1), P.L. 31, as amended, 52 P.S. §1406.5; section 5 of the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.55; and the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 et seq. (Costs Act).

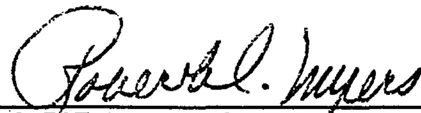
ORDER

AND NOW, this 5th day of January, 1990, it is ordered as follows:

1. Appellants' request for additional time to prepare their case is denied.

2. Appellants shall file their pre-hearing memorandum on or before January 26, 1990. If they fail to do so, an order will be entered sua sponte dismissing their appeal.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 5, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

LUZERNE COAL CORPORATION et al.	:	
	:	
v.	:	**EHB Docket No. 87-481-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 9, 1990**

OPINION AND ORDER
SUR LUZERNE COAL CORPORATION'S MOTION FOR RECONSIDERATION
OF THE OPINION AND ORDER GRANTING DER'S MOTION IN LIMINE
TO SHIFT THE BURDEN OF PROOF AND BURDEN OF PROCEEDING

Synopsis

A motion for reconsideration of interlocutory Opinion and Order will not be reviewed pursuant to 25 Pa.Code §21.122(a). 25 Pa.Code §21.122(a) does not govern reconsideration of interlocutory orders. Interlocutory orders may be reconsidered, but only in exceptional circumstances. The fact that a response to a motion in limine was filed by a party but was untimely when filed, is not grounds to reconsider such an interlocutory Opinion and Order.

OPINION

On November 20, 1989 in a conference telephone call between the member of this Board, to whom this case is assigned for primary handling, and counsel for all parties, counsel for the Department of Environmental Resources ("DER") advised that prior to a hearing on the merits of this matter she might file a motion seeking to shift the burden of proof in this case to Luzerne

Coal Corporation ("Luzerne") and National Mines Corporation ("National"). Dates for the submission of such a motion and for the submission of any responses were agreed to in this telephone conference call. In turn, these dates were memorialized in Paragraph 6 of this Board's Order of November 20, 1989.

DER's Motion was received in Pittsburgh on December 11, 1989. It was joined with a Motion for Summary Judgment against both Luzerne and National. On December 12 we sent counsel for Luzerne and counsel for National a letter concerning these DER motions. The first paragraph of the letter instructed that responses to DER's Motion in Limine were due to be filed by December 22, 1989 "...as we agreed in our conference telephone call last month." The second paragraph indicated responses to the Motion for Summary Judgment and supporting Briefs should be filed by December 28, 1989.

National filed its response to DER's Motion in Limine and subsequently, on December 28, 1989, filed its response to DER's Motion for Summary Judgment.

No timely response to DER's Motion in Limine was filed on Luzerne's behalf. On December 27, 1989 counsel for Luzerne contacted the Board member assigned to hear this case, for purposes of securing an extension for filing Luzerne's response to DER's Motion for Summary Judgment (and Brief in suport of that response) from December 28, 1989 to January 2, 1990. The Board agreed to the extension. No discussion was held as to any response by Luzerne to DER's Motion in Limine, which, as of December 27, 1989, was already five days overdue (assuming one would be filed).

An Opinion and Order granting DER's Motion was prepared by the Board during the week of December 26 through December 29, 1989, for issuance

on January 2, 1990. On January 2, 1990 Luzerne's Response to both DER's Motion for Summary Judgment and DER's Motion in Limine together with Luzerne's Brief in support thereof were received by the Board.

On January 2, 1990 the Board's Opinion and Order concerning the Motion in Limine were modified to contain a footnote, indicating that Luzerne's Response to the Motion in Limine and Brief supporting same were not considered in reaching the result set forth in that Opinion, because of the date of their filing. The Opinion and Order were then issued.

On January 3, 1990 the instant Motion was filed on Luzerne's behalf, seeking reconsideration of the Opinion and Order as to DER's Motion in Limine.[1] On January 4, 1990 Luzerne delivered to the Board's Pittsburgh office a Supplement to its Motion. Also on January 4, 1990 the Board notified counsel for National and for DER by letter that if they wished to file a response to Luzerne's supplemented Motion, they had to do so by 5:00 P.M. on January 8, 1990 (trial on the merits of this matter was then scheduled to commence on January 10, 1990).[2] National and DER have both filed such responses. National's response was included with its own Motion for Reconsideration, which Motion is not addressed herein.

As we have held in the past, reconsideration is not routine. Reconsideration pursuant to 25 Pa.Code §21.122 will only be granted in the

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[1] The Motion to Reconsider says our Opinion and Order on DER's Motion contain an error in that they say Luzerne filed no response. They were prepared before Luzerne's untimely response was received. Footnote 2 in that Opinion explains this and the fact that we did not modify that opinion except to show the untimely filing of those documents.

[2] In separate orders, both dated January 4, 1990, we denied DER's separate Motions for Summary Judgment against Luzerne and National.

limited circumstances set forth in Section 21.122 of our Rules. Wharton Township v. DER (EHB Docket No. 88-421-E, issued December 27, 1989) and Albert J. Harlow Jr. v. DER, 1987 EHB 349. As we have further held, our rules on reconsideration do not apply to interlocutory orders like that entered in this matter on January 2, 1990. Chemical Waste Management, Inc. et al. v. DER et al., 1982 EHB 482. While the Board has recognized our inherent power to reconsider our interlocutory orders, we have made it clear this will only occur in exceptional circumstances, John F. Culp III v. DER, 1984 EHB 611. As pointed out by Luzerne, this Board's failure to consider a timely filed brief could constitute such circumstances, however. Magnum Minerals v. DER, 1983 EHB 589.

In November Luzerne was ordered by this Board to file Luzerne's response to any DER Motion on shift of the burden of proof by December 22, 1989. Thereafter its counsel was sent a letter reflecting receipt by the Board of such a Motion, which again reminded him of this deadline. No timely request for an extension of the deadline was filed and neither was a timely response to the Motion. The fact that a timely request for additional time to respond to the companion Motion for Summary Judgment was made and granted, during which the Motion in Limine was not mentioned (and which would have been untimely as to the Motion in Limine in any case), does not create the exceptional circumstances visualized by John F. Culp III v. DER, supra. Further, it is clear that Magnum Minerals, supra, dealt with timely rather than untimely Briefs.

Our position on this Motion is not changed by virtue of the arguments advanced in the formal Supplement to its Motion which Luzerne delivered to us on January 4, 1990. The arguments advanced therein with case citations do not

address the issue in this case. In the cited cases where appellate courts reversed lower courts, a party was put out of court through the granting of a judgment in favor of the party's opponent. Moreover, in those cases judgments were entered for noncompliance with a rule of court. Here the Order was entered after noncompliance with our prior explicit order and, more importantly, Luzerne is <u>not</u> thrown out of court. The burdens of proof and proceeding may have changed, but it is still entitled to present all of its evidence and brief all legal issues before we decide this case on its merits. Accordingly, since exceptional circumstances have not been shown, Luzerne's Motion to Reconsider our Order of January 2, 1990 cannot be granted.

O R D E R

AND NOW, this 9th day of January, 1990, Luzerne Coal Corporation's Motion to Reconsider our Order dated January 2, 1990, granting DER's Motion in Limine, is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 9, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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For Appellant (Luzerne Coal Corp.):
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Pittsburgh, PA
For Appellant (National Mines Corp.):
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Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BOAI

LORAINE ANDREWS and DONALD GLADFELTER	:	**EHB Docket No. 87-482-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and EAST MANCHESTER TOWNSHIP	:	
and	:	
NORMAN BERMAN and DAVID SCHAD, Intervenors	:	**Issued:** January 10, 1990

OPINION AND ORDER SUR MOTION TO STRIKE

Synopsis

A motion to strike an amendment to a pre-hearing memorandum will be denied where the amendment is made well in advance of the date of hearing and results in no prejudice to the opposing parties.

OPINION

This matter was initiated by the November 17, 1987, filing of a notice of appeal by Loraine Andrews and Donald Gladfelter (Appellants), seek- review of the Department of Environmental Resources' (Department) July 23, 1987, approval of a revision to the official plan of East Manchester Township, York County, for the Riverview Subdivision, pursuant to the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act), and the rules and regulations promulgated thereunder. In their notice of appeal the Appellants alleged that the Department failed to adequately review the planning module for the proposed development, to adequately respond to problems raised by Appellants, to test for the availability of an adequate groundwater supply, to

establish whether the plan was consistent with a comprehensive program of water quality management in the watershed as a whole, to adequately assess the environmental impact of the proposed subdivision and ensure the impact will be minimized, to consider whether the subdivision was consistent with the York County comprehensive plan and master plan, and to comply with Article 1, §27 of the Pennsylvania Constitution. The Appellants also asserted that the module did not demonstrate whether the subdivision was in compliance with county or local storm water management plans.

A petition to intervene, filed on December 10, 1987, by Norman Berman and David Schad (Intervenors), the landowners and developers of Riverview, was granted by Board order dated January 6, 1988. Intervenors' motion for summary judgment was denied by the Board on May 10, 1989.

On September 25, 1989, Appellants filed their first amendment to their pre-hearing memorandum, adding the names of three expert witnesses and summaries of their proposed testimony.

On September 28, 1989, Intervenors filed a motion to strike Appellants' first amendment to the pre-hearing memorandum, arguing that none of these witnesses were identified in response to interrogatories served on March 14, 1988, or listed in the original pre-hearing memorandum. Further, Intervenors assert that Appellants never sought or received the Board's permission to amend their pre-hearing memorandum. Intervenors now contend they were denied the opportunity to prepare to answer the testimony of the proposed additional witnesses and that they have waited 17 months for a hearing and do not want to be further delayed due to Appellants' failure to prepare their case in a timely manner.

Appellants filed their answer to this motion on October 6, 1989, alleging that they reserved the right to amend in their pre-hearing memorandum

and that no objections were filed to their statement of reservation. They also contend that adequate time exists for Intervenors to prepare for the testimony of these witnesses, since no hearing date has been set.[1] Appellants further claim there is no time limit for filing amendments, nor is permission from the Board required to do so. Finally, Appellants assert that Pa.R.C.P. No. 4007.4 allows discovery to be supplemented at any time.

The Department, consistent with its practice regarding third party appeals, did not respond to the motions.

Pa.R.C.P. No. 4007.1 imposes a duty upon a party to supplement its responses to discovery requests in the following circumstances:

> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify and the substance of his testimony as provided in Rule 4003.5(a)(1).
>
> (2) A party or an expert witness is under a duty seasonably to amend a prior response if he obtains information upon the basis of which
>
>> (a) he knows that the response was incorrect when made, or
>>
>> (b) he knows that the response though correct when made is no longer true.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests to supplement prior responses.

In the notes that follow the rule it is explained that the purpose of this rule is to impose a continuing obligation on the answering party to supplement

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[1] On November 8, 1989, a hearing on the merits was scheduled for January 23-25, 1990.

its responses to interrogatories and oral depositions if it becomes aware of subsequent answers making prior answers incorrect and to discourage knowing concealment. Pa. Rules of Court - 1989, p. 292. However, this rule does not apply here, for, in this case, the Appellants are proposing to "supplement" their prehearing memorandum, not their responses to discovery requests.

The Board's rules of practice and procedure provide at 25 Pa.Code §21,82(c) that the Board may issue such pre-hearing orders as it deems necessary for limiting issues of fact and law in a proceeding. The Board employs two standard pre-hearing orders. Pre-Hearing Order No. 1 requires the submission of a pre-hearing memorandum which states the facts a party intends to prove, cites the contentions of law relied upon, identifies the order of the witnesses at hearing and includes all documents and other exhibits the party intends to introduce at the hearing. Pre-Hearing Order No. 2 requires the parties to file a stipulation listing exhibits, expert witnesses, evidence and facts agreed upon, and a statement of legal issues on which the matter turns; this stipulation must be filed approximately two weeks before the hearing. The two pre-hearing orders are designed to complement each other; Pre-Hearing Order No. 1 operates to define the issues after a period of discovery, while Pre-Hearing Order No. 2 operates to refine the issues for presentation at the hearing on the merits. Max Funk, et al. v. DER and Erie Energy Recovery Company, Inc., 1988 EHB 1242, 1248.

The General Rules of Administrative Practice and Procedure instruct the Board to construe its rules liberally in order to ensure just determination of the issues presented. 1 Pa.Code §31.2. Accordingly, the Board has frequently allowed parties to amend their pre-hearing memoranda. Concerned Citizens Against Sludge v. DER, 1983 EHB 512, Howard Fugitt and James E. Gatten v. DER, 1983 EHB 509, and North Cambria Fuel, 1986 EHB 1132.

Whether an issue not raised in a party's pre-hearing memorandum should be deemed waived is a matter for the Board's discretion; in general, waiver is not a proper remedy unless prejudice to the opposing party can be shown. North Cambria Fuel, *supra*.

Here, since the amended pre-hearing memorandum was filed well in advance of the deadline for stipulation and the date set for hearing, there was sufficient time to seek leave to depose the additional proposed experts. Consequently, there has been no prejudice and the Intervenors' motion to strike will be denied.[2]

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[2] The decision to deny the relief sought by Intervenors should not be interpreted as condoning the practice of expansively and repeatedly amending one's pre-hearing memorandum. This practice leads to additional procedural motions which delay the ultimate resolution of a matter.

O R D E R

AND NOW, this 10th day of January, 1990, it is ordered that the motion of Norman Berman and David Schad to strike Loraine Andrews' and Donald Gladfelter's First Amendment to their Pre-Hearing Memorandum is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: January 10, 1990

cc: **Bureau of Litigation**
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For East Manchester Township:
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M. DIANE SMITH
SECRETARY TO THE BOA

ACADEMY OF MODEL AERONAUTICS	:	
	:	
V.	:	**EHB Docket No. 89-365-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 12, 1990

OPINION AND ORDER
SUR
MOTION TO COMPEL DISCOVERY
AND
FOR AN EXTENSION OF TIME

Synopsis

Interrogatories and requests for production of documents are timely if made before the end of the discovery period even though the time remaining is not adequate for the answering party to respond. The answering party is free to request the Board to extend the time. The Board does not use a specific number as a litmus test in determining whether the use of interrogatories is oppressive. Instead it follows the general language of the Pa. Rules of Civil Procedure.

OPINION

This appeal was instituted on September 12, 1989 by the Academy of Model Aeronautics (Appellant), challenging the refusal of the Department of Environmental Resources (DER) to permit the use of radio-controlled aircraft at Ridley Creek State Park and Tyler State Park. Pre-Hearing Order No. 1, issued by the Board on September 14, 1989, required, inter alia, that

discovery would be "completed within 75 days of the date of this Order, unless extended for good cause upon written motion", and that Appellant would file its pre-hearing memorandum on or before November 28, 1989. This date, of course, also marked the end of the 75-day discovery period.

By a letter dated November 1, 1989, DER mailed to Appellant its First Set of Interrogatories and Request for Production of Documents. By a letter dated November 3, 1989, Appellant identified 4 "problems" it had with DER's discovery request - (1) the request was untimely since the number of days remaining in the discovery period was less than the 30 days allowed for discovery responses by Pa. R.C.P. 4006(a)(2); (2) the number of interrogatories, including sub-parts, exceeded 40; (3) maps referred to in the interrogatories were not attached; and (4) interrogatories requesting the legal basis for certain of Appellant's positions were improper.

The third "problem" was resolved by the parties but they could not agree on solutions to 1, 2 and 4. As a result, DER filed on December 8, 1989, a Motion to Compel Discovery and For an Extension of Time. Appellant responded on December 22, 1989. In the meantime, Appellant had filed its pre-hearing memorandum on November 30, 1989 and DER had filed its pre-hearing memorandum on December 20, 1989.

Most of the discovery disputes that are presented to the Board for resolution are, purely and simply, contests of wills between the opposing attorneys. It is unfortunate that the Board must expend time and resources on such trivial matters that could be put to better use in whittling down the backlog of pending cases. Appellant's first "problem" relates to the timeliness of DER's discovery request. The Board has administered the

discovery-period language of Pre-Hearing Order No. 1 so as to consider timely any interrogatories or requests for documents served within the discovery period, even though the time remaining may not be adequate for the response. In such a situation, the answering party typically requests and is granted an extension of time. Both parties have acknowledged that an extension of time would have settled this dispute; neither one would make the request, however.

With respect to Appellant's second "problem", relating to the number of interrogatories, the Board has never adopted a specific number as a litmus test. Instead, the Board has followed the general language of Pa. R.C.P. 4005(c). After reviewing DER's interrogatories and considering not only their number but also their complexity and time impositions, we conclude that they do not subject Appellant to unreasonable annoyance, embarrassment, oppression, burden or expense.

In its pre-hearing memorandum, Appellant has set forth its legal and factual contentions, named its witnesses, identified its documents, and stated that it will not present any scientific tests or expert testimony. Any factual or legal contention not contained in the pre-hearing memorandum is abandoned (Pre-Hearing Order No. 1 - ¶5). The filing of this pre-hearing memorandum moots the issue raised by Appellant's fourth "problem" - the appropriateness of DER's "contention" interrogatories. Also mooted are DER's expert witness and document interrogatories to which Appellant stated no objection.

ORDER

AND NOW, this 12th day of January 1990, it is ordered as follows:

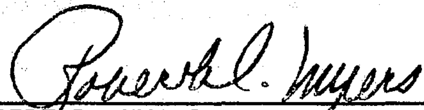
1. DER's Motion to Compel Discovery and For an Extension of Time is granted in part.

2. On or before January 31, 1990, Appellant shall file full and complete answers under oath, in accordance with Pa. R.C.P. 4005, to the following interrogatories initially propounded by DER on November 1, 1989: 1, 9, 10, 11, 12, 13, 14, 18, 19, 23, 24, 25, 26, 27, 28, 29, 30 and 31.

3. On or before January 31, 1990, Appellant shall produce at the office of legal counsel for DER, in accordance with Pa. R.C.P. 4009, all documents included in DER's Request for Production of Documents initially made by DER on November 1, 1989.

4. DER shall have the privilege of amending its pre-hearing memorandum on or before February 12, 1990.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 12, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

CONCERNED RESIDENTS OF THE YOUGH, INC.	:	
	:	
V.	:	**EHB Docket No. 86-513-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 17, 1990
and MILL SERVICE, INC., Permittee	:	

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment will be denied where the moving party has not demonstrated entitlement thereto as a matter of law, nor will it be granted where material facts remain at issue.

OPINION

The Concerned Residents of the Yough Inc. (CRY) initiated this matter September 4, 1986, by filing a notice of appeal from the Department of Environmental Resources' (DER) August 7, 1986 issuance of Solid Waste Management Permit No. 301071 (permit) to Mill Service Inc. (Mill Service). The permit, issued pursuant to the Solid Waste Management Act, the Act of July 9, 1980 P.L. 380 as amended, 35 P.S. §6018.101 et seq. (SWMA) authorized the construction and operation of a residual waste disposal facility known as Impoundment No. 6 at Mill Service's Yukon waste disposal site in South Huntingdon Township, Westmoreland County.

On September 12, 1988, CRY filed a motion for summary judgment

asserting that it was entitled to summary judgment as a result of Mill Service's unlawful conduct in the operation of Impoundment No. 5, a hazardous waste facility completely separate from but located at the Yukon site. CRY alleges that Mill Service is operating Impoundment No. 5 without a permit in violation of the "interim status" provisions of §404 of SWMA, and further, that there have been repeated discharges of hazardous wastes to the waters of the Commonwealth from the sides and bottom of Impoundment No. 5. CRY also asserts that Mill Service has failed to pay a $3000 daily fine specified in paragraph 23 of the consent order for failure to comply with the schedule set forth in the consent order. On the basis of these facts concerning Impoundment No. 5, CRY argues that the issue of the permit for Impoundment No. 6 was improper in that §503(d) of the SWMA required DER to deny Mill Service's permit application for the reason that Mill Service had engaged in unlawful conduct unless it, Mill Service, could demonstrate to the satisfaction of DER that its unlawful conduct had been corrected. CRY further asserts that Mill Service's permit application should have been denied under §503(c) of the SWMA because of the demonstrated lack of ability or intention of Mill Service to comply with the SWMA. CRY also contends that the liner for Impoundment No. 6 is improperly designed and that operational problems have resulted in violations of the SWMA.

In its response of November 7, 1988 to CRY's motion for summary judgment and motion to have the Board compel DER to revoke the Mill Service permit, Mill Service argues that the issue properly before the Board is whether, under §503(c) of the SWMA, DER abused its discretion or acted arbitrarily, capriciously or in violation of the law in issuing to Mill Service the residential waste permit [Impoundment No. 6], not whether DER should, under §503(c) of the SWMA, revoke, modify or suspend Mill Service's

permit. Mill Service also counters the arguments of CRY regarding the integrity of the liner at Impoundment No. 5 contending that the incidents are irrelevant to this proceeding because they occurred subsequent to the issuance of the permit for Impoundment No. 6. Mill Service also makes the point that the incidents at Impoundment No. 5 were contemplated by the consent order and further, that the operation of Impoundment No. 5 was not without a permit in violation of the SWMA because it had met the requirements for "interim status" set out in 25 Pa. Code §75.272(a) or, in the alternative, that Impoundment No. 5 did not require a permit by virtue of 25 Pa. Code §75.264(a)(3).

DER filed an answer to CRY's motion on November 10, 1988 concurring in general with Mill Service's contentions regarding the "interim status" of Impoundment No. 5. with regard to the requirements of 25 Pa. Code §75.272(a) and with Mill Service's contentions concerning the consent order. DER also joined Mill Service in arguing that the problems at Impoundment No. 5 are subsequent to the issue of the permit for impoundment No. 6 and are therefore irrelevant herein.

The Board is authorized to grant summary judgment when there is no genuine dispute as to material fact, and the moving party is entitled to judgment as a matter of law. Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978).

The Board does not accept CRY's argument that it be granted summary judgment in this matter on the basis of alleged problems and violations at another Mill Service facility [Impoundment No. 5], all of which are subsequent in time to the issuance of the permit for Impoundment No. 6. The question before the Board is whether DER acted properly on August 7, 1986 when it issued Mill Service a permit for Impoundment No. 6. Nor are the alleged difficulties with the liner at Impoundment No. 6 before the Board at this

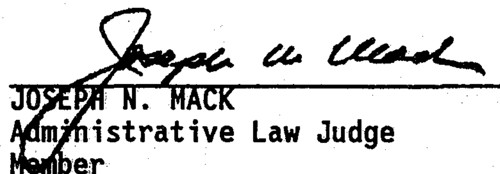
time. The issue here is the propriety of the action of DER at the time of the grant of the permit for Impoundment No. 6.

It should also be noted that in addition to these problems, there still remain substantial material facts at issue which would preclude summary judgment in this matter.

ORDER

AND NOW, this 17th day of January 1990, it is ordered that CRY's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 17, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

FELTON ENTERPRISES, INC.	:	**EHB Docket No. 87-104-E**
	:	**(Consolidated Docket)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 17, 1990

OPINION AND ORDER SUR AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

The Department of Environmental Resources' ("DER") Amended Motion for Partial Summary Judgment as to forfeiture of Appellant's surface mining bond, is granted. The motion is also granted insofar as it seeks to bar the challenge of DER Compliance Order No. 88-G-297 by Felton Enterprises, Inc. ("Felton"). Where DER's motion and supporting affidavits show a failure to backfill at Felton's mine site at the time of the forfeiture and thereafter, in violation of the requirements of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* ("SMCRA"), and the regulations promulgated thereunder, DER makes its case for summary judgment. Where DER's Compliance Order merely directs Felton's compliance with a prior unappealed compliance order to Felton, it cannot be challenged by its recipient. Felton's failure to file any response to DER's amended motion creates no dispute of a material fact or issue of law on which to deny the motion.

OPINION

This matter began on March 17, 1987, by the filing of Felton's notice of an appeal from DER's Notice of Forfeiture dated February 9, 1987. Felton's appeal challenged DER's notice of its forfeiture of two collateral and three surety bonds posted with DER by Felton in connection with Felton's surface mining operations in Derry Township, Westmoreland County, under Mine Drainage Permit No. 34A76SM9.

After this matter was scheduled for hearing on January 17, 1989, the parties requested the hearing's cancellation and it was canceled to allow settlement negotiations.

In a separate proceeding before this Board at Docket No. 88-535-R, Felton was simultaneously pursuing an appeal from DER Compliance Order No. 88-G-297 dated September 28, 1988. This Order directed Felton to cease all mining activities at the site covered by Permit No. 34A76SM9. Because Felton failed to file a pre-hearing memorandum in this proceeding, despite our order to do so, this Board issued a Rule to Show Cause why the appeal should not be dismissed. In a reply to our Rule on June 19, 1989, Felton requested that the appeal at Docket No. 88-535-R be consolidated with that at Docket No. 87-104-R. The Board granted consolidation of these two appeals by Order dated June 22, 1989.

Thereafter, on June 23, 1989, DER filed a Motion for Summary Judgment as to the collateral bond posted for Mining Permit 1665-2.[1] In paragraph 3 of that motion DER states that it has not forfeited the certificate of

[1] On June 23, 1989, DER also filed a Response to Felton's request for consolidation opposing same and thereafter petitioned this Board to reconsider its order granting consolidation of the two appeals. On June 30, 1989, we denied DER's petition.

deposit posted for Mining Permit 1665-1 (one of the two collateral bonds mentioned in its forfeiture notice). In paragraph 6 of this Motion DER also withdrew the forfeiture of Surety Bond Nos. GP465514, GP465554, and GP465312 (the three surety bonds referenced in its forfeiture notice). In response to DER's motion, Felton filed a document captioned "Reply to Motion for Summary Judgment and Countermotion." In turn, on August 3, 1989, DER filed a document captioned "Reply to Felton's Motion for Summary Judgment and Response to Felton's Reply to the Department's Motion for Summary Judgment". By Opinion and Order dated November 17, 1989, we denied both DER's initial Motion for Summary Judgment and Felton's Motion for Summary Judgment.

While the initial cross motions were pending and on September 25, 1989, DER filed an Amended Motion for Partial Summary Judgment. As to Felton's surface mining bonds, it sought forfeiture solely of the collateral bond (a $6330.00 Certificate of Deposit) posted for Mining Permit No. 1665-2. It also sought a summary judgment that as a matter of law Felton could not challenge Compliance Order No. 88-G-297. New affidavits not appearing with its initial Motion for Summary Judgment were attached to DER's amended motion.[2]

Upon receipt of the Amended Motion for Partial Summary Judgment, the Board wrote a letter dated October 2, 1989, to Felton's counsel directing that he file by no later than October 16, 1989, any objection by Felton to DER's Motion. The Board has not received a response of any type by Felton either to DER's amended motion or to the Board's letter to Felton's counsel.

---

[2] We disposed of these two entirely separate motions filed by DER serially and in two opinions for clarity's sake and because the relief sought in each was not identical.

In an appeal from a forfeiture by DER of a bond posted under SMCRA, the burden is on DER to prove, through a preponderance of evidence, that the facts justify the act of forfeiture. James E. Martin et al. v. DER, 1988 EHB 1256.

The fact that DER has such a burden does not automatically mean there must be a full hearing on the merits of any appeal from such an action. Where there is no genuine issue of material fact and DER is entitled to forfeiture as a matter of law, the Board is empowered to grant a motion, such as that now before us, for summary judgment. Commonwealth v. Summerhill Borough, 34 Pa.Cmwlth 574, 383 A.2d 1320 (1978).

In deciding whether to grant such a motion, we must be guided by the standards set forth in Pa.R.C.P. 1035. This rule provides any party may move for summary judgment on the pleadings and any depositions, affidavits, admissions and answers to interrogatories. Pa.R.C.P. 1035(b) provides the adversary party the opportunity to file opposing affidavits setting forth the contested facts. Pa.R.C.P. 1035(d) then provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added)

In the instant case when DER's Amended Motion for Partial Summary Judgment was filed with this Board, we invited Felton's counsel to make a response. Our letter of October 2, 1989, in this regard to Attorney Allan E. MacLeod has gone unanswered either by a pleading or the type of factual response envisioned in Pa.R.C.P. 1035(b) and (d). Under circumstances such as this where DER has filed a motion and supporting affidavits there is an actual

shift of the burden to Felton to offer rebuttal. Roland v. Kravco Inc., 355 Pa Super 493, 513 A.2d 1029 (1986). The lack of a response from Felton does not meet this factual burden. Accordingly, it now remains for us to determine whether under DER's facts, the law allows for bond forfeiture and dismissal of the appeal from DER's Compliance Order No. 88-G-297.

Bond Forfeiture

As to the forfeiture of Felton's Certificate of Deposit No. 3736 posted in connection with Mining Permit No. 1665-2, the simple answer is: DER is entitled to forfeiture.

Absent a response from Felton, there are no facts in dispute. Felton secured Mining Permit No. 1665-2 from DER to mine 6.33 acres of land. As part of the permit issuance process, it posted $6330 in the form of Certificate of Deposit No. 3736. This was a collateral bond to guarantee its obligations under SMCRA, the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations promulgated under these statutes, as to this mine site.

One of the requirements imposed on Felton is that it reclaim its mine site in accordance with 25 Pa.Code Chapter 87. Specifically, 25 Pa.Code §87.141(d) requires that rough backfilling and grading follow mining by not more than 60 days. According to DER's motion and the affidavit of Mine Conservation Inspector William Stroble, this mining operation began in 1982 and ceased in 1984, after affecting all 6.33 acres of land covered by this bond, but backfilling was still not completed. Clearly, backfilling and grading are not roughly concurrent with mining. These allegations and this affidavit are uncontradicted by Felton, so we cannot doubt the facts before us.

Felton's Notice of Appeal raises no legal defense to a grant of summary judgment by this Board. Upon a review of DER's Amended Motion for

Partial Summary Judgment, the affidavits submitted to support it, and Felton's failure to offer any legal or factual rebuttal thereto, the same can be said for Felton's Pre-Hearing Memorandum. Roland v. Kravco Inc, *supra*.

In light of Morcoal Company v. Commonwealth of Pennsylvania, DER, 74 Pa.Cmwlth 108, 459 A.2d 1303 (1983), there can be no question that DER has met its burden both as to forfeiture of this bond and our granting of its motion.

Compliance Order

In light of Commonwealth of Pennsylvania v. Derry Township, 466 Pa 31, 351 A.2d 606 (1971), it should come as no real surprise to Felton that its failure to timely appeal DER's Compliance Order No. 88-G-258 might have serious adverse consequences for it in terms of its subsequent ability to challenge Compliance Order No. 88-G-297. It is perhaps this fact which led Felton to fail to reply to DER's Amended Motion for Summary Judgment as it pertains to this Compliance Order. Unfortunately, we will never know the basis for that decision or if Felton had an argument or facts it wished to assert in defense of this motion.

DER has pled issuance of Compliance Order No. 88-G-258 to Felton. It has submitted an affidavit from this Board's Secretary showing that there was no appeal of that Compliance Order to this Board. It has also submitted William Stroble's affidavit saying Felton has yet to comply with Compliance Order No. 88-G-258. DER has also pled its subsequent issuance of Compliance Order No. 88-G-297 to Felton. Stroble's affidavit shows that the action which Felton was directed to undertake in DER Compliance Order No. 88-G-297 is identical to that DER directed Felton to undertake previously in unappealed DER Compliance Order No. 88-G-258.

In light of Felton's lack of any response to this motion, the facts averred by DER and established in its affidavits, Pa.R.C.P. 1035, and Common-

wealth v. Derry Township, *supra*, there is no issue left to decide with regard to DER's amended motion with respect to the Compliance Orders. As to the appeal from issuance of Compliance Order No. 88-G-297, DER's motion is granted.

ORDER

AND NOW, this 17th day of January, 1990, DER's Amended Motion for Partial Summary Judgment is granted. Felton's appeal of the forfeiture of Certificate of Deposit No. 3637 in the amount of $6330 as the collateral bond for Mining Permit No. 1665-2 is dismissed. Felton's appeal from DER's issuance of Compliance Order No. 88-G-297 is also dismissed.

ENVIRONMENTAL HEARING BOARD

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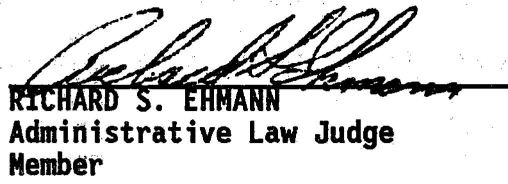
Chairman

Robert D. Myers

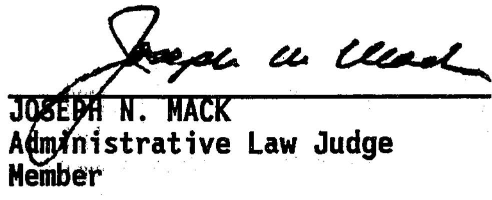
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 17, 1990

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bl

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M. DIANE SMITH
SECRETARY TO THE BOA

RUSHTON MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-213-F**
	:	**(Consolidated Appeals)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 22, 1990

OPINION AND ORDER SUR
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Synopsis

A motion for partial summary judgment filed by the Department of Environmental Resources is denied, and a cross-motion filed by the Appellants is granted, in a consolidated appeal involving forty-six coal mining activity permits issued by the Department. The "standard conditions" inserted in the permits by DER should have been promulgated as regulations because they established binding norms of general applicability and future effect.

OPINION

This proceeding involves forty-six appeals which have been consolidated for the resolution of certain common issues.[1] The appeals were filed by coal mine operators from the issuance of coal mining activity permits (permits) by the Department of Environmental Resources (DER). The common

[1] After these common issues are decided, the consolidation will be rescinded and the appeals will be processed individually to resolve issues peculiar to each appeal.

issues involve the legality of certain "standard conditions" which DER placed in these permits.[2]

This Opinion addresses motions for partial summary judgment which were filed by both DER and the Appellants.[3] In its motion, DER seeks summary judgment on three legal arguments which the Appellants raised in their pre-hearing memorandum against the standard conditions. Conversely, the Appellants in their motion seek summary judgment in their favor on these same issues.

DER's motion (at para. 6) describes the "standard terms and conditions" as follows:

a. Conditions B.1.n and B.1.o defining the terms "subsidence" and "support area";

b. Condition B.2c(1)(d)-(f) and B.2d(2)(a) relating to reporting of changes in mining activity which may result in noncompliance with the permit.

c. Condition B.2.d. relating to notification of toxic substances;

d. Condition B.2.g. relating to maintenance of records and submission of information;

e. Condition B.5.d. relating to possible enforcement actions;

f. Condition B.5.k. relating to acceptance of permit conditions;

---

[2] In addition to the forty-six appeals consolidated at this docket number, our ruling on this motion will also affect ten appeals from coal refuse disposal permits (consolidated at EHB Docket No. 86-138-F) and three appeals from permits for coal preparation facilities (consolidated at EHB Docket No. 86-517-F). These other types of permits also contained the standard conditions at issue here.

[3] Actually, DER filed a "motion to limit issues," and the Appellants filed a reply to that motion. However, during a conference call with the Board on November 17, 1989, the parties agreed that these pleadings could be treated as motions for partial summary judgment.

g. Condition C.1 relating to the filing of copies of the subsidence control portion of the permit and all supporting maps;

h. Conditions C.4 and C.5 relating to periodic mapping requirements ("six month maps");

i. Condition C.6 relating to the mapping of support areas beneath oil and gas wells; and

j. Condition C.8 relating to notification requirements for owners of surface land, political subdivisions and residents of structures overlying the mining activity.

The Appellants agree with this description of the standard conditions (Appellants' Reply, para. 6).

The legal arguments raised by Appellants upon which both parties seek summary judgment are:

> 1) The standard conditions constitute regulations and are invalid because they were not promulgated in accord with the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §1102 et seq.
>
> 2) The standard conditions are beyond DER's statutory authority because they are not necessary for the Commonwealth to maintain "primacy" in regulating surface mining of coal.
>
> 3) Certain of the standard conditions in the permits are unconstitutionally vague.

It is not necessary to address issues 2 and 3 because, as we will explain below, we conclude that the standard conditions are invalid because they were not promulgated as regulations.

DER asserted in its motion that the standard conditions are valid because DER has express authority to prescribe the terms and conditions of mining permits, citing Section 5 of the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.5;

and Sections 307 and 315 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.307 and 691.315. DER argues that permit conditions do not constitute "regulations" even if the conditions are placed in several permits regulating the same activity, citing Warren Sand & Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Commw. 186, 341 A.2d 556 (1975). DER argues that the cases cited by the Appellants for the proposition that rules of general applicability must be published as regulations are distinguishable because none of those cases involved DER's insertion of conditions in permits, as did Warren Sand & Gravel.

The Appellants argue that the standard permit conditions constitute regulations and are invalid because they have not been promulgated in accord with the Commonwealth Documents Law, 45 P.S. §1102 et seq. The Appellants contend that the standard conditions are regulations because they are "binding obligations of general applicability and future effect" (Appellant's Memorandum in Opposition to DER's Motion, p. 3). In support of this argument, Appellants cite Lopata v. Commonwealth, Unemployment Compensation Board of Review, 507 Pa. 570, 493 A.2d 657 (1985), Pennsylvania Human Relations Commission v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671 (1977), Newport Homes, Inc. v. Kassab, 17 Pa. Commw. 317, 332 A.2d 568 (1975), and Elkin v. Commonwealth, DPW, 53 Pa. Commw. 554, 419 A.2d 202 (1980). The Appellants contend that Warren Sand & Gravel does not control here because it was decided before Norristown, Elkin, and Lopata. The Appellants also question the reasoning in Warren Sand & Gravel, arguing that the mere fact that an agency possesses authority to place conditions in permits does not excuse the agency from promulgating the conditions as regulations when the conditions have a binding, general nature and future effect. Finally, the Appellants argue that the same types of policies and definitions which DER now

seeks to impose through permit conditions were previously dealt with through DER's regulations.

The cases cited by Appellants involved a variety of agency actions which the Courts held were in the nature of regulations. In Newport Homes, the Secretary of Transportation issued a "final directive" that applications for permits for trailers with widths of fourteen feet should be denied. The Court held that the final directive was a regulation because of its "general applicability and future affect" 332 A.2d at 574. Since the final directive was not validly promulgated as a regulation, the Court held that PennDOT would have to decide on the permissibility of the trailers on a case-by-case basis.

In Lopata, the Court found that a "bulletin" which the agency had relied upon in denying unemployment compensation benefits was a regulation, rather than a "statement of policy," because it created a binding norm. The Court ruled that the bulletin could not serve as a basis for decisions on benefits because it had not been published in accord with the Commonwealth Documents Law.

Finally, in Elkin, a decision by the agency to curtail benefits was reversed because the decision was based upon an unpublished internal memorandum prepared by the agency's legal counsel. Commonwealth Court reasoned that while the decision to deny benefits had the appearance of an individual adjudication, it was clearly based on a rule of general application which could have been enacted by the legislature without violating the constitutional prohibition against special legislation (Pa. Const. art III, §32). Thus, the Court concluded that the agency's conclusion fell within the

definition of regulation under the Commonwealth Documents Law,[4] and that it must be promulgated in accord with that Law to be given effect.

Applying the above precedents to the instant case, it seems clear that the standard permit conditions constitute binding norms of general application and future effect. The conditions are "binding" in that DER has inserted them into each of the mining permits involved here. Although DER has asserted that these conditions can be modified in "appropriate circumstances" (Motion to Limit Issues, para. 7), this only means that exceptions could be granted to the general rule. The conditions have a "general application" because DER has inserted them into entire classes of permits involving coal mining. Indeed, DER itself characterizes the conditions as "standard terms and conditions" (Motion to Limit Issues, para. 6). Finally, the conditions have "future effect" because DER only intended them to apply prospectively; DER did not attempt to apply the conditions to past events. Therefore, if the cases cited above are controlling, we must conclude that the standard conditions are in the nature of regulations, and that they are invalid because they were not promulgated as regulations. Newport Homes, 332 A.2d at 574, Lopata, 493 A.2d at 660, Elkin, 419 A.2d at 204, see also, Hardiman v. Commonwealth, DPW, ____Pa. Commw. ___, 550 A.2d 590 (1988).

In defense of its actions here, DER cites Warren Sand & Gravel. In that case, three sand and gravel companies appealed the insertion of certain limitations in their permits. These limitations were general in nature; they were not based upon the particular circumstances of each company's operation.

---

[4] Section 1102(12) of the Commonwealth Documents Law, 45 P.S. §1102(12), defines "regulation" as follows:

(12) "**Regulation**" means any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency.

Despite the general nature of the permit limitations, Commonwealth Court ruled that they did not constitute regulations:

> [T]he Gravel Companies have raised the question of whether the terms and conditions attached to the permits were in and of themselves rules and regulations. We hold that the terms and conditions attached to the permit (sic) are terms and conditions of the permit, rather than rules and regulations. Section 4 of the Water Obstructions Act, 32 P.S. §684, gives DER the power to incorporate terms and conditions in a permit and DER's regulations specifically provide that permits issued pursuant to the Water Obstructions Act shall be "subject to such stipulations and special conditions as may be deemed necessary in the interest of the public" See 25 Pa. Code 105.21 and 105.77.

341 A.2d at 564. In other words, since DER was empowered to place terms and conditions in permits, those terms and conditions did not constitute regulations.

It is difficult to reconcile the reasoning of Warren Sand & Gravel with that of Newport Homes, Lopata, and Elkin. As the Appellants argue in their response to DER's motion, the fact that DER has authority to place conditions in permits does not logically mean that DER may do so when those conditions are in the nature of regulations. DER's argument gives controlling effect to the labels DER places upon its actions. This approach elevates form over substance.

The proposition that the label an agency places upon its action is not controlling is supported by examining Pennsylvania Human Relations Commission v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671 (1977). There, the Supreme Court analyzed in great detail whether a document which the agency characterized as a "policy statement" was, in reality, a "regulation." While the Court ultimately agreed with the agency's characterization, it reached this conclusion only after determining that the document was, in substance as well as form, a policy statement. The Supreme

Court's approach in Norristown cannot, in our view, be reconciled with the Commonwealth Court's rationale in Warren Sand & Gravel. Therefore, looking to the substance of DER's action here, we find that the standard conditions were regulations due to their binding nature, general application, and future effect. It follows that the standard conditions are invalid because they were not promulgated as regulations.

Although this opinion is grounded in the legal precedents cited above, our conclusion also has a sound policy basis. DER issues permits in connection with many of the programs it administers. If we were to accept DER's argument in this case, we would be authorizing the Department to implement across-the-board policy changes by simply inserting "standard conditions" in permits rather than by amending its regulations, as it would otherwise have to do. By opting to insert standard conditions in permits, DER would avoid the scrutiny of the Environmental Quality Board and the necessity of requesting, and reviewing, comments from the public before the regulations are revised.[5] The procedures for amending regulations have a purpose, and we must consider that by upholding DER's authority to insert the instant standard conditions in permits, we might be frustrating that purpose.

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[5] DER would also avoid the review by legislative committees and the Independent Regulatory Review Commission attendant to the Regulatory Review Act, Act of June 25, 1982, P.L. 633, as amended, 71 P.S. §745-1 et seq. However, Commonwealth Court declared recently that key provisions of this Act are unconstitutional. Commonwealth, DER v. Jubilirer, No. 253 M.D. 1989 (filed December 7, 1989).

ORDER

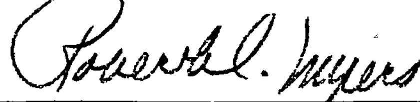
AND NOW, this 22nd day of January, 1990, it is ordered that:

1) The Motion for Partial Summary Judgment filed by the Department of Environmental Resources is denied.

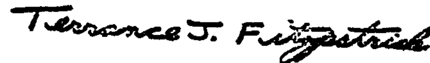
2) The Motion for Partial Summary Judgment filed by the Appellants is granted, and the permit conditions described on pages two and three of the preceding opinion are declared invalid.

3) The Board will arrange a conference call to discuss the procedure for addressing the remaining issues in these appeals.

ENVIRONMENTAL HEARING BOARD*



ROBERT D. MYERS
Administrative Law Judge
Member



TERRANCE J. FITZPATRICK
Administrative Law Judge
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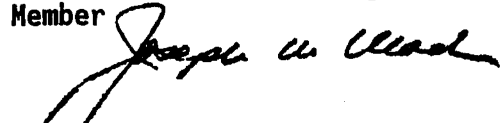

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 22, 1990

cc: **Bureau of litigation**
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Central Region
For Appellant:
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Pittsburgh, PA

* Chairman Maxine Woelfling and Member Richard S. Ehmann did not participate in this decision.

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M. DIANE SMITH
SECRETARY TO THE BO

ROBINSON TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 87-242-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 26, 1990
and ALOE COAL COMPANY, Permittee	:	

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

By the Board

Synopsis

A DER decision to issue a fly ash/bottom ash disposal permit authorizing disposal at a permittee's strip mine site is sustained in this challenge by a third party. The Board may not substitute its discretion for that of DER absent a showing that DER abused its discretion. The third party appellant failed to make such a showing in this case.

INTRODUCTION/Procedural History

This adjudication involves an appeal by the Robinson Township Board of Supervisors ("Robinson") from the Department of Environmental Resources' ("DER") reissuance on May 19, 1987 of Surface Mining Permit No. 02803001(c) to Aloe Coal Company. The reissuance of this permit was the vehicle used by DER to amend this permit to authorize the permittee to dispose of fly ash and bottom ash on 8.5 acres of a backfilled strip mine site located in part in

Robinson Township, Washington County, Pennsylvania. As is routine for DER with regard to third party appeals, it filed no Pre-Hearing Memorandum in this case and left the permit's defense up to Aloe Coal Company ("Aloe"). After Robinson and Aloe both filed Pre-Hearing Memoranda and their respective Pre-Hearing Stipulations, a hearing on the merits of this appeal was held on January 18, 1989 before former Board Member William A. Roth. Mr. Roth resigned without having prepared a draft adjudication in this matter.[1]

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

FINDINGS OF FACT

1. The Appellant is the Robinson Township Board of Supervisors whose address is RD #4, P. O. Box 92, McDonald, PA 15057. (Appellant's Notice of Appeal)

2. The Appellee is the Commonwealth of Pennsylvania's Department of Environmental Resources, the executive agency of the Commonwealth with the authority and duty to administer the Pennsylvania Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, as amended, 53 P.S. §1396.1 *et seq.*, the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, No. 318, as amended, 52 P.S. §30.51 *et seq.*, and the rules and regulations adopted under these statutes.

3. The Permittee is Aloe Coal Company whose address is P. O. Box 3,

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[1] This Board may issue an adjudication based on a cold record where the member who presided at the hearings has left the Board without drafting an adjudication. Lucky Strike Coal Co. et al. v. Commonwealth, DER, 119 Pa. Cmwlth 440, 547 A.2d 447 (1988).

Imperial, PA 15126. (Permit attached to Appellant's Notice of Appeal)

4. Aloe is permittee of a 625-acre surface coal mine (T. 85) known as the Bald Knob Strip which is located partially in Robinson Township, Washington County, and partially in Findley Township, Allegheny County. (Exhibit-Permittee's No. 3)[2]

5. Previously, Aloe had been authorized by DER to dispose of coal refuse generated at a nearby coal washery (T. 47) on a 158-acre portion of the mine site (T. 85, 86) covered by Permit 02803001. (Exhibit A-1)

6. On May 19, 1987, pursuant to Aloe's application, DER amended Surface Mining Permit 02803001 authorizing Aloe to dispose of fly ash on a specific 8.5-acre portion of the surface mine. (Exhibit A-1, T. 82, 86)

7. Robinson's appeal is limited to a challenge of the permit as it pertains to ash disposal. (T. 3)

8. The only ash approved for disposal at this site is that generated by burning coal at the Quaker State Oil Refinery at Congo, West Virginia. If Aloe wished to dispose of ash from another source at this site, it would have to go back to DER and seek another permit amendment. (T. 83)

9. When ash disposal was approved by DER, it was accomplished through reissuance of Aloe's entire Surface Mining Permit with fly ash disposal included, so the reissued permit contains conditions and limitations not pertaining to ash disposal such as those at B10, B12 and B13. (T. 89)

10. Robinson was notified of Aloe's application by letter from DER dated November 20, 1986, and told to submit its comments thereon to DER in writing by January 20, 1987. (T. 34-35)

---

[2] "T__" is an indication of reference to the transcript of the hearing before Mr. Roth. A reference to Exhibit A-1 is a reference to Appellant's first exhibit offered into evidence at that hearing. Exhibit-Permittee's No. 3 is the third exhibit offered into evidence by Aloe.

11. Robinson submitted written comments to DER but did not do so until March of 1987. (T. 35-36)

12. DER representatives attended meetings with Robinson's representatives to discuss Aloe's application for a permit in January or February of 1987 and took their comments into account when reviewing the application. (T. 84)

13. Robinson understands where ash is to be disposed of on Aloe's mine site. (T. 33)

14. Ash disposal at the Aloe site is to occur as follows:

> On top of the mine's spoil will be two to four feet of compacted subsoil and on top of that will be two feet of compacted ash. On top of the ash there will be four more feet of compacted subsoil which will be seeded, limed and fertilized in accordance with the revegetation plan. (T. 55-56)

15. There will only be one thickness or lift of ash on this site. (T. 56)

16. Copple, Rizzo & Associates prepared Aloe's application. (T. 46)

17. Patrick Copple ("Copple") is a partner in Copple, Rizzo & Associates (T. 62) which is an engineering firm and a laboratory. (T. 45)

18. Copple has a B. S. from Youngstown State University in civil engineering and has been with Copple, Rizzo since 1978 (T. 45), in which time he has done over 100 analyses of permit applications to evaluate environmental liabilities. (T. 62)

19. Copple is of the opinion that ash disposal in accordance with the permit will not create any environmental problems.

20. Jay Hawkins ("Hawkins") is employed by DER as a hydrogeologist in DER's Bureau of Mining and Reclamation. As of the hearing date he had worked for DER in this capacity for 3 years and ten months. (T. 80)

21. In this position Hawkins reviews surface mining permit applications, including applications to dispose of coal ash in mines.

22. Hawkins was lead reviewer on the Aloe application (T. 81) which, at the time he started the review, was the first application for ash disposal he reviewed. (T. 99) He reviewed all portions of it for DER. (T. 81)

23. Hawkins has a B.S. in Geology from Waynesburg College and an M.S. from West Virginia University in geology with emphasis on hydrogeology and coal geology. (T. 81)

24. Hawkins was satisfied that, based on the application, Aloe's ash disposal operation could be carried out without adversely affecting the environment. (T. 93)

25. The permit requires and Aloe has installed both upgradient and downgradient wells to monitor ground water quality for possible changes during disposal. (T. 57)

26. The permit requires groundwater monitoring twice yearly for certain water quality parameters specified in the permit (T. 91) and quarterly monitoring for standard mine drainage parameters. (T. 92 and Exhibit A-1)

27. Permit Condition B-15 requires ash analyses within forty-five days of commencement of ash disposal and Condition B-17 requires it annually thereafter based on the anniversary date of permit issuance. (Exhibit A-1)

28. Hawkins considered annual ash analyses adequate because the ash can only come from one source and ash quality will not vary much if only from one facility. (T. 90)

29. Differences in the quality of the coal ash would be very slight if coal supply sources are changed (T. 14) and Hawkins expects no drastic change in ash quality from a facility like Quaker State's fluidized bed type boiler. (T. 96)

30. Robinson objects to Part A III of Aloe's permit as to effluent limitations. (Appellant's Notice of Appeal)

31. All discharges of water from Aloe's site are controlled through effluent limitations set forth in other portions of Part A of the permit. (T. 87 and 88)

32. In the event pollution or groundwater degradation is discovered by Aloe, it must notify Robinson of it within one week of observing it, according to Permit Condition B-19. (Exhibit A-1)

33. Hawkins required bi-annual monitoring of water quality in Permit Special Condition No. B-20 as an extra safety precaution. (T. 91)

DISCUSSION

Whenever a third party appeals from DER's issuance of a permit, the burden of proof is on that Appellant to show cause why DER's decision should be reversed by this Board. 25 Pa. Code §21.101(c)(3). Wisniewski et al. v. DER, 1986 EHB 111. As our prior cases have pointed out, to prevail, Robinson must show DER committed a manifest abuse of discretion or acted in violation of the law. Sheasley v. DER, 1982 EHB 85. Moreover, in approving ash disposal, DER is presumed to have acted properly. Warren Sand and Gravel Company Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1976). Robinson has failed to produce evidence that such an abuse has occurred.

At the very beginning of its own brief, Robinson concedes:

> "It is admitted that a significant portion of [Appellant's] objections were explained at the time of hearing on January 18, 1989. Based on the testimony presented by the employees of the Department of Environmental Resources as well as witnesses called on behalf of [Aloe], certain explanations were given indicating that a large number of the objections were in fact otherwise covered in the permit."

Unfortunately after making this statement, Robinson, which claims to have 23

perceived inconsistencies in the permit, never took the next step to explain clearly where it was still unsatisfied.

Aloe argues that, based on this fact and Robinson's burden of proof as set forth above, Robinson should be deemed to have abandoned all issues not specifically argued by Robinson in its post-hearing brief. We concur with this argument. Dale R. Mackey and Grace Mackey et al. v. DER, 1988 EHB 170. Magnum Minerals v. DER, 1988 EHB 867.[3]

Appellant's Post-Hearing Brief does take issue with the DER decision to issue this permit because:

1. DER's permit reviewer was inexperienced.
2. Regulation by DER of fly ash/bottom ash disposal is a new field.
3. DER's requirement for analysis of the fly ash is only once per year.
4. DER does not regulate or monitor the out-of-state generator to insure the same source of coal is used, the same combustion process is used at the generator, and the ownership of the generator remains the same, and
5. DER's permit does not require adequate monitoring of the effluent quality of the discharges from Aloe's site.

Unfortunately, Robinson has failed to offer even one scintilla of evidence which overcomes the presumption of regularity of DER's conduct or shows DER's abuse of its discretion in issuing this permit. It could be that DER did

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[3] The question of Aloe's compliance with Robinson's zoning ordinances is not before us. Borough of Taylor v. DER et al., 1988 EHB 237 and neither is Aloe's compliance with Robinson's solid waste ordinance or that ordinance's viability as to ash disposal. Municipality of Monroeville v. Chambers Development Corporation, 88 Pa. Cmwlth. 603, 491 A.2d 307 (1985), Plymouth Township v. Montgomery County, 108 Pa. Cmwlth. 200, 531 A.2d 49 (1987). As Aloe's counsel correctly points out, to the extent that Robinson's solid waste ordinance is valid, Robinson may enforce it, so compliance therewith is not relevant here. Borough of Taylor, supra.

abuse its discretion, but it also could be that in this appeal we have phobic fears without foundation, and for this Board to overturn DER's decision, we need hard evidence to support such a decision. Robinson offered no such evidence. It did not produce any alternative to DER's decision by way of showing the need for more stringent standards or by a showing of DER's failure to consider some material issue. In this case, Robinson could not make its point merely by cross-examining Aloe's engineer and DER's hydrogeologist, both of whom testified that disposal in accordance with the permit's requirements would not cause environmental harm.

Annual analysis of the ash is sufficient unless Robinson shows more frequent analysis is needed. A reviewer's inexperience, absent a demonstrated error, is not grounds for reversal. A failure to regulate: (1) the coal supply to limit Quaker State's use to a single source, (2) the constancy of the combustion process and (3) the continuity of the boiler's ownership, are only of significance where Robinson shows an adverse impact of failing to do so. The newness of the program is not an issue unless Robinson shows that in developing it and applying it to Aloe's permit, DER omitted some critical point. These showings were not attempted.

As to monitoring of the effluent, no failure to adequately monitor and control pollutants in the discharges was shown. Indeed, the testimony showed the opposite: all of Aloe's discharges are controlled by effluent limitations and compliance monitoring schedules which DER felt were adequate or more than adequate. Here, Robinson's concern was shown by Aloe's evidence to be based

on Robinson's misunderstanding of the permit.[4]

In short, the burden on Robinson has not been met. Robinson has failed to give us cause to sustain its appeal.

CONCLUSIONS OF LAW

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

2. Robinson, as Appellant, has the burden of proof.

3. This Board cannot reverse the DER decision absent a showing by Robinson that DER has manifestly abused its discretion or acted in violation of law.

4. Robinson has failed to meet this burden.

---

[4] DER's Hawkins testified to bi-annual (meaning twice as frequent as annual) monitoring as to certain effluent limitations as an extra safety precaution. Such a requirement is monitoring twice a year rather than every six months. While this point was not raised by Robinson, it is clear twice yearly monitoring could occur on the same or consecutive days. If extra safety is sought by DER as testified to, it is assumed by this Board that this condition is thus gramatically imprecise and monitoring every six months is what was intended. We will correct this imprecision in our Order.

ORDER

WHEREFORE, this 26th day of January, 1989, it is ordered that:

1. This appeal is dismissed.

2. Permit condition B-20 of Permit No. 02803001(c) is amended to provide that monitoring shall occur every six months for all monitoring points.

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DATED: January 26, 1990

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CONCERNED CITIZENS OF EARL TOWNSHIP et al.:

V. : **EHB Docket No. 88-516-M (consolidated)**

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and DELAWARE COUNTY SOLID WASTE AUTHORITY, Permittee : **Issued: January 26, 1990**

OPINION AND ORDER
SUR
SUNDRY DISCOVERY MOTIONS

Synopsis

Interrogatories and Requests for Production seeking information and documentation on the purchase of a landfill three years previous to the issuance of the contested permits are appropriate. The condition of the landfill, which would have been a critical factor in the purchase, may shed light on the effectiveness of the provisions of the permits. When legal counsel for all parties reach an agreement on document production, all parties are bound by its terms. One party's assumptions that (1) Board approval was necessary to the agreement and that (2) another party would act as lead counsel were not justified under the circumstances. Termination of document production after more than 5 months, well beyond the time agreed to and after efforts had been made to accommodate all parties, was not unreasonable.

OPINION

These consolidated appeals relate to permits issued by the Department of Environmental Resources (DER) with respect to the Colebrookdale Landfill located in Earl Township, Berks County. This Landfill, previously owned by

RRM Corporation, was acquired in 1985 by Delaware County Solid Waste Authority (DCSWA). RRM Corporation's solid waste permit was reissued by DER on or about April 10, 1986 in DCSWA's name. DCSWA still owns the landfill and was the recipient of the contested Solid Waste Permit No. 100345 and NPDES Permit No. PA 0040860 issued on November 16, 1988. The Solid Waste Permit authorized an expansion of the Landfill; the NPDES Permit authorized the discharge of treated leachate from the existing and expanded areas of the Landfill.

Initially, there were four appeals with the following Appellants: Concerned Citizens of Earl Township (88-514 and 88-515), Berks County and Berks County Commissioners, Earl Township, Oley Township, Colebrookdale Township and Boyertown Borough (88-516), and Frank J. Szarko (88-518). The appeals were consolidated at 88-516 by a Board Order dated April 11, 1989. DCSWA reached agreement with the governmental entities and they withdrew as Appellants between October 20 and November 9, 1989. Concerned Citizens of Earl Township and Frank J. Szarko are the remaining Appellants.

Prior to the consolidation, the Appellants at 88-516 (collectively referred to as "Berks County") had served on DCSWA a First Set of Interrogatories and Requests for Production of Documents. On February 28, 1989, DCSWA filed a Motion for Protective Order with respect to Interrogatories 10, 11 and 12 which sought information and documentation relative to DCSWA's acquisition of the Landfill in 1985. In objecting to the Interrogatories, DCSWA maintained that the information sought would be (1) irrelevant, (2) unduly burdensome to produce, (3) prejudicial to DCSWA, and (4) proprietary and commercial. In response to DCSWA's Motion, Berks County filed a Motion to Compel on March 23, 1989.

Disposition of these Motions was deferred pending the resolution of DCSWA's Motion to Disqualify Berks County's legal counsel (Bishop, Cook,

Purcell and Reynolds). Hearings on the Motion to Disqualify, scheduled for May 19 and June 19, 1989, were cancelled at the request of the parties involved. This Motion and the two discovery Motions remained outstanding on October 20, 1989, when Berks County and Berks County Commissioners withdrew as Appellants. In the meantime, on September 1, 1989, Appellant Frank J. Szarko (Szarko) had served DCSWA with his own First Set of Interrogatories and First Request for Production of Documents. These were identical to those served by Berks County on January 23, 1989, with the exception of 3 additional Interrogatories added at the end. DCSWA filed its responses on September 29, 1989, repeating its objections to Interrogatories 10, 11 and 12.

When the Board entered an Order on October 26, 1989, regarding Berks County's withdrawal, it denied the Motion to Disqualify as moot and directed the remaining parties to advise the Board whether action was still required on the discovery Motions. On December 5, 1989, both Szarko and DCSWA responded. Szarko filed a Motion to Compel responses to his Interrogatories 10, 11 and 12, incorporating Berks County's Motion by reference. DCSWA filed two Motions: one seeking to have the previous discovery Motions dismissed as moot, and one seeking a protective order with respect to Szarko's Interrogatories 10, 11 and 12.

DCSWA filed a Second Motion for Protective Order on December 18, 1989. This Motion is unrelated to Szarko's Interrogatories 10, 11 and 12; it seeks to prohibit Szarko from pursuing any further discovery into DCSWA's documents. On December 19, 1989, Szarko filed a Second Motion to Compel addressed to the same issue.[1]

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[1] DCSWA also has filed (November 24, 1989) a Motion to Dismiss Szarko's appeal. This Motion is the subject of another Opinion and Order issued simultaneously with this one.

Interrogatories 10, 11 and 12

The Interrogatories at issue, together with DCSWA's Answers, read as follows:

10. Describe fully the terms and conditions under which the Authority acquired its interest the Colebrookdale Landfill including:

(a) the date of the acquisition;

(b) the person or entity from which it was acquired;

(c) the consideration that the Authority paid for its interest in the Landfill;

(d) the payment schedule for the purchase, including the dates of all payments made and/or to be made by the Authority; and

(e) any modifications requested by the Authority to the solid waste permit at the time the Landfill was purchased by the Authority.

Answer: DCSWA has moved for a protective order precluding inquiry into the subject matter of this interrogatory and will await decision from the Board before providing any additional response to this interrogatory. By way of further response, DCSWA objects to this interrogatory as the information requested is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence.

11. Identify all documents prepared by or for the Authority that relate in any way to the negotiations for the purchase and/or to the purchase of the Colebrookdale Landfill.

Answer: See answer to interrogatory 10, incorporated by reference as if fully set forth.

12. Identify all documents submitted to the Authority during the negotiations for the purchase by the person or entity from who it was acquired.

Answer: See answer to interrogatory 10, incorporated by reference as if fully forth.

In its First Motion for Protective Order (December 5, 1989), DCSWA stated its objections as follows:

(a) The information and/or documents requested are irrelevant and unnecessary to the issues presented in this appeal, are not likely to lead to the discovery of relevant information, and would be unduly burdensome to produce;

(b) Because Frank J. Szarko failed to appeal the reissuance of Solid Waste Permit No. 100345 from RRM Corporation to the DCSWA in 1986, Frank J. Szarko is now precluded from raising any issues pertaining to that transfer and any information and/or documents pertaining thereto;

(c) The information and/or documents requested pertain to confidential commercial information and such disclosure would seriously injure DCSWA.

The relevancy issue merits little discussion, since relevancy is construed so broadly at the discovery stage: Pa. R.C.P. 4003.1. The information and documents requested in Interrogatories 10, 11 and 12 relate to the Colebrookdale Landfill - the subject matter of these consolidated appeals. The condition of that Landfill, in all likelihood, was an important factor in DCSWA's decision to acquire it and in DCSWA's determination of an appropriate price to pay for it. That information, gathered just a few years ago, may shed light on the effectiveness of the provisions inserted by DER in the 1988 Permits.

DCSWA's preclusion argument is equally meritless. Whether or not Szarko may be precluded from litigating any issues applicable to the transfer of RRM's Solid Waste Permit to DCSWA, he still has the right to engage in discovery that may produce evidence relevant to the issues he can litigate. As already discussed, Interrogatories 10, 11 and 12 fall within the scope of that right.

The remaining objection deserved more comment. Relying on this Board's decision in New Hanover Township v. DER, 1988 EHB 812, DCSWA avers that Szarko's requests pertain to confidential commercial information, the

disclosure of which would seriously injure DCSWA. The New Hanover case involved attempted discovery directed to a non-party private corporation engaged in ongoing negotiations for the purchase of a landfill. Szarko's discovery is directed toward a party which is a governmental agency and which concluded negotiations for the Landfill nearly 5 years ago. These differences make the New Hanover decision of little value as precedent. The potential harm that was so obvious in New Hanover is not apparent here. While DCSWA avers that disclosure would cause it serious injury, it makes no effort to explain why or how. That is not adequate, under the circumstances of this proceeding, to stop discovery.

We agree with DCSWA, however, that Interrogatories 11 and 12 are overbroad. The only documents that are appropriate for discovery under these two Interrogatories are those which relate, directly or indirectly, to past, present or possible future environmental problems associated with the Landfill. These problems might stem from deficiencies in design, inadequate facilities, errors of management, faulty operations, or a variety of other sources. DCSWA has an obligation to produce any documents which deal with the Landfill in this broad sense.

Document Production

DCSWA's Second Motion for Protective Order (December 18, 1989) seeks to prohibit Szarko from demanding any further document production pursuant to his Request of September 1, 1989. In support of its Motion, DCSWA alleges that, because of the broad nature of the document request initially served by Berks County on January 23, 1989 and because of the burden and expense of collecting, organizing and producing these documents, legal counsel for all parties agreed to the following arrangement late in February 1989:

1. Berks County's document request would serve as the document request for all parties in all of the appeals;

2. DCSWA would produce for inspection and copying all non-privileged material responsive to Berks County's request; and

3. The documents would be made available to all legal counsel for a period of two months. Thereafter, they would be returned to their original custodians and not produced again.

DCSWA's Responses to Berks County's First Set of Interrogatories and Request for Production of Documents, dated March 17, 1989, incorporated the essential parts of the agreement among legal counsel. Pursuant to the agreement, DCSWA began producing documents in sequence, beginning March 10, 1989 and continuing to April 1, 1989. According to the agreement, the documents were to be available only to June 1, 1989, at the latest.[2] However, this deadline was extended by DCSWA to August 1, 1989. On August 10, 1989, DCSWA's legal counsel sent a letter to other legal counsel announcing that the documents had been produced according to the agreement and would no longer be available.

On August 22, 1989, Szarko's legal counsel sent a letter to DCSWA's legal counsel objecting to the termination of document production. As a result of this objection, DCSWA agreed to make the documents available until September 1, 1989. Apparently, Szarko's legal counsel began reviewing the documents on September 1, did not complete the task that day, and requested a further extension. An extension to September 8 was granted.

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[2] There is some uncertainty about this date. While the agreement contained a two-month time limit (that would have expired on June 1 for documents produced on April 1), the March 6, 1989 letter from DCSWA's legal counsel to other legal counsel used a final date of June 30, 1989.

At or about this time, Berks County decided to microfilm all of the documents. As a result, their representatives and Szarko's representatives were working on the documents at the same time. Neither was able to complete the work by the close of business on Friday, September 8, 1989. At the request of these parties, DCSWA agreed to extend the deadline to Tuesday, September 12, to permit copying to be done over the intervening weekend, and to permit copying to be done until 10:00 p.m. on Monday, September 11 and Tuesday, September 12.

Szarko's legal counsel did not take advantage of the weekend hours or the evening hours on Monday, September 11. At 10:00 p.m. on Tuesday, September 12, when DCSWA finally terminated document production, Szarko had copied about 7,000 pages. Of the other Appellants, Concerned Citizens of Earl Township had copied 1,834 pages and Berks County had copied the entire document production of nearly 50,000 pages.

On August 22, 1989, Szarko's legal counsel sent a letter to DCSWA's legal counsel objecting to the termination of document production and demanding the right to copy additional documents containing 2,532 pages. DCSWA refused.

Document production in proceedings before the Board is governed by Pa. R.C.P. 4009 (25 Pa. Code §21.111(d)). Basically, this rule authorizes a party, without leave of court, to serve on any other party a request to produce documents, specifying a reasonable time, place and manner for doing so. The other party must respond within 30 days, either agreeing to the production or stating objections thereto. This procedure can be varied, however, by agreement of the parties (Pa. R.C.P. 4002). That is what happened in this case. Berks County served a request on DCSWA pursuant to Pa. R.C.P. 4009. Before responding to the request, DCSWA's legal counsel sought and

obtained an agreement with all other legal counsel, pursuant to Pa. R.C.P. 4002. According to that agreement, Berks County's request would serve as a request for all other parties, DCSWA would produce the documents, and the other parties would have access to them for a period of two months, after which they would no longer be available.

This agreement was memorialized in a letter to all legal counsel (February 24, 1989) and was set forth in DCSWA's formal response to the request (March 17, 1989) served on all legal counsel. Szarko's legal counsel was a party to this agreement and made no objection to its provisions. Szarko argues, however, that he was acting under two assumptions - (1) that the agreement would not be effective unless approved by the Board, and (2) that Berks County's legal counsel would act in the role of lead counsel for discovery purposes. Szarko makes no averments concerning anything that was said or done to warrant these assumptions.

Perhaps, Szarko's legal counsel confused the Federal civil practice rules with those of Pennsylvania. Fed. R.C.P. 29 requires court approval for certain types of discovery agreements. Pa. R.C.P. 4002 specifically departs from that requirement. Szarko argues correctly that discovery in Board proceedings is limited to 60 days and cannot be extended without Board approval (25 Pa. Code §21.111(a)). Actually, the Board's Pre-Hearing Orders No. 1, issued in each of the consolidated appeals, allowed 75 days for discovery. This period ended on March 6, 1989 for all the appeals except Szarko's which ended on March 21, 1989.

By letter dated March 1, 1989, legal counsel for all parties jointly requested consolidation of the appeals and jointly requested approval of a proposed "Pre-Hearing Order No. 2". The proposed Order, inter alia, extended the discovery deadline to August 11, 1989, set dates for the filing of

pre-hearing memoranda, and set dates for 16 days of hearing. By an Order of April 11, 1989, the Board, inter alia consolidated the appeals, set a date for a hearing on DCSWA's Motion to Disqualify, deferred action on pending discovery motions and deferred action on the proposed "Pre-Hearing Order No. 2" until action had been taken on the Motion to Disqualify. However, the Board suspended the discovery deadlines established in Pre-Hearing Orders No. 1 and specifically authorized the parties to continue to engage in discovery.

Since hearings on the Motion to Disqualify were cancelled at the request of the parties involved, no action was taken on that Motion or on the proposed "Pre-Hearing Order No. 2." On October 20, 1989, when Berks County's withdrawal as an Appellant rendered the Motion to Disqualify moot, the schedule set out in proposed "Pre-Hearing Order No. 2" was no longer relevant. Szarko argues that, since proposed "Pre-Hearing Order No. 2" was never approved by the Board, the document production agreement among legal counsel never became effective.

That agreement was neither set forth nor referred to in proposed "Pre-Hearing Order No. 2", however. The Board was never called upon to approve it at any time. As already noted, the agreement was totally effective without Board approval, except for the necessary extension of the discovery period which only the Board could grant. That extension was granted by the Board's Order of April 11, 1989. Szarko was not justified in assuming that the agreement was not effective and binding upon him. At the very least, he should have inquired of other legal counsel (especially DCSWA's) instead of allowing more than 4 months to go by without any activity.

Szarko's inaction may be explained by his second assumption - that Berks County's legal counsel was acting in the role of lead counsel. In multiparty litigation, it often occurs that one law firm will play a leading

role, whether because of its client's greater interest in the litigation or greater resources with which to pursue it or because of some other reason. Legal counsel for other parties frequently are willing to play a minor role in order to lessen the economic impact of the litigation on their clients. There is nothing wrong with this situation; and, in fact, it may help to expedite the case. But if the arrangement develops casually and without a specific agreement, other parties may be at risk if the lead party settles or withdraws. Implicit in Szarko's assumption that Berks County was acting as lead counsel is the further assumption that Berks County would protect Szarko's interest. Without an agreement creating an obligation to do so, Berks County had no such duty. Szarko was not justified in making either assumption.

Szarko apparently awoke to his situation after receiving the August 10, 1989, letter from DCSWA's legal counsel confirming that document production had terminated on August 1, 1989. At Szarko's request, the documents were reopened to discovery until September 12, 1989. Weekend and after-hours access was provided during the last 4 days of this period. Szarko took advantage of some of this opportunity but not all of it. When the deadline arrived, he still had several thousand pages to copy. Since the documents had been available for more than 5 months by this time and since DCSWA had made every effort to accommodate all legal counsel, we cannot conclude that DCSWA acted unreasonably in terminating document discovery on September 12, 1989.

In his Second Motion to Compel, Szarko requests, in the alternative, that the Board issue a subpoena to Berks County for the microfilm which it made of DCSWA's documents so that Szarko can copy it. Since Berks County has withdrawn as an Appellant, it is subject to discovery only as a non-party.

The procedure is discussed in Pa. R.C.P. 4007.1. In accordance with our standard practice in such situations, we will issue a subpoena duces tecum form to Szarko for non-party discovery. Our doing so is not intended to deprive Berks County of any relevant legal objection it may have to such discovery.

ORDER

AND NOW, this 26th day of January, 1990, it is ordered as follows:

1. Szarko's Motion to Compel Responses to Interrogatories 10, 11 and 12, filed on December 5, 1989, is granted with the limitations set forth in the foregoing Opinion.

2. DCSWA's Motion for a Protective Order, filed December 5, 1989, is denied except to the extent set forth in the foregoing Opinion.

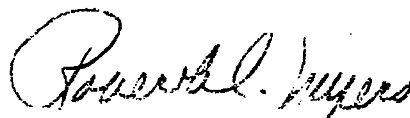
3. DCSWA's Motion to Dismiss Berks County's Motion to Compel, filed on March 23, 1989, and to withdraw its own Motion for Protective Order, filed on February 28, 1989, is granted on the ground of mootness.

4. DCSWA's Motion for Protective Order, filed on December 18, 1989, is granted.

5. Szarko's Motion to Compel, filed on December 19, 1989, is denied.

6. A subpoena duces tecum form will be issued to Szarko for non-party discovery against Berks County pursuant to Pa. R.C.P. 4007.1.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 26, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

CONCERNED CITIZENS OF EARL TOWNSHIP et al.:

V. : **EHB Docket No. 88-516-M (consolidated)**

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and DELAWARE COUNTY SOLID WASTE AUTHORITY, Permittee : **Issued: January 26, 1990**

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL

Synopsis

A Motion to Dismiss for lack of standing will be denied in an appeal from issuance of permits for a landfill when the Appellant alleges (1) that he owns and resides on land adjacent to the landfill, and (2) that the stream into which effluent will be discharged from the landfill flows through his land downstream from the landfill site.

OPINION

On November 24, 1989, Delaware County Solid Waste Authority (DCSWA) filed a Motion to Dismiss the appeal of Frank J. Szarko (Szarko) from the issuance by the Department of Environmental Resources (DER) of permits applicable to the Colebrookdale Landfill, Earl Township, Berks County, owned and operated by DCSWA. Solid Waste Permit No. 100345 authorized an expansion of the Landfill; NPDES Permit No. PA 0040860 authorized the discharge of treated leachate from the existing and expanded areas of the Landfill. DCSWA's Motion challenges Szarko's standing to appeal.

In response, Szarko filed an Amendment to his Notice of Appeal on December 5, 1989 and an Answer to the Motion to Dismiss on December 19, 1989.

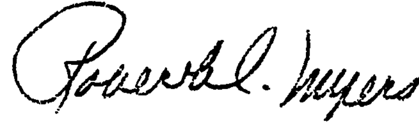
Szarko alleges that he owns and resides on land adjacent to the Landfill and downgradient from the Landfill. He alleges further that Manatawney Creek, which runs through his land, already receives runoff from the Landfill site upstream from his land. Under the NPDES Permit, effluent from the Landfill will be discharged to this stream. He alleges that the operation of the Landfill threatens his land with pollutants that will adversely affect the health and welfare of him and his family.

These allegations are sufficient to show the potential for Szarko to suffer direct, immediate and substantial harm as a result of DER's actions. Therefore, he has standing to file and maintain his appeal: William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269(1975); Del-Aware Unlimited, Inc. v. DER, 1985 EHB 869; Throop Property Owners Association v. DER, 1988 EHB 391.

ORDER

AND NOW, this 26th day of January 1990, it is ordered that DCSWA's Motion to Dismiss, filed on November 24, 1989, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 26, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

BOROUGH OF GIRARDVILLE,
PEOPLE AGAINST KEYSTONE CHEMICAL COMPANY,
and ROBERT KRICK

V.

EHB Docket No. 88-505-F

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and KEYSTONE CHEMICAL COMPANY, INC., Intervenor

Issued: January 29, 1990

OPINION AND ORDER SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss, filed by Keystone Chemical Company, Inc., Intervenor, is granted. DER's suspension, rather than revocation, of the Intervenor's "interim status" as a lawful operator of a hazardous waste treatment, storage, and disposal facility, does not affect the rights of the Appellants. Therefore, the Appellants lack standing to appeal DER's decision.

OPINION

This case involves two appeals, which have been consolidated. The Appellants, Borough of Girardville, People Against Keystone Chemical Co. (Girardville), and Robert Krick brought the first appeal in objection to an order issued by the Department of Environmental Resources (DER) in 1986 regarding the hazardous waste treatment, storage, and disposal facility (facility) operated by the Keystone Chemical Company, Inc. (Keystone). In this Order, DER suspended Keystone's interim status as a lawful facility, ordered closure of the site and imposed a civil penalty. Girardville brought

its second appeal on December 8, 1988, objecting to a consent order and agreement signed by DER and Keystone to resolve various issues arising from the 1986 Order and previous DER Orders.[1]

Girardville's basis for appealing the consent order is identical to its basis for appealing DER's 1986 Order: that DER erred by merely suspending, rather than revoking, Keystone's interim status. Girardville asserts that interim status could not be suspended because it had already expired by operation of law under Section 404(a) of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.404(a).

This Opinion and Order addresses Keystone's Motion to Dismiss the appeal, filed on May 13, 1989.[2] Keystone argues that Girardville presents no justiciable controversy, as the order suspending interim status and the consent order have worked no injury on Girardville. Keystone argues that, under the order and the consent order, Keystone may not operate its facilities until it obtains a final permit. Further, Keystone argues that the SWMA has not been violated in this instance because no hazardous waste treatment, storage, or disposal activity, as per the statute, has taken place since the interim status was suspended.

Girardville responded to the motion to dismiss, asserting that a justiciable action exists because it is requesting affirmative action from the Board and because DER's failure to revoke Keystone's interim status has affected its rights. It characterizes the action it requests as enforcement of Section 404(a) of the SWMA, 35 P.S. §6018.404(a), and related DER

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[1] Keystone had also appealed DER's 1986 Order (EHB Docket No. 86-406-W). This and two prior appeals were withdrawn December 12, 1988, after the consent order was issued.

[2] DER filed a letter supporting Keystone's motion.

regulations. Girardville asserts that its rights have been affected because: 1) the consent order violates the SWMA (Brief in Support of Appellant's Response to Permittee's Motion to Dismiss, p. 7); 2) DER's failure to revoke or terminate Keystone's interim status allows the facility to remain open indefinitely, contrary to the SWMA (Id. at p. 5); 3) DER's failure to revoke or terminate interim status allows Keystone to argue before the municipality that its status is lawful and on-going for purposes of local zoning requirements, prolonging its status as a prior non-conforming use under applicable laws of zoning (Id. at p. 11).

The essence of Keystone's argument is that DER's action has not affected Girardville's rights. Although Keystone has couched this argument in terms of whether there is a "justiciable controversy," we believe it is more appropriate to evaluate whether Girardville has standing to bring this appeal. In order to have standing, a party must show that he has been "aggrieved" by the decision he seeks to appeal. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280 (1975). To establish that he has been aggrieved, a party must demonstrate that the decision has had a "direct" and "immediate" impact upon his rights. Id., 346 A.2d at 282-284. For the reasons which follow, we find that Girardville lacks standing to bring this appeal.

In support of its first argument, Girardville cites to 35 P.S. §6018.404(a) to show that DER's failure to revoke interim status has affected its rights. That section states:

> (a) Any person or municipality who:
>
> (1) owns or operates a hazardous waste storage or treatment facility required to have a permit under this act, which facility is in existence on the effective date of this act;
>
> (2) has complied with the requirements of section

501(a);

(3) has made an application for a permit under this act; and

(4) operates and continues to operate in such a manner as will not cause, or create a risk of, a health hazard, a public nuisance, or an adverse effect upon the environment, shall be treated as having been issued such permit until such time as a final departmental action is made. In no instance shall such person or municipality continue to store or treat hazardous wastes without obtaining a permit from the department within two years after the date of enactment hereof.

35 P.S. §6018.404(a). For further emphasis, Girardville cites DER's regulations at 25 Pa. Code §§75.265(2)(5) and 75.265(2)(6), relating to interim status.[3]

In essence, Girardville argues that interim status could only exist until 1982, and that this Board should review DER's failure to revoke Keystone's interim status. In support of this argument, Keystone cites B & D Coal Co. v. DER, 1986 EHB 615, in which the Board stated that where DER has a duty to act under the statute, as in releasing a bond within the time period set out in the statute, DER's failure to release the bond affects the rights of the bond release applicant. This case is distinguishable from B & D Coal Co., however. DER has acted in this case, and the Keystone facility is closed. That this closure resulted from what DER termed a "suspension" rather than a "revocation" of Keystone's interim status does not alter the fact that the facility is closed, and, thus, does not work an injury upon Girardville. Hence, Girardville's argument lacks merit.

Girardville's next assertion is that DER's failure to revoke or

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[3] 25 Pa. Code §75.265(2)(5) provides interim status to owners and operators until the department acts on part B of the application. 25 Pa. Code §75.265(2)(6) states that "[i]n no instance shall an HWM facility owner or operator continue to store or treat hazardous waste under interim status without obtaining an HWM permit from the department before September 5, 1982."

terminate interim status allows the facility to remain open indefinitely. This is simply inaccurate. The Keystone facility is closed, and it will remain so unless DER determines in the future that it may be reopened. If this occurs, Girardville will have the right to file an appeal with this Board. Until this occurs, however, Girardville's rights have not been affected.

Finally, Girardville argues that its rights have been affected because DER's failure to revoke Keystone's interim status works to protect the facility's status as a nonconforming use under the local zoning ordinances. According to Girardville, the failure to revoke interim status affords Keystone the opportunity to argue that its status is lawful and on-going for purposes of local zoning requirements. Were interim status to be revoked, Girardville asserts, the nonconforming use would be treated as abandoned, and Keystone would be prohibited from operating under the current zoning laws. Girardville states that this retention of its status as a protected nonconforming use creates the immediate and direct impact necessary to sustain its right to appeal.

This argument fails for two reasons. First, in order to find that Girardville would be harmed, we would have to conclude that Girardville's interpretation of the local zoning ordinance is correct. But the interpretation of local zoning ordinances is a matter outside the competence of the Board. See generally, City of Scranton v. DER & Diamond Colliery Co., 1986 EHB 1223. Second, Girardville's argument, even if true, does not establish the sort of "direct and immediate" impact necessary to confer a right to appeal. See William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 282-284 (1975). Any potential effect of DER's action would be indirect because it would merely become a factor in a separate action

regarding a zoning ordinance. Moreover, the issue will never even arise, unless DER allows the facility to reopen--a decision which will be appealable in its own right.

In summary, we conclude that DER's suspension, rather than revocation, of Keystone's interim status does not have a legally recognizable effect on Girardville's rights. Thus, Girardville lacks standing to bring this appeal, and Keystone's motion to dismiss will be granted.

ORDER

AND NOW, this 29th day of January, 1990, it is ordered that the Motion to Dismiss filed by Keystone Chemical Company is granted, and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 29, 1990

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SECRETARY TO THE BOA

PENNSYLVANIA FISH COMMISSION	:	**EHB Docket No. 89-369-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
DOVERSPIKE BROTHERS COAL COMPANY,	:	
Permittee	:	**Issued:** January 29, 1990

OPINION AND ORDER SUR
MOTION TO DISMISS

Synopsis

The doctrine of *nullum tempus occurrit regi*[1] does not operate to excuse a state agency from complying with time periods for filing an appeal with the Board. The Board lacks jurisdiction to rule on an appeal filed after the expiration of the 30 day appeal period.

OPINION

This matter was initiated with an appeal filed on September 12, 1989, by the Pennsylvania Fish Commission (Commission) challenging a Coal Refuse Disposal permit (permit) issued on July 18, 1989, to Doverspike Brothers Coal Company (Doverspike) by the Department of Environmental Resources (Department). The Commission, in its appeal, claims that a variance authorized by the permit will result in destruction of a tributary and wetlands, that the permit fails to provide mitigation for lost stream and wetland values, and generally, that

[1] "Time does not run against the King." Black's Law Dictionary, Revised 4th Ed at 1217.

disposal activities would not protect the hydrologic balance or prevent adverse impacts upon fish, wildlife, or the environment.

On September 25, 1989, Doverspike filed a motion to dismiss the Commission's appeal on the grounds that it was filed more than 30 days after notice of the permit issuance was published in the Pennsylvania Bulletin, thus depriving the Board of jurisdiction to hear the Commission's appeal.

On September 27, 1989, the Commission responded to Doverspike's motion, denying that its appeal was untimely. In essence, the Commission claimed that the 30 day appeal period in 25 Pa.Code §21.52(a) did not apply to it because of the doctrine of *nullum tempus occurrit regi*. In the alternative, the Commission contended that limitations on actions are not applicable to actions brought by the Commonwealth unless a statute expressly so provides, citing Department of Transportation v. Rockland Construction Co., 439 Pa 531, 448 A.2d 1047 (1982). The Commission argued that there would be no unfair advantage and that Doverspike was not prejudiced by the delay of the appeal. Finally, the Commission asserted that the late filing was excusable since the appeal was signed on September 11, 1989.

On October 4, 1989, the Department advised the Board that, consistent with its policy regarding third party appeals, it would not respond to Doverspike's motion to dismiss.

On October 10, 1989, Doverspike replied to the Commission's response, asserting that the timeliness of an appeal is strictly a jurisdictional issue and that an untimely appeal deprives the Board of jurisdiction. Doverspike's reply also argued that the Commission failed to justify the filing of its appeal *nunc pro tunc*. And, Doverspike alleged that the Commission's reliance upon the doctrine of *nullum tempus occurrit regi* was misplaced, since that doctrine provides that the Commonwealth is not subject to statutes of

limitation that bind private litigants and the issue in this matter is subject matter jurisdiction.

Jurisdiction does not attach to an appeal by a third party from an action of the Department unless the appeal is filed with the Board within 30 days after notice of the action has been published in the Pennsylvania Bulletin. 25 Pa.Code §21.52(a). Lower Allen Citizens Action Group v. DER, ___ Pa.Cmwlth ___, 546 A.2d 1330 (1988). The date of receipt of the appeal by the Board is the determinative date for ascertaining whether an appeal has been filed within the 30 day appeal period. 25 Pa.Code §21.11(d). The Commission's notice of appeal was filed with the Board on September 12, 1989. Notice of issuance of the permit was published in the Pennsylvania Bulletin on August 12, 1989 (See 19 Pa.B. 3475). In order to be timely, the Commission's appeal had to be received by the Board on or before September 11, 1989. Here, the Commission's appeal was received by the Board more than 30 days after notice of the Department's issuance of the permit, and, therefore, the Board is without subject matter jurisdiction over the appeal.

The Commission has asserted the doctrine of *nullum tempus* to excuse it from the requirements of 25 Pa.Code §21.52(a). As the Commission correctly points out in its citation to the Rockland Construction decision, this doctrine has been applied to excuse the Commonwealth from being bound by statutes of limitations. See also Northampton County Area Community College v. Dow Chemical, ___ Pa.Super. ___, 566 A.2d 591 (1989). However, the issue before us is one of jurisdiction. Jurisdiction goes to a tribunal's power to hear and decide a matter. Hoover v. Bucks County Tax Claim Bureau, 44 Pa.Cmwlth. 529, 405 A.2d 562 (1979). On the other hand, the purpose of a statute of limitation is to promote justice by barring claims based upon stale evidence. Department of Transportation v. J.W. Bishop Co., Inc., 55 Pa.Cmwlth

377, 423 A.2d 773 (1980), vacated 497 Pa. 58, 439 A.2d 101 (1981). Thus, jurisdiction of a court to hear a matter is an entirely different issue than whether the bringing of the matter is barred by statutes of limitations.

While we have been unable to find any caselaw concerning the application of this doctrine to jurisdictional questions, we have found decisions indicating that the courts have not excused Commonwealth agenicies from jurisdictional requirements. In the Appeal of Clarendon V.F.W. Home Assn., 167 Pa.Super. 44, 75 A.2d 171 (1950), the Superior Court held that the Court of Quarter Sessions of Warren County was without authority to enter an order where the Pennsylvania Liquor Control Board had failed to file a timely appeal. Similarly, in National Wood Preservers v. DER, 489 Pa. 221, 414 A.2d 37, 40 at n.8 (1980), the Supreme Court dismissed the Department's petitions for allowance of appeal as improvidently granted where the Department failed to file timely appeals from Commonwealth Court's order.

Here, the Commission's failure to file its appeal within the mandatory 30 day appeal period cannot be excused by virtue of its status as an agency of the Commonwealth, and we must dismiss its appeal for lack of jurisdiction.[2]

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[2] While the Commission did not specifically request allowance to file its appeal *nunc pro tunc* in accordance with 25 Pa.Code §21.53, we believe that it has not presented reasons sufficient to substantiate the grant of such a request.

O R D E R

AND NOW, this 29th day of January, 1990, it is ordered that Doverspike Brothers Coal Company's Motion to Dismiss is granted and the appeal of the Pennsylvania Fish Commission is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

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TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 29, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

KERRY COAL COMPANY	:	
	:	
V.	:	**EHB Docket No. 89-231-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 30, 1990

OPINION AND ORDER SUR
APPELLANT'S MOTION TO COMPEL
ANSWERS TO INTERROGATORIES

Synopsis

The instant case is an appeal by the applicant from DER's denial of an application for a surface mining permit, where the applicant proposes mining and a discharge from the minesite in the watershed of a stream receiving special protection. After commencement of this appeal, Appellant filed 29 interrogatories for which it sought answers from DER. The Board received a copy of DER's response thereto which contained both answers to specific interrogatories and objections to others. Appellant filed a Motion to Compel DER to answer nine interrogatories which it says DER failed to fully answer. DER has filed a response opposing this motion. In light of the nature of this appeal's scope, our prior opinion in this case on discovery dated December 7, 1989 and Big "B" Mining Company v. Commonwealth, DER, 1987 EHB 815, the Motion to Compel will be granted, except where it seeks information not authorized by the Rules of Civil Procedure.

OPINION

Kerry Coal Company ("Kerry") has appealed from the denial of application No. 04880104 by the Department of Environmental Resources ("DER"). In its application, Kerry proposes the Schaeffer-Nelson mine to be located in South Beaver Township, Beaver County. The proposed mine is to be located in the Brush Run and Painter Run Watersheds. Both parties have engaged in discovery in this case. Where DER sought answers to interrogatories by Kerry and Kerry balked at answering same, we issued our Opinion and Order dated December 7, 1989 compelling answers by Kerry.

Now the shoe is on the other foot and it appears that it may pinch. Kerry has filed 29 interrogatories and DER has responded thereto with answers and objections, which Kerry contends are an inadequate response. Accordingly, we now have before us Kerry's Motion to Compel Appellee to Answer Interrogatories and DER's Response To Kerry's Motion To Compel Answers To Interrogatories both concerning these nine interrogatories. Apparently, a further opinion and order are needed as the parties did not pay sufficient attention to footnote number 1 in our prior opinion in which we advised the counsel to solve their own discovery disputes, if at all possible.

As stated in our earlier opinion, preliminarily it must be observed that Pa. R.C.P. 4003.1 sets forth a broad definition as to what is considered allowable discovery. A party may discover "<u>any</u> matter not privileged which is relevant to the subject matter involved in the pending action." It is also a given that discovery before this Board is governed by the Pennsylvania Rules of Civil Procedure. <u>Frances Nashotka Sr., et al. v. Commonwealth, DER</u>, 1988 EHB 1050.

Interrogatories Nos. 3 and 4

DER appears to have lumped its refusal to answer Interrogatory No. 3

in with its refusal to answer Interrogatory No. 4. Was this in the hope that no one will recognize the difference between the two questions? If so it was a vain hope.

Interrogatory No. 4 seeks the identity of all experts consulted by DER in preparation for this litigation. Pa. R.C.P. 4003.5(a)(3) bars Kerry's Interrogatory No. 4 so long as DER does not voluntarily answer same, which it has not done. Goldblum v. Ins. Co. of North America 127 P.L.J. 249, (1979). Of course, DER must disclose the identity of each expert it will call as an expert in the hearing but DER's Response says DER has done this. DER need not do it again.

Interrogatory No. 3 seeks information not about experts consulted for trial but about experts consulted by or employed by DER in reference to review of Kerry's application. We interpret this to mean consulted by or employed by DER in connection with DER's review of this application prior to DER's denial of this application and Kerry's subsequent filing of the instant appeal. To interpret it otherwise makes it redundant with Interrogatory No. 4 and runs it afoul of our position on experts for trial set forth above. Nothing in DER's Response suggests any such experts are experts retained by DER for preparation for this litigation. Kerry has a right to know who DER used to review the issues in Kerry's application prior to its denial. Where the expert was employed by DER for both purposes, his identity must be disclosed though DER need not indicate he was consulted for trial unless of course he will testify. Where the expert was retained with regard to application review only, his identity is not protected by Pa. R.C.P. 4003.5(a)(3). Accordingly, DER is obligated to answer the thus limited Interrogatory No. 3.

Interrogatory No. 13

Interrogatory No. 13 and DER's initial answer thereto states:

13. Did the Department establish in stream water quality criteria for Brush Run and Painter's Run for discharges by Kerry Coal Company that would not degrade the receiving streams?

If Yes,

(A) When were the criteria determined?

(B) What parameters were established?

(C) How was Kerry advised of the parameters?

ANSWER:

This question cannot be answered because it is unintelligible. Water quality criteria do not refer to discharge characteristics, and are not established on a case-by-case basis. Water quality criteria are established for a stream and are promulgated as a regulation in 25 Pa. Code §93.7.

While Kerry's question may not be clear to DER because, according to DER's Answer, "water quality criteria" has special meaning to DER which does not deal with specific discharges, Kerry's question is capable of clarification. DER has already answered "no" as to in-stream general water quality criteria but has not answered whether or not DER has calculated what the effluent quality of Kerry's discharges would have to be to cause no degradation of the receiving stream. Such a question is a proper one which DER is hereby directed to answer. If it answers "no" of course, it need not answer the remainder of Interrogatory No. 13 or the subsequent related interrogatories. If in interpreting Kerry's Interrogatory, the Board has misunderstood what is sought by Kerry, Kerry can rephrase this question and secure DER's answer thereto.

Interrogatories Nos. 16 and 17

Interrogatory No. 16 seeks information as to DER's issuance of permits for other surface mining operations within a mile of the proposed mine site. DER's answer is an objection that other mines have different

characteristics and thus this question will not lend to admissible evidence so DER should not have to answer the interrogtory. Such an answer constitutes a conclusion which it is the Board's responsibility to draw. We will not let DER draw our conclusions for us by saying this discovery will not lead to admissible evidence. Kerry may ask to see what DER did nearby as to permits for surface mines. The information provided in response may be relevant and admissible. Maybe DER erred in issuing other mining permits in the area or maybè the law changed after some of those permits were issued as DER's Response to Kerry's Motion suggests, but the reverse may also be true. We do not know at this point. Thus this question and Interrogatory No. 17, which ties into it, must be answered by DER.

Interrogatories Nos. 21 and 22

Kerry's two interrogatories seek information as to pollution of the waters of the Commonwealth by mines within one mile of Kerry's proposed mine. Again, DER contends that this information will not lead to admissible evidence. It may. DER must answer same. After Kerry has obtained this information through discovery, at a hearing on the merits of this appeal, Kerry may try to offer some of it and DER may object successfully, but we will not let DER foreclose access to this information at this time. This is also not to say that at the hearing on this appeal DER cannot rebut evidence Kerry offers in this subject matter area. We will not now address such yet-to-be-offered evidence, or rebuttal evidence. Discovery is the stage where factual information, some of which may be inadmissible and some of which may not ultimately even lead anywhere, is exchanged. We will not limit discovery as we limit evidence at a hearing. Discovery, seeking potential relevant factual information from which admissible evidence may spring, will be allowed, even if it ultimately produces no evidence. At this time, we need only determine

if it might lead to production of admissible evidence. If it might, it will be allowed.

Interrogatory No. 23

DER's response to Kerry's Motion indicates DER will answer this interrogatory, so we need not concern ourselves further with it.

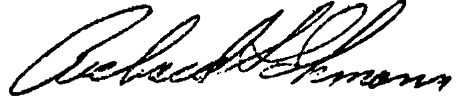
Interrogatory No. 24

Here, DER's only objection to the interrogatory is being required to define "design" in an answer to Kerry's interrogatory which uses this word. Here, "design" could mean everything in Kerry's application including its social and economic justification or be limited to the specific design of the wastewater treatment plant. DER is correct that it does not know and should not have to guess this definition. This is especially true when Kerry could have defined this word as chose to do for others in its interrogatories. If Kerry defines it, however, DER must answer the question.

ORDER

AND NOW, this 30th day of January, 1990, Kerry Coal's Motion to Compel Answers to Interrogatories is granted as modified in our Opinion as to Interrogatories Nos. 3, 13, 16, 17, 21 and 22. The motion is denied as to Interrogatory No. 4. As to Interrogatory No. 23, it is denied as moot because DER has agreed to answer same. As to Interrogatory No. 24, it is granted provided that Kerry shall furnish counsel for DER with a written definition of "design" within ten days hereof. DER shall file its Answers to Interrogatories Nos. 3, 13, 16, 17, 21, 22, 23 and 24 as modified by this Opinion within 40 days of entry of this Order by this Board.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 30, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

THOMPSON & PHILLIPS CLAY COMPANY, INC.	:	**EHB Docket No. 86-275-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 9, 1990

OPINION AND ORDER SUR SECOND MOTION FOR SUMMARY JUDGMENT

Synopsis

Motion for summary judgment sustaining the denial of bond release is granted where affidavits establishing a discharge in violation of the applicable permit conditions are uncontested and the Department of Environmental Resources is entitled to judgment as a matter of law.

OPINION

This matter was initiated by the May 29, 1986, filing of a notice of appeal by Thompson & Phillips Clay Company, Inc. (Thompson and Phillips), seeking review of a May 6, 1986, letter from the Department of Environmental Resources (Department) denying the Stage II release of bonds posted pursuant to Mine Drainage Permit (MDP) No. 3269BSM6 for a mine operated by Thompson and Phillips in Boggs and Decatur Townships, Clearfield County. The Department refused to release the bonds because of discharges of acid mine drainage (AMD) from the site and advised Thompson and Phillips that it would have to abate the discharges before its bonds could be released.

On June 12, 1986, Thompson and Phillips filed an amended notice of appeal claiming, *inter alia*, that it had not caused the AMD, it had complied with the applicable requirements for bond release, and it was entitled to the requested releases. Thompson and Phillips alleged that because it had not caused or allowed the AMD discharges and because the non-complying discharges pre-dated its mining, it was not required to treat the AMD discharges to meet the limitations in 25 Pa.Code §77.102.

On August 25, 1988, the Department filed a motion for summary judgment, or partial summary judgment, or, in the alternative, to limit issues. This motion alleged that it was undisputed that a pollutional discharge occurred which violated Thompson and Phillips's permit conditions, 25 Pa.Code §77.102, and applicable statutes, and that under §315(a) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL), Thompson and Phillips was responsible for treatment of that discharge to meet applicable requirements. The Department also contended that §315(b) of the CSL allowed liability to continue under the bond until there was no further significant risk of a pollutional discharge from the mine.

Thompson and Phillips responded by reiterating the arguments regarding liability set forth in its amended notice of appeal and also contending that entry of summary judgment would be inappropriate because of disputed material facts relating to the pollutional nature of the discharge.

In an opinion and order dated March 15, 1989, the Department's motion for summary judgment was denied because of disputed material facts relating to the pollutional nature of the discharges and the Department's failure to demonstrate that it was entitled to judgment as a matter of law in that it was unclear whether the operation was regulated as a coal or non-coal (i.e. clay) operation. However, the Department's motion to limit issues relating to

liability was granted. The Board, citing Bologna Mining Co. v. DER, EHB Docket No. 86-555-M (Opinion issued March 3, 1989), reasoned that under §315(a) of the CSL, Thompson and Phillips was responsible for any AMD discharge from its permit site, although the discharge may have existed before Thompson and Phillips began mining and although Thompson and Phillips may not have affected or worsened the discharge.

On June 12, 1989, the Department filed a second motion for summary judgment, contending that it was entitled to summary judgment because discharges from Thompson and Phillips' operation did not comply with the limits in its MDP and 25 Pa.Code §77.102(c) and, therefore, the Department was required by §315 of the CSL to withhold release of Thompson and Phillips' bonds as a result of its failure to fully comply with the law and its failure to demonstrate that "there is no further significant risk of pollutional discharge."

On June 22, 1989, Thompson and Phillips filed a motion for an extension of time to respond to the summary judgment motion to enable it to take discharge samples in order to determine whether a factual dispute existed regarding the quality and pollutional characteristics of the discharge. Thompson and Phillips' motion was granted in a June 30, 1989, order directing it to respond to the Department's motion on or before September 8, 1989. As of the date of this opinion, Thompson and Phillips has not responded to the Department's motion.

The Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the motion for summary judgment in the light most favorable to the non-

moving party. Robert C. Penoyer v. DER, 1987 EHB 131. Pennsylvania Rule of Civil Procedure No. 1035(d) provides that when a motion for summary judgment is made and supported as provided in that rule:

> an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Under the circumstances presented herein, we believe that the entry of summary judgment for the Department is appropriate.

At the outset, we note that the Department has done little to clarify the confusion over whether Thompson and Phillips mined coal or clay and, therefore, what standards apply to Thompson and Phillips' request for bond release. The MDP is entitled "Commonwealth of Pennsylvania, Sanitary Water Board, Permit Authorizing the Operation of a Coal Mine." Compliance Order 85 H 100, which is one of the exhibits appended to the Department's second motion for summary judgment, refers to violations of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (SMCRA), and the rules and regulations adopted thereunder at 25 Pa.Code §87.102. On the other hand, the Department's second motion for summary judgment cites both SMCRA and the Non-Coal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.* (Non-Coal SMCRA), as well as 25 Pa.Code §77.102, which is applicable to non-coal operations. Thompson and Phillips' notice of appeal and pre-hearing memorandum refer to a clay mine. The Department's inability

to address this issue is not fatal, for the result would be identical under both SMCRA and NonCoal SMCRA, since the same regulations are applicable to Thompson and Phillips' request for bond release.

We will first address the issue of the relevant law and regulations. Several statutes regulating mining contain bonding requirements. Section 315(b) of the CSL, which is applicable to both coal and clay mines, requires that liability under bonds must continue if there is a "significant risk of pollutional discharge." Section 4(g) of SMCRA, which regulates release of bonds, provides, in pertinent part, that:

> Subject to the public notice requirements of subsection (b), if the department is satisfied the reclamation covered by the bond or portion thereof has been accomplished as required by this act, it may, in the case of surface coal mining operations, upon request by the permittee release in whole or in part the bond or deposit according the the following schedule: (1) when the operator has completed the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan, the release of sixty per cent of the bond for the applicable permit area; (2) when revegetation has been successfully established on the affected area in accordance with the approved reclamation plan, the department shall retain that amount of bond for the revegetated area which would be sufficient for the cost to the Commonwealth of reestablishing revegetation. Such retention of bond shall be for the duration of liability under the bond as prescribed in subsection (d). . . . In the case of noncoal surface mining operations, in lieu of the schedule and criteria for release of bonds provided for in this subsection, the schedule and criteria for release of bonds shall be as set forth in regulations promulgated hereunder. No bond shall be fully released until all requirements of this act are fully met.
>
> * * * * *
>
> (emphasis added)

The bond release regulations adopted under SMCRA at 25 Pa.Code §§86.170-86.172 became applicable to non-coal operations on July 31, 1983, 25 Pa.Code §86.173. Subsequent to the adoption of these bond release regulations, Non-Coal SMCRA was enacted into law and became effective on February 19, 1985. Section 9(j) of Non-Coal SMCRA, states that:

> Subject to the public notice requirements in section 10, if the department is satisfied that the reclamation recovered by the bond portion thereof has been accomplished as required by this act, it may, upon request by the permittee, release, in whole or in part, the bond according to the reclamation schedule and criteria for release of bonds set forth in regulations promulgated hereunder. No bond shall be fully released until all requirements of this act are fully met. Upon release of all or part of the bond and collateral as herein provided, the State Treasurer shall immediately return to the operator the amount of cash or securities specified therein.
>
> (footnote omitted)

However, recognizing the necessary period of transition between regulation of non-coal operations under SMCRA and regulation under Non-Coal SMCRA, §24 of Non-Coal SMCRA provided that regulations promulgated under SMCRA would be applicable to non-coal operations until new regulations were adopted under Non-Coal SMCRA. Consequently, whether Thompson and Phillips's operation was a coal mine or a clay mine, its application for bond release would be evaluated under the same standards, i.e., 25 Pa.Code §§86.170-86.172.

In reviewing a request for bond release, the Department is required by 25 Pa.Code §86.171(f)(1) to consider:

> (i) Whether the permittee has met the criteria for release of the bond under §86.172.
>
> (ii) Whether the permittee has satisfactorily completed the requirements of the reclamation plan, or relevant portion thereof, and <u>complied with the requirements of the law, the regulations promulgated thereunder, and the</u>

conditions of the permit, and the degree of difficulty in completing any remaining reclamation, restoration, or abatement work.

(iii) Whether pollution of surface and subsurface water is occurring, the probability of future pollution or the continuance of any present pollution, and the estimated cost of abating pollution.

(emphasis added)

In the matter before us, the Department contends that its refusal to grant Thompson and Phillips' Stage II bond release was not an abuse of discretion because of discharges of AMD from Thompson and Phillips' operation in violation of the applicable regulations and the terms and conditions of its MDP. Since the Department is authorized to withhold bond release for these reasons, our only task is to determine whether there are any disputes of material fact concerning the Department's allegations of violations of the terms and conditions of Thompson and Phillips's permit and the applicable regulations.

The MDP issued to Thompson and Phillips contains specific conditions relating to water quality. Standard Condition No. 10 prohibits the discharge of mine drainage if the pH is less than 6.0 or greater than 9.0, while Standard Condition No. 11 forbids the discharge of mine drainage with an iron concentration in excess of 7.0 milligrams per liter (mg/l).

In support of its motion for summary judgment, the Department offered the affidavit of James McDonald, a Department Surface Mine Conservation Inspector, who stated that Thompson and Phillips constructed ponds to collect and treat a discharge, but that on or about April 28, 1986, it ceased treating water emanating from the discharge, despite the fact that discharge continued. The Department also proffered the affidavit of Mr. McDonald, as well as the affidavits of Jeffrey Smith and Wayne McGinness, to establish through sampling results that discharges from the Thompson and Phillips site did not comply

with the pH and iron limitations in Thompson and Phillips' MDP. The one sample taken by Mr. McDonald on April 28, 1986, at or about the time of the Department's May 6, 1986, letter which is at issue here, indicates a pH of 3.2 and an iron concentration of 83.0 mg/l, both far in excess of the applicable permit limits of 6.0-9.0 for pH and 7.0 mg/l for iron. Additionally, in response to Interrogatory No. 25, Thompson and Phillips indicated that a discharge on the southwesterly side of the site existed and was pollutional; the timeframe of the interrogatories was from 1960 to the present (i.e., the date of the responses, November 30, 1987.) Since Thompson and Phillips did not contest Mr. McDonald's affidavit and acknowledged the existence of a pollutional discharge, we must conclude that it was in violation of its MDP.

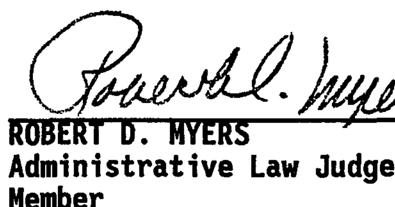
Having already concluded that Thompson and Phillips is liable for any discharges from its operation and now finding that there is no dispute that Thompson and Phillips was in violation of its MDP, we find that the Department properly denied Thompson and Phillips' bond release request under 25 Pa.Code §86.171(f)(1). Therefore, the Department is entitled to judgment as a matter of law and we will sustain its denial of bond release.

O R D E R

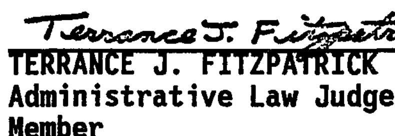
AND NOW, this 9th day of February, 1990, it is ordered that the Department of Environmental Resources' second motion for summary judgment is granted and the appeal of Thompson & Phillips Clay Company, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

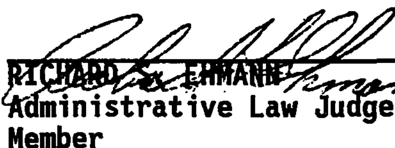
MAXINE WOELFLING
Administrative Law Judge
Chairman



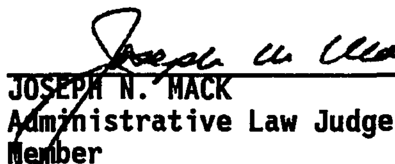
ROBERT D. MYERS
Administrative Law Judge
Member



TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 9, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

GORDON AND JANET BACK	:	**EHB Docket No. 87-177-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 9, 1990

OPINION AND ORDER SUR
MOTION TO PRECLUDE EXPERT TESTIMONY

Synopsis

A motion to preclude expert testimony as a sanction for failure to identify a witness in response to a request for production of documents and failure to prepare and provide a report concerning the substance of testimony is denied. The proper vehicle for ascertaining such information is written interrogatories and the moving party failed to utilize it.

OPINION

This matter was initiated by Gordon and Janet Back (Backs) with the May 4, 1987, filing of a notice of appeal seeking review of a March 31, 1987, order issued to the Backs by the Department of Environmental Resources (Department). The order alleged that surface and groundwaters at or near the Backs' residence in Nether Providence Township, Delaware County had become contaminated with fuel oil as a result of a rupture in the Back's fuel oil tank. The order directed the Backs to undertake various remedial measures to contain and eliminate the oil contamination.

By order dated September 2, 1988, the matter was scheduled for a hearing on the merits on January 30 and 31, 1989. In response to a request from the Backs, a view of the premises was conducted on October 14, 1988. The hearing on the merits was canceled in response to a January 25, 1989, request from the Department, which was assented to by the Backs. The basis of the Department's request was that sampling of Beatty Run, the stream running through the Backs' property, would be conducted in April, 1989, and that the matter could become moot as a result of the sampling. The Department, somewhat belatedly, obtained the samples and, as a result, the parties engaged in settlement discussions. The settlement discussions did not prove fruitful, and the Backs requested that the hearing on the merits be rescheduled. The Backs filed a motion to limit issues on November 24, 1989, and the Board granted the motion in part on November 30, 1989, limiting the issues to whether oil-soaked soils existed on the Backs' property, the nature of the site's geology, the nature and extent of any migration of oil from the subsurface to Beatty Run, and the reasonableness of the remedial measures directed by the Department. A hearing on the merits was scheduled for December 1, 1989, but instead of presenting testimony, the parties engaged in settlement negotiations which again proved to be unsuccessful. By an order of the Board dated January 9, 1990, a hearing on the merits was rescheduled for February 14 and 15, 1990.

Presently before the Board for disposition is the Back's motion to preclude the expert testimony of Robert Day-Lewis, a Department hydrogeologist. The Backs contend that the Department's failure to identify Mr. Day-Lewis as a witness in response to the Backs' June 24, 1987, request for production of documents is grounds for sanctioning the Department by prohibiting Mr. Day-Lewis' testimony. Additionally, the Backs assert that the Department's

failure to provide them with a report of his investigation into the pollutional incident alleged to have taken place on the Backs' property is prejudicial to them, since they are unable to determine the nature of Mr. Day-Lewis' testimony.

The Department responded to the Backs' motion by arguing that a request for production of documents is not the proper vehicle for ascertaining the identity of witnesses, that the Backs had notice of Mr. Day-Lewis' involvment in the matter since at least July 9, 1987, and had never sought to serve interrogatories concerning his involvement; and that Mr. Day-Lewis was identified as an expert witness in the Department's November 13, 1987, pre-hearing memorandum. As for the Backs' contentions that the Department should provide it with a report concerning the nature of Mr. Day-Lewis' testimony, the Department asserts that since Mr. Day-Lewis is a party expert, he is under no obligation to prepare an expert report.

We can find no support in the Pennsylvania Rules of Civil Procedure for the proposition that a party is required to identify witnesses in response to a request for production of documents. The proper vehicle to secure such information is through the service of written interrogatories. Thus, we can hardly sanction the Department for its failure to identify Mr. Day-Lewis, or any other witness, in its response to the Backs' request for production of documents. Similarly, we can find no authority for the contention that Mr. Day-Lewis must prepare a report concerning the nature of his testimony and that the Department must provide it to the Backs.

As for the Backs' assertion that they would be prejudiced by Mr. Day-Lewis' testimony because they are unaware of its nature, we find that claim to be groundless. The Backs were put on notice that Mr. Day-Lewis would be a witness when the Department filed its pre-hearing memorandum in November,

1987. Indeed, the Backs' deposition of Ruth Plant, the Department inspector, in May, 1987, should have put them on notice of Mr. Day-Lewis' involvement in this matter. Yet, the Backs made no attempt to discover the nature of Mr. Day-Lewis' involvement or the substance of any testimony until December 15, 1989, when they served interrogatories. We can hardly penalize the Department for the Backs' failure to pursue discovery. Consequently, we must deny the Backs' motion.

O R D E R

AND NOW, this 9th day of February, 1990, it is ordered that the Backs' motion to preclude the expert testimony of Robert Day-Lewis is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: February 9, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

WHEATLAND TUBE COMPANY : EHB Docket No. 87-061-E (Consolidated)

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued February 14, 1990

OPINION AND ORDER
SUR WHEATLAND TUBE COMPANY'S
PETITION FOR RECUSAL

Synopsis

Grounds for recusal of a Board member are not shown where all that is alleged is that the Board member represented DER nearly four years ago in talks with this appellant on issues at most only peripherally related to those arising in this appeal. Recusal is granted solely because in my opinion based on the facts in this case, the interests of our judicial system and its appearance of impartiality are better served by recusal.

OPINION

This appeal arises from the issuance by the Department of Environmental Resources ("DER") of an NPDES Permit to Wheatland Tube Company ("Wheatland") on January 20, 1987. Wheatland filed its appeal with us on February 19, 1987. Thereafter in October of 1987 DER issued Amendment No. 1 to this permit and on November 11, 1987 Wheatland appealed the amendment at

Docket No. 87-475-R. The two appeals were consolidated at this docket number by our Order of January 11, 1988 and handled by former Board member William A. Roth, until he left the Board in 1989. Thereafter on October 30, 1989, in anticipation that, having been confirmed, I would soon join the Board, the Board's Chairman issued an Order reassigning this case to me for primary handling.

By letter dated November 11, 1989, counsel for Wheatland wrote to the Board's Chairman asking that this case be reassigned because Wheatland alleged that I had in the past represented DER vis a vis Wheatland as to certain aspects of this matter. By Order dated November 21, 1989, after explaining to Wheatland's counsel that reassignment for hearing would not eliminate my vote on any final adjudication of this dispute by the Board, I denied the request for reassignment and directed Wheatland and DER to seek recusal, if counsel for either party believed there is reason for me to consider whether I should recuse myself from further participation in this case. Wheatland and DER were directed to address certain specific issues in any petitions for recusal they would file and to file them by December 22, 1989.

Counsel for DER responded to my Order by letter saying DER had not been seeking recusal and would not be filing any such petition.

On December 22, 1989 Wheatland filed a Petition for Recusal.[1] DER was duly notified and given the opportunity to respond thereto. By letter filed with us on January 8, 1990, DER advised us it would file no response.

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[1] The petition filed by Wheatland did not address all of the issues Wheatland was instructed to consider by this Order, but we must consider it regardless of this failing because of the nature of the issue it raises.

The issue raised by Wheatland's Petition is thus ripe for resolution.[2] At issue in the instant appeal are effluent limitations set by DER's Bureau of Water Quality Management for various waste constituents at various points of discharge from Wheatland's plant and a requirement that Wheatland prepare a "Toxic Reduction Evaluation" and submit it to DER. Initially it should be observed that Wheatland does not suggest I appeared in this or any other proceeding involving Wheatland before this Board or in any court. Wheatland's Petition also does not offer any evidence to suggest I participated in any fashion in setting the effluent limitations ultimately inserted by DER in this permit. Indeed the Petition's attachments and the various other pleadings filed here show that these effluent limitations were not established by DER until after I had ceased representing DER in any capacity. According to Wheatland's Notice of Appeal and its Petition, the permit was issued over a year after I ceased representing DER and reentered private practice.

Wheatland's Petition also seeks recusal at least in part on the basis of my former role with DER, citing cases like Scalzi v. City of Altoona, 111 Pa.Cmwlth. 449, 533 A.2d 1150 (1987). Cases such as Scalzi v. City of Altoona, supra, Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969) and their progeny all deal with recusal because of comingling of prosecutorial and adjudicatory functions. All of this group of cases concern situations where these roles are intermingled in some fashion in one person. For example, in FR&S, Inc. v. Department of Environmental Resources, 113 Pa.Cmwlth. 576, 537

[2] No hearing has been scheduled on this Petition because no hearing was requested and because for purposes of this opinion and order, the factual allegations set forth therein and evident from the other pleadings are assumed to be true. Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County, 507 Pa. 194, 489 A.2d 1286 (1985).

A.2d 957 (1988), aff'd ___ Pa. ___, 560 A.2d 128 (1989) (cited by Wheatland), concern was voiced, where an attorney resigned from DER to immediately undertake the role of Chairman of this Board. Here, Wheatland's Petition conveniently overlooked the fact that nearly four years elapsed between my resigning from DER and my taking this position with the Environmental Hearing Board. Such a distance in time between these two roles prevents a question as to appearance of bias or lack of impartiality from arising based upon comingling. Gateway Coal Company v. DER (Docket Nos. 76-163-B and 77-051-B issued February 8, 1978).[3] None of the cases cited in Wheatland's Petition and none of those which I have found in my research have ever gone so far as to say under the circumstances in this case there could be any valid commingling claim.[4]

Despite these facts, Wheatland contends recusal is appropriate because before I resigned as an attorney for DER, I represented DER in negotiations with Wheatland aimed at resolving Wheatland's lack of either treatment or permits for several sewage and industrial waste discharges from this plant.

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[3] That Opinion was not published by this Board in 1978 when it was issued, for reasons which are now unknown. It is very well written and should be instructive for all attorneys who may think about raising recusal in the future; accordingly, I attach a copy of it to this Opinion so that it will appear of record in the future.

[4] In 1988 The Environmental Hearing Board Act, Act No. 94, P.L. 530 was approved by act of the Legislature. By this Act the Board became wholly independent from DER, thus eliminating any comingling issue under Canon 3. I have not dealt with this Act in writing the above but note it in passing and observe that Wheatland's Petition also failed to address this statute's impact on this argument.

A review of the documents and affidavits submitted in support of the Petition makes it clear that indeed in the period from 1983 through 1985 I was one of several DER personnel who met with and corresponded with representatives of Wheatland about the various discharges.[5] These documents and affidavits attached to Wheatland's Petition show my involvement was aimed at securing commitments from Wheatland to abate the discharges by serially: 1) studying these discharges well enough to know their volume and effluent characteristics, 2) applying for NPDES Permits for the discharges, and 3) assuming permits would be issued, installing the treatment equipment needed to bring the discharges into compliance with the permits' effluents limitations. Finally, Wheatland's Petition does not assert that the commitments I sought on DER's behalf were even given before I ceased to serve as DER's counsel in these talks. Thus my role, if the horse still comes before the cart, was to develop the horse, whereas the instant appeal is as to the shape of the cart. Wheatland's petition comes down to my participation in talks aimed 1) at securing a schedule from Wheatland for its submission of the application for the permit, which permit is now under appeal and 2) discussions of effluent limitations that might apply when and if DER issued such a permit. The distinction between the such meetings and Wheatland's challenge to numbers in the permit now before me four years later, are enough to make it clear that

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[5] Wheatland's Petition seriously miscasts the meetings between it and DER as "enforcement proceedings." It is clear from Wheatland's Petition that no proceedings had been commenced, but rather, there were meetings aimed at dispute resolution to avoid any proceedings. Meetings do not become enforcement proceedings merely by Wheatland choosing to call them that now. The same is true of the mischaracterization of my actions as: "Judge Ehmann's prior representation of DER in connection with the permit now on appeal." (Petition, Page 11). In fact, elsewhere in its petition Wheatland admits there never was representation as to the permit now on appeal. (Petition, Page 8).

there was nothing improper in the Board Chairman's assigning this case to me for hearings.

Our inquiry does not end here, however. Canon 3c of the Code of Judicial Conduct states: "A Judge should disquality himself in a proceeding in which his impartiality may reasonably be questioned...." The cases interpreting this Canon make it clear the Canon is to be read so that Canon 3c suggest recusal may be appropriate where a Board member's impartiality could be questioned by a reasonably neutral observer. FR&S, Inc. v. Department of Environmental Resources, supra,; Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County, supra. I am not convinced by this party litigant's urging of recusal that my impartiality could reasonably be questioned especially since such a litigant is not a reasonably neutral third party. I nevertheless am recusing myself in this matter. My reasons therefor are that Wheatland has raised this issue and its lawyers must feel strongly about it or they would not raise it. Secondly, I clearly had direct contacts with Wheatland on DER's behalf as to preliminary concerns with abatement of some of this plant's water pollution problems, (although not the DER decisions in question here). Finally, in my opinion it serves the courts, this Board and our overall system of justice better in these particular circumstances, if I recuse myself.

Accordingly, since I have elected recusal in this case, I enter the following Order.

O R D E R

AND NOW, this 14th day of February, 1990, Board Member Richard S. Ehmann grants the Petition of Wheatland Tube Company and recuses himself in this case.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

O R D E R

AND NOW, this 14th day of February, 1990, in light of the recusal of Richard S. Ehmann in this case as set forth in the foregoing Opinion and Order, the above-captioned matter is transferred for primary handling from the Honorable Richard S. Ehmann to the Honorable Joseph N. Mack. All future filings with the Board must include Docket No. 87-061-MJ.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: February 14, 1990

cc: **Bureau of Litigation**
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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GATEWAY COAL COMPANY : Docket No. 76-163-B and 77-051-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Appellant, Gateway Coal Company (Gateway) has, by motion, requested that the Environmental Hearing Board reassign two cases pending before the Board and docketed at EHB Docket Nos. 76-163-C and 77-051-B from Member Burke to another Member of the Board. Both cases involve appeals by Gateway Coal Company from actions of the Department of Environmental Resources (DER), through its Commissioner of Deep Mine Safety, under the provisions of the Pennsylvania Bituminous Coal Mine Act, the Act of July 17, 1961, P.L. 659, *as amended*, 52 P.S. §701.

This opinion is written by Member Burke as we believe that a motion questioning the impropriety of a Board Member should be initially addressed by that Member.

Appellant asserts that a reassignment is necessary to: "eliminate the possibility of bias against Gateway or a violation of its right to procedural due process, to avoid a violation of the spirit of the Code of Judicial Conduct and to avoid the appearance of bias and impropriety".

Appellant bases its motion on Member Burke's prior employment as an Assistant Attorney General for the DER. In its motion, appellant contends that Member Burke served as an Assistant Attorney General for the DER prior to his appointment to the Environmental Hearing Board, that both appeals were filed with the Board by Gateway at a time when Member Burke was an Assistant Attorney General, and that counsel for DER in both cases, Dennis W. Strain, Esquire, was a fellow employee of Member Burke in the Bureau of Litigation, Western Enforcement Field Office and shared office and other facilities with Member Burke.

Appellant further continues that Member Burke, while he was an Assistant Attorney General, represented the DER against Jones and Laughlin Steel Corporation, a company "affiliated" with Gateway, in matters before this Board at Docket No. 73-345-B.

Although Appellant requests the "reassignment of these cases for handling", we believe that Appellant is, in reality, requesting that Member Burke be disqualified from any participation in the two cases. All adjudications are entered by the full Board rather than by individual members. Thus a reassignment alone would not affect the requisite participation of Member Burke in the ultimate adjudication of these appeals.

The governing statute is Canon 3C of the Code of Judicial Conduct, adopted by the Supreme Court on November 21, 1973. The relevant portion of the Canon states:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

Although there may be legitimate dispute on whether or not the Code of Judicial Conduct applies to Members of this Board, we will proceed on the assumption that it does apply. The provision titled "compliance with the Code of Judicial Conduct" states in part: "Anyone, whether or not a lawyer, who is an officer of a judicial system[1] performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate is a judge for purposes of this Code".

Appellant also cites various cases in a memorandum of law submitted simultaneous with its motion for the proposition that Member Burke's handling of the two appeals would deprive Appellant of procedural due process. However none of the cases cited by Appellant are relevant to the facts of these appeals. The cases, *Gardner v. Reposky*, 434 Pa 126, 252 A2d 704 (1969), *Commonwealth v. American Bankers Insurance Company of Florida*, 26 Pa Commonwealth Court, 189 363 A2d 874 (1976), *Horn v. Township of Hilltown*, 461 Pa 745, 337 A2d 858 (1975) and *Donner v. Downington Civil Service Commission*,

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[1]Although the Board is not considered a part of the judiciary, it does perform a quasi-judicial function.

3 Pa. Commonwealth Ct., 283 A2d 92 (1971), all relate to the commingling of the prosecutorial and judicial functions of an administrative agency. The principle stated by all the cases is that the same person cannot be prosecutor and judge. In *American Bankers Insurance Company of Florida, supra,* a case quoted extensively by Appellants, the counsel for the Department of Insurance was the direct subordinate of the hearing examiner. The Commonwealth Court held that the prosecutorial and adjudicatory functions of the Department of Insurance were insufficiently isolated from each other and therefore a showing of actual bias or prejudice on the part of the hearing examiners need not be shown to establish a lack of procedural due process, but will be presumed from such a commingling of functions. However, Gateway, in the prosecution of these appeals, does not have to contend with a commingling of prosecutorial and adjudicatory functions. Sections 472 and 1921-A of the Administrative Code of 1929, Act of April 9, 1929, P.S. 177, *as amended,* 71 P.S. §51 *et seq,* provide for a separate entity, the Environmental Hearing Board, to adjudicate actions of the DER. The Commonwealth Court in *Commonwealth of Pennsylvania, Department of Environmental Resources v. United States Steel Corporation,* 7 Pa. Commonwealth Ct. 429, 300 A2d 508 (1973), ruled that the statutorily required procedure for adjudicatory appeals from actions of the DER comports with due process requirements. Member Burke has had no involvement with DER's prosecution of these appeals and has no knowledge of the facts *dehors* the record. Therefore, since there is no exercise of dual control over the prosecutory and adjudicatory functions, these cases do not evince the appearance of bias or impropriety and the resulting deprivation of due process, prohibited by the Courts in *Gardner v. Reposky, supra* and its progeny.

The effect of noncompliance with Canon 3C of the Code of Judicial Conduct by a judge is a recommendation of sanctions by the Judicial Inquiry and Review Board to the Pennsylvania Supreme Court. Also, a violation of Canon 3C which results in the appearance of bias constitutes a denial of due process of law. See *Commonwealth Coatings Corporation v. Continental Casualty,* 393 U.S. 145, 89 S. Ct. 337, 21L Ed. 2d 301, 37 L.W. 4038 (1968).

Appellant argues that Member Burke's representation of the DER while he served as an Assistant Attorney General against Jones and Laughlin

Steel Corporation, a company affiliated with Gateway, in various matters including an appeal pending at EHB Docket No. 73-345-B, might reasonably cause his impartiality to be questioned. We disagree. All involvement by Member Burke with those matters was, of course, terminated upon his resignation from DER. Also, none of those matters are even tangentially related to these appeals. For example, the subject matter of the pending appeal at EHB Docket No. 73-345-B is compliance by Jones and Laughlin with the Pennsylvania Air Pollution Control Act, whereas the present appeals relate to the obligations of Gateway under the deep mine safety aspects of the Pennsylvania Bituminous Coal Mine Act, *supra*. Since there is no relationship between the Jones and Laughlin cases and these appeals and no connection exists between Mr. Burke's prior representation of DER and his duties as a Board Member, we believe it to be unreasonable to suppose the existence of disqualifying bias on such grounds. The resolution of these appeals will not even remotely affect his personal or pecuniary interest. Even in a criminal case, the fact that a judge prosecuted an accused for other offenses while he was a district attorney is not a ground for disqualification. 46 Am Jur 2d §197, p. 221 (1969). See also *In re Grand Jury Investigation*, 486 F. 2d 1013, (3d Civ. 1973), *Goodspeed v. Beto*, 341 F. 2d 908, (5th Civ, 1965), *Gravenmier v. United States*, 469 F. 2d 66, (9th Cir. 1972) and *United States v. Vasilick*, 160 F.2d 631 (3rd Cir. 1947). In *Eisler v. United States*, 170 F.2d 273, (D.C. Cir. 1948) a charge of personal bias was found inadequate, even though it alleged the following facts: the judge, as an Assistant Attorney General, had directly assisted FBI inquiries into the activities of alien communists, including the litigants; the judge was a personal friend of the FBI Director and the judge, in a prior capacity, had sponsored legislation for the deportation of alien communists.

Since Member Burke never participated either of record or in any capacity as a lawyer in either of the appeals, and since he has no knowledge of the disputed evidentiary facts, these provisions of Canon 3C are not applicable.

Appellant also argues that Member Burke's service as an Assistant Attorney General and consequently a fellow employee of Attorney Strain during the period of time when these appeals were pending with DER constitutes grounds for his disqualification.

Canon 3C requires disqualification of a judge when a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter. John P. Frank, a leading commentator on the subject, states in his article, Commentary on Disqualification of Judges - Canon 3C, 1972 Utah Law Review, 377, that ..."this provision is simply a manifestation of the general rule that a judge shall not hear cases which he handled as a lawyer. This view has been expressed in a federal statute which provides that a justice shall be disqualified in any matter in which he or his firm have been counsel". Id at 381. All members of a law firm are viewed as being in the same position as the attorney chosen by the firm to handle the case. *Chromulak v. Garcia*, 44 D&C 2d. 334 (1968); *Laskey Brothers of West Virginia, Inc. v. Warner Brothers Pictures*, 224 F. 2d 824 (2d. Cir. 1955), *cert. denied*, 350 U.S. 932 (1956), *Handelman v. Weiss*, 368 F. Supp. 258 (S.D.N.Y. 1973). In Opinions 72 and 49, the Committee on Professional Ethics of the American Bar Association held that the relations of partners in a law firm are such that neither the firm nor any members or associates thereof, may accept any professional employment which any member of the firm cannot properly accept. ABA Opinions 49 (1931) and 72 (1932)

However, a government attorney is not viewed as having the same relationship with fellow employees as an attorney with a private firm. The Commentary following Canon 3C(1)(b) explains how the provision applies to a judge who was formerly employed by a government agency.

> "A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association".

The determining factor on disqualification for a former government attorney is the extent or degree of contact he had with the case before being appointed a judge.

In *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L Ed. 2d 50 (1972), where the Supreme Court, by a 5 to 4 vote, ruled that no justiciable issue was raised by plaintiff's seeking to enjoin domestic military surveillance, Justice William Rehnquist was requested by motion to recuse himself from

participation in the matter because of his connection with the case when he was with the Justice Department. Justice Rehnquist did not formally participate in the preparation of briefs or pleadings on behalf of the government. He did, however, serve as a witness for the Justice Department on the issue of the constitutionality of government surveillance before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, at which time he made specific reference to the facts of the *Laird* case. He also submitted a memorandum of law to the Subcommittee in which he defended his contention that surveillance activities such as those in *Laird* are constitutional.

Despite his involvement with the *Laird* case before his appointment to the Supreme Court, Justice Rehnquist did not disqualify himself when the Supreme Court heard the case. Initially, he agreed that a judge who is a former Justice Department official is disqualified if he signed a pleading or brief or if he actively participated in any case even though he did not sign a pleading or brief. He then decided that "since I did not have even an advisory role in the conduct of the case of *Laird v. Tatum*, the application of such a role would not require or authorize disqualification here." Id. 409 U.S. 824 at 830.

Justice Rehnquist also examined his role in light of the portion of 28 U.S.C.A. §455 which requires disqualification where the judge "is so related to, or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein". Justice Rehnquist concluded that:

> I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department. Id 409 U.S. 824 at 831.

While Justice Rehnquist grounded his decision on the requirements of 28 U.S.C.A. §455, he stated that: "Since I do not read these particular provisions (the draft of standards of judicial conduct adopted by a committee of the American Bar Association[2]) as being materially different from the

[2] Although the Code of Judicial Conduct had not been adopted by ABA's House of Delegates prior to Justice Rehnquist's participation in *Laird*, it had been prepared and adopted by the Special Committee on Standards of Judicial Conduct and made available to the public by May, 1972.

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M. DIANE SMITH
SECRETARY TO THE BOA

FREDERICK EYRICH and HARLAN J. SNYDER	:	
	:	
v	:	**EHB Docket No. 88-013-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 16, 1990**
and OLEY TOWNSHIP, Permittee	:	

OPINION AND ORDER SUR
DER MOTION TO DISMISS

Synopsis

DER's Motion to Dismiss this appeal based upon the contention that there was no "deemed approval" under 25 Pa. Code §71.16(d), is denied. A deemed approval occurred because DER failed to address Oley Township's proposed supplement to its Official Sewage Plan within 120 days of its submission to DER. There was no waiver of this 120 day review period by the developer because the developer took no actions whatsoever on this supplement during the 120-day period.

OPINION

This convoluted matter began on January 19, 1988, when Harlan J. Snyder and Frederick Eyrich (collectively "Eyrichs") appealed to this Board from DER's failure to act within 120 days on a plan revision as allegedly required by 25 Pa. Code §71.16. The plan revision does not belong to Eyrichs and is not for their property but for property owned by Marjorie J. Helfferich ("Helfferich"), to be developed as High Knoll Estates, which property is

located in Oley Township in Berks County. According to Eyrichs' appeal, Oley Township ("Oley") is also where Eyrichs are residents.

Oley advised this Board by letter from its solicitor dated June 20, 1989, that it has elected not to participate in this proceeding as to the question of "deemed approval" discussed below. Oley takes this position apparently even though it recognizes the fact that it is a party. Oley is a party by virtue of 25 Pa. Code §21.2 because of the fact that it is Oley which made the submission of the proposed supplement to its own Official Sewage Facilities Plan for the Helfferich property, which submission is now being challenged by Eyrichs. By virtue of this fact under 25 Pa Code §21.2.

The only person interested in this matter who has not appeared or intervened by counsel in this case is Helfferich.

After Eyrichs filed their appeal, they filed their Pre-Hearing Memorandum in accordance with our Pre-Hearing Order No. 1 dated January 26, 1988. In response to Eyrichs' Pre-Hearing Memorandum, DER wrote to this Board by letter dated June 15, 1988 and advised that it elected to file no Pre-Hearing Memorandum. DER's letter took the position (taken routinely by DER in third-party appeals) that any duty to defend in this case rested on Oley or Helfferich.

After receipt of the letter dated June 20, 1988 from Oley's solicitor saying Oley would not participate in this matter, and on June 27, 1988, we ordered DER to advise the Board of its position regarding Eyrichs' contentions as to a "deemed approval" of Oley's supplemnent. On September 1, 1988 DER filed a Memorandum of Law on this matter which contained a Motion to Dismiss this appeal on the theory that since there had been no "deemed approval" of the supplement by DER, there was nothing to appeal from.

On September 14, 1988, we notified counsel both for Oley and Eyrichs

of DER's Motion and directed that if they wished to respond thereto, they file their responses by October 4, 1988. Oley then advised us by letter of June 7, 1989, of its decision not to respond. Eyrichs filed their response to DER's Motion on June 15, 1989.[1] Thereafter William A. Roth left this Board and on December 19, 1989, this case was assigned to Board Member Richard S. Ehmann.

The issue before this Board, based on DER's Motion, is whether a "deemed approval" of Oley's proposed supplement to its Official Sewage Plan for the Helfferich property, has occurred through expiration of the 120-day period in 25 Pa Code §71.16.

25 Pa Code §71.16 provides:

> (d) Upon failure of the Department to approve an official plan within 120 days of its submission, the official plan shall be deemed to have been approved, unless the Department informs the municipality that an extension of time is necessary to complete review.

According to the Statement of Facts in DER's Memorandum and Motion and the facts set forth in Eyrichs' Pre-Hearing Memorandum, on June 2, 1987 DER received Oley's proposed supplement. On August 5, 1987 DER advised Oley by letter of three deficiencies in the proposed supplement (Exhibit A to Appellants' Pre-Hearing Memorandum). By letter dated January 13, 1988, DER acknowledged that it had received the information addressing these three deficiencies on August 18, 1987, but stating further DER review shows additional information must now be submitted by Helfferich through Oley

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[1] In the interim period between our letter of September 14, 1988 and Oley's letter of June 7, 1989, DER and Eyrichs filed a joint Motion For Judgment On The Pleadings. When we advised the parties of our reluctance to rule on this Motion citing Ingrid Morning v. DER, 1988 EHB 919 and suggested alternatives to this Motion, the parties withdrew their joint motion by letter dated May 12, 1989. As a result on May 25, 1989, we then ordered that all responses to DER's Motion to Dismiss be filed by June 16, 1989.

(Exhibit B to Appellants' Pre-Hearing Memorandum). These facts are not disputed by the parties.

In response to DER's letter, Helfferich's counsel wrote to DER on February 4, 1988 advising that between August 18, 1987 and January 13, 1988, 148 days had expired and thus by operation of 25 Pa Code §71.16(d) the proposed supplement was "deemed approved." (Exhibit C to Eyrichs' Pre-Hearing Memorandum) In turn, DER replied on February 29, 1988 that it disagreed with Helfferich that a "deemed approval" had occurred. (Exhibit D to Eyrichs' Pre-Hearing Memorandum)

On May 6, 1988 Helfferich's counsel advised DER his client would submit the information DER sought in its letter of January 13, 1988 so as to avoid the expense and delays of litigation (Exhibit C-2 to DER's Memorandum of Law). The letter also said that in doing so, Helfferich was not abandoning her contention that a deemed approval had occurred.

DER's Memorandum of Law and Eyrichs' response take nearly identical positions that a deemed approval has not occurred. DER says:

1. Deemed approval never begins to operate because we never received the information we requested in our January 13, 1988 letter so the application was not complete enough to start the 120 day clock.

2. Even if DER should have acted within 120 days of August 18, 1987, since we are going to receive this study from Helfferich and nonparticipating Oley would like a hydrogeologic study too. Eyrich and DER both think DER should make a final decision here, and DER will make it within 120 days of submission of this study.

3. Eyrich has told DER that Oley would like this study and will not issue building permits for High Knoll Estates until DER finally decides this issue affirmatively, so Oley's action is an implicit waiver of the 120-day

rule.

Eyrichs' Response says:

1. The 120-day deadline is waivable by the parties.

2. By Helfferich's agreement to submit this information, Helfferich has waived the 120 day provision of 25 Pa Code §71.16(d).

3. Oley waived application of the 120-day requirement to this supplement by expressing its desire to see a hydrogeologic study of the Helfferich property.

In plain English, no matter how Eyrichs and DER wish to change history, by operation of 25 Pa Code §71.16(d) a deemed approval occurred as to Oley's supplement for the Helfferich property.

DER's memorandum concedes this when it says:

> Although it may be argued that the Department had a duty under 25 Pa Code §71.16(d) to decide that the plan was incomplete within 120 days from its submittal, since the municipality and developer have committed to supply the information after the 120 day period ended, they obviously seek a final determination from the Department on the matter. (emphasis in original)

Having said this, DER never comes back to offer any way to overlook or ignore its unexplained inaction.

Eyrichs' memorandum does no better. It states:

> "Appellants agree with the Department that there should not have been a deemed approval in the instant matter. Even though according to the regulations a deemed approval would have occurred had the township or developer refused to comply with the Department's requests...."

Thus Eyrichs concede the 120 clock in 25 Pa Code §71.16 had run by the time DER wrote its letter of January 13, 1988.

Even if Eyrichs did not concede that there was a 120-day problem here, the materials submitted by the parties show this is so. As of August

18, 1987 DER had Oley's complete proposal before it. On January 13, 1988 DER sought more information. By that date, over 120 days had passed since DER received the information on August 18, 1987. It is no wonder that Helfferich's counsel wrote back to DER in February of 1988 saying we have a deemed approval and in May of 1988 saying we will give you the hydrogeologic study to try to settle things without litigation but without waiving our legal defense of a "deemed approval."

Eyrichs and DER argue Oley waived operation of 25 Pa Code §71.16. It may be that Oley did waive it on Oley's behalf. No one suggests that Oley can waive it for Helfferich or even that Oley tried to waive it for anyone but Oley. Indeed except for allegations that Oley's alleged interest in the study constitutes a waiver, no party even shows a waiver by Oley. Oley's waiver, if it occurred, applies only to Oley. It does not act as a waiver for Helfferich. To see if Helfferich waived this regulation's application we must look at her actions and those of her counsel.

Eyrich and DER argue Helfferich's waiver occurred by virtue of the letter from her lawyer in May of 1988. Helfferich did not waive application of §71.16's 120-day clock to Oley's supplement for her land. The letter from Helfferich's counsel, agreeing to provide the study sought by DER, expressly reserves this defense. Nothing could be clearer. After saying Helfferich will furnish the study, it says:

> "You should be advised that by this action we are not waiving or altering our position that our client has the benefit of the deemed approval theory.... However to avoid the expenses and delays inherent in litigation we have encouraged our client to obtain the studies...."

There is no way to construe such language as a waiver.

Eyrichs cite us Crowley v. DER, EHB Docket No. 88-221-M (issued January 9, 1989) and the cases cited therein in support of their waiver

argument. That case dealt with this same deemed approval issue but its facts are not like those in the instant matter.

As stated in Crowley v. DER, supra, it is indeed possible a waiver of the 120 day period in §71.16 could occur where someone makes a submission to DER and then requests DER defer its decision. The cases cited in Crowley v. DER, supra, stand for this proposition's application under Sections 508 and 908 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended 53 P.S. §10508 and 10908. These cases hold that for a waiver to occur, there must be a request for deferral of a decision and it must occur within the period in which the review was to occur. Here there was not only no such request but even if the May, 1988 letter by Helfferich's counsel could be stretched to be construed as a request for deferral (which stretches it beyond recognition), this "request" was not made until after the 120-day period was already over. Thus the requisites for a waiver set forth in Crowley, supra, are not met.

Insofar as the parties read Crowley, supra, and the cases cited therein for the proposition that a waiver can occur after expiration of the 120 period in §71.16, by virtue of actions of the allegedly waiving party providing DER information it seeks, they are in error. The cases cited in Crowley, supra, do not say this. None of them deals with that circumstance. The closest one to this proposition is a footnote in In re Appeal of Grace Building Co., Inc. 39 Pa. Cmwlth. 552, 395 A.2d 1049 (1979). A reference in a footnote that case, which was decided on other grounds, says a waiver occurred where a party continued to have further hearing on the merits of its zoning appeal after the time ran and having these hearings was deemed a waiver. Here Helfferich has not been shown to have had any formal proceedings before Oley or DER on this supplement, Helfferich only grudgingly gave DER the

study (after stating no waiver), and Helfferich's counsel has not participated in this appeal in any way.[2]

In Crowley, supra, there were attempts by Crowley to get DER the information it sought both within the 120 day period and apparently afterward (though the parties there did not make a clear record on this point), which actions were the waiver. No such attempts during the 120 day period were made here. Insofar as Crowley, supra, is read by the parties in this case to say that taking steps to get information for DER, after expiration of the 120 day period, constitutes a waiver of the 120-day period in §71.16(d) we now clarify that decision to indicate this is not what we said. If a party has a deemed approval under §71.16(d) and thereafter takes steps to provide information to DER, that is not a waiver of this 120 day period. DER's deemed approval has been given at that point. It is not voided by Helfferich's attempts to place DER and Helfferich back on an amicable footing.

The above being true and the supplement having been approved by DER through inaction, we cannot grant DER's motion. This case must now go forward on its merits.[3]

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[2] This Board would have appreciated it if Helfferich's counsel had given us the benefit of his client's position on the issues raised by Eyrichs and DER.

[3] We wonder whether this opinion does not render this appeal moot, we question what relief can be granted Eyrichs and ask that the parties provide us their view of this issue in the attached Order.

ORDER

AND NOW, this 16th day of February, 1990, the Motion to Dismiss filed by DER in the above-captioned matter is denied. DER is ordered to file a Pre-Hearing Memorandum on or before March 2, 1990.

Counsel for DER and for Eyrich shall file a Brief on the issue of the mootness of this appeal in light of this Order. Said Brief shall be filed with this Board by March 16, 1990.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: February 16, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Louise Thompson, Esq.
Eastern Region
For Appellant:
Randall J. Brubaker, Esq.
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For Permittee Oley Township:
D. Frederick Muth, Esq.
Township of Oley

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M. DIANE SMITH
SECRETARY TO THE BO

LUZERNE COAL CORPORATION et al.	:	
	:	
v.	:	**EHB Docket No. 87-481-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued February 26, 1990**

OPINION AND ORDER
SUR MOTION FOR RECUSAL OF RICHARD S. EHMANN

Synopsis

Fifteen years of service in the Bureau of Litigation, Department of Environmental Resources is not of itself grounds for recusal of a Board Member.

OPINION

The procedural history of this matter is set forth in the Board's January 2, 1990 opinion and order regarding the Department of Environmental Resources' (DER) motion in limine and the Board's January 9, 1990 opinion and order denying Luzerne Coal Corporation's (Luzerne) motion for reconsideration. The matter of recusal was initially raised in a telephone conversation between counsel for Luzerne and Richard S. Ehmann (Mr. Ehmann) sometime between the two above recited orders. At that time Mr. Ehmann requested that any further discussion be in writing in petition form. On January 11, 1990 Luzerne filed a motion seeking the recusal of Mr. Ehmann because of his "longstanding

association with the Bureau of Litigation's Pittsburgh office...coupled with his personal relationships with attorneys in this case."

Luzerne alleges, <u>inter alia</u>, that Mr. Ehmann had for most of his professional career been associated with the DER Western Region, Bureau of Litigation in various capacities, including supervisor of the office, and that, as such, had as his "clients" the DER employees who recommended and issued compliance orders such as the one at issue here and either supervised or associated with the attorneys who were involved in this matter. Finally, counsel for Luzerne stated that he had acted as counsel for Mr. Ehmann in two adoptions 10 and 14 years previously and alleged that National Mines Corporation (National), the other appellant, did not object to Mr. Ehmann's handling of this matter because of the feeling that Mr. Ehmann would favor DER or National over Luzerne.

After receiving the motion, the Board, on January 12, 1990, issued an order assigning the matter to Member Joseph N. Mack for the specific purpose of conducting an evidentiary hearing and deciding the motion. The order also directed that the hearing be held on January 16, 1990 and that Luzerne file a memorandum of law in support of its motion prior to the hearing.

Prior to the hearing, and in accordance with the Board's January 12, 1990 order, Luzerne tendered a brief which reiterated most of the material in its Motion for Recusal and added a long section entitled "The Burden of Proof Decision" which went on to detail the facts surrounding a procedural decision made by Mr. Ehmann which shifts the burden of proof from DER to the appellants, which decision was made in response to a motion by DER

(motion in limine). The opinion by Mr. Ehmann indicates that Luzerne had filed a brief on the issue and that it was not considered because it was not timely filed.

At the hearing Luzerne called four witnesses: Richard S. Ehmann, Stanley Geary, Diana Stares and Alan Miller. The first three of these witnesses testified that they had worked in the Pittsburgh office, Bureau of Litigation, DER for varying times but that they did not work on the same cases or even the same type of cases. The examination by Luzerne centered on the fact that there had been a consent order or orders that came about while the three of them were all working in the Pittsburgh office. All three testified that Mr. Ehmann had nothing to do, either directly or indirectly, with the earlier Luzerne case or the consent order.

The second line of questioning for all of the witnesses had to do with whether or not the DER had a policy of attempting to shift the burden of proof in appeals before the Board from DER to appellants. The three witnesses who had been a part of the Pittsburgh office all testified that they knew of no such policy and, further, that the shifting of burden had only been attempted in a very small number of cases and had been successful in two cases.

The last witness, one of the counsel for Luzerne, testified that he had not filed his brief on the motion in limine question because he had misunderstood the time limits imposed by the Board's order.

Legal Issues

In deciding this motion we must look to the Code of Judicial Conduct, and most specifically Canon 3C(1) and the Commentary which follows it:[1]

> 3C(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> Commentary
>
> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this sub-section; a judge formerly employed by a governmental agency, however should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

The language in Canon C(1) which says "his impartiality might reasonably be questioned" is incorporated in 28 USC §455a and has been interpreted by the federal courts as meaning "Might be questioned by a reasonable person knowing

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[1] The Standing Committee on Ethics and Professional Responsibility of the American Bar Association, which wrote and proposed the 1972 Code, will propose to the Bar at its 1990 meeting a Model Code of Judicial Conduct (1990) which will change the commentary of the 1974 Code to read as follows:

Commentary:

> A lawyer in a government agency does not ordinarily have an association with other lawyers within the meaning of this section...
>
> Note: the word ordinarily was substituted for necessarily to indicate that disqualification does NOT usually result from these relationships.

all the relevant facts and circumstances," Roberts v. Bailar, 625 Fed 2nd 125, 129 (6 Cir 1980); Gateway Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Resources, 76-163-B and 77-051-B (Issued February 8, 1978).

The witnesses called by Luzerne substantiate Mr. Ehmann's 14-year period of practice with DER which terminated in 1985, prior to the initiation of the present case. These same witnesses make it abundantly clear that Mr. Ehmann did not, within the meaning of Canon 3(C)(1)(b) and its accompanying commentary, "have an association with" the other lawyers in DER or even the other lawyers in the Pittsburgh office of DER. It is clear from the testimony that the Pittsburgh office had a group of "coal" or "mining" lawyers which included Diana Stares and Stanley Geary and just as clearly did not include Mr. Ehmann. This separation came about through separate federal funding of certain positions. These lawyers kept to themselves and by their own testimony developed a separate rapport and were advised and supervised internally, i.e. by other "coal" or "mining" lawyers.

The appellant Luzerne's position seems to be that the mere presence in the Pittsburgh office of Mr. Ehmann is sufficient to taint him so that he should not hear cases where DER "clients" are involved, even after five years out of the office. This is, in essence, an allegation of an appearance of partiality. Judging it by the standard in Roberts v. Bailar, supra, we cannot find that a reasonable person, under the circumstances presented in the testimony, could question Mr. Ehmann's impartiality.

In support of its position, Luzerne urges us that the Commonwealth Court's ruling in FR&S v. Department of Environmental Resources, 113 Pa.Cmwlth. 576, 537 A.2d 957 (1988), Aff'd ___ Pa ___, 560 A.2d 128 (1989)

compels the conclusion that Mr. Ehmann should be recused from hearing this case because of his prior association with DER. Rather than compelling Mr. Ehmann's recusal in this case we believe that the Commonwealth Court's opinion supports the opposite conclusion. While the court noted that Board Chairman Woelfling's former employment with DER gave rise to some suggestion of bias, it was primarily concerned about due process defects resulting from the manner in which a draft adjudication prepared by a Board member who resigned was acted upon subsequentlyby the Board. Those circumstances are certainly not present in this case.

The final issue which must be addressed is Luzerne's allegations concerning Mr. Ehmann's disposition of DER's motion in limine or the "burden of proof" issue.[2] This motion filed by DER sought a ruling pursuant to 25 Pa.Code §21.101 to shift the burden of proof on the theory that the burden should rest upon the party or parties who have the best access to the facts at issue. Luzerne's position seems to be that this decision, perceived as being against its interests, constitutes grounds for recusal. The receipt of an unfavorable procedural ruling, absent other circumstances, does not constitute grounds for recusal.

[2] Luzerne asserts that DER had a policy concerning this issue and that Mr. Ehmann was somehow associated with or aware of the policy. It also seems to suggest that Mr. Ehmann's disposition of the motion in limine in a manner favorable to DER is somehow grounds for recusal. We fail to comprehend how either of these assertions would provide grounds for recusal.

O R D E R

AND NOW, this 26th day of February, 1990, it is ordered that Luzerne Coal Corporation's motion for recusal of Richard S. Ehmann is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 26, 1990

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M. DIANE SMITH
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HARLAN J. SNYDER and FRED EYRICH	:	
v.	:	EHB Docket No. 88-196-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MARATHON LAND CORPORATION, INTERVENOR	:	Issued: February 26, 1990

OPINION AND ORDER SUR MOTION TO COMPEL

Synopsis

A motion to compel discovery is granted in an appeal from the Department of Environmental Resources' (DER) approval of a revision to a township's official sewage plan. Although the tract of land upon which testing is sought was not the subject of the instant revision, and prior approval of that tract's sewage provision may not now be appealed, the Appellants have established that the test results could be relevant to show that geologic conditions in the entire subdivision are such that the instant revision was unjustified.

OPINION

This case involves an appeal by Harlan J. Snyder and Fred Eyrich (Snyder & Eyrich) objecting to the Department of Environmental Resources' (DER) approval of a revision to the Oley Township Sewage Facilities Plan. The approved revision provided for on-lot sewage disposal for six residential

units located on lots 10-15 (Section II) of the Pine Creek Subdivision. The developer of the subdivision, Marathon Land Corporation (Marathon), has intervened in this action.

This opinion and order addresses Snyder and Eyrich's motion to compel discovery. The motion asserts that Marathon refuses to allow Snyder and Eyrich to conduct tests on lots 1-9 (Section I) of the subdivision as part of their discovery. Snyder and Eyrich state the following reasons for compelling Marathon and DER to allow discovery of Section I: 1) the geologic problems which exist at the site occur throughout the whole development; 2) under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. and under DER's regulations at 25 Pa Code §71.15(c)(3),[1] DER's prior approval of the plan for Section I's sewage facilities is invalid because Section I was initially submitted as an independent segment, rather than as part of a subdivision; and 3) Snyder and Eyrich's pre-hearing memorandum and notice of appeal alleged that both Sections I and II did not have geologic conditions suitable for on-site sewage disposal (Appellant's Pre-hearing Memorandum, p. 1), and neither Snyder and Eyrich's unopposed motion for leave to conduct discovery, nor the Board's order granting it, limited discovery to Section II.

Marathon responded to the motion to compel, arguing that discovery of Section I is irrelevant because that section has already been approved and Snyder and Eyrich did not appeal that approval within 30 days of its effectiveness. Thus, Marathon asserts that Section I's approval may not now be raised, which leaves only Section II in dispute.

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[1] 25 Pa Code §71.15 has since been repealed as part of a comprehensive modification of Chapter 71 of DER's regulations. See 19 Pa Bulletin 2429, June 10, 1989. However, §71.15 was in effect at the time of the events which led to this appeal; thus, it is relevant here.

DER also responded to the motion to compel, stating that the Section I approval cannot now be appealed. DER conceded, however, that the soil conditions of lots in Section I may be relevant to Snyder and Eyrich's contention that DER erred in approving the additional 6 lots in Section II without a preliminary hydrogeologic study.

We agree with DER, and will compel discovery of Section I insofar as it relates to the issue of whether DER failed to properly assess geologic conditions relevant to sewage disposal on Section II.

The motion to compel's central contention, that the approval of Section I sewage facilities is invalid, is outside the scope of the instant appeal. In order for an action to be appealed to this Board, the objecting party must file its appeal within 30 days of the DER action. §§1920A, 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, 71 P.S. §§186, 510-20 and 510-21, 25 Pa Code §21.52(a). According to 25 Pa Code §71.15(c)(3),[2] the Section I plan was approved when the municipality approved it. At the very latest, Snyder and Eyrich knew of this approval via a letter sent on November 9, 1987, by Oley Township to DER which confirmed the Section I approval. A carbon copy of this letter was sent to Mr. Eyrich. The current appeal was filed on May 13, 1988, well past the thirty-day time

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[2] 25 Pa Code §71.15(c)(3) (repealed), pertaining to Department review of 537 plan supplements, stated:

> The Department will review supplements to plans and make its decision as to the adequacy of the plan supplement in writing to the municipality within 45 days of receipt of the supplement; provided however, if the proposed subdivision as defined in the act is ten residential lots or less and is not part of an existing or other proposed subdivision and proposes to utilize on-lot sewage disposal systems, then the proposed subdivision shall be considered as an approved supplement to the plan of the municipality provided that the information prepared and submitted on the Planning Module for Land Development, Component 1, is reviewed and found acceptable for subsurface sewage disposal by the sewage enforcement officer and otherwise approved by the municipality.

limitation for appeals to this Board. Therefore, it is clear that the approval of Section I is not before us.[3]

However, Snyder and Eyrich's motion points out that they have alleged in their pre-hearing memorandum that the geological conditions of the entire tract are insufficient to support the development's on-site sewage disposal facilities. We agree with Snyder and Eyrich that geologic conditions in Section I may be relevant to this appeal, because groundwater pollution from the lots in Section II could migrate into Section I. Furthermore, test data from Section I were submitted to DER along with data from Section II when the township applied for the revision now under appeal. These factors indicate that--as to the propriety of adding Section II to the sewage plan--discovery of Section I may have some relevance. Since, for purposes of discovery, relevancy is broadly construed, and will be found to exist upon any conceivable basis, we will grant the motion to compal. See Pa R.C.P. §4003.1; Goodrich-Amram 2d, §4003.1:F, pp. 66-67; Save Our Lehigh Valley Environment v. DER, 1988 EHB 147, 150.

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[3] DER raises the additional argument that there was no DER action as to Section I because the approval was granted by the local sewage enforcement officer and the municipality pursuant to 25 Pa Code §71.15 (c)(3). We find it unnecessary to address this argument, as the appeal was untimely in any event.

ORDER

AND NOW, this 26th day of February, 1990, it is ordered that the Motion to Compel filed by Harlan J. Snyder and Fred Eyrich is granted.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: February 26, 1990

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WILLIAM F. CRAMER :
:
V. : **EHB Docket No. 90-018-MR**
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: February 26, 1990**

**OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS**

Synopsis

A Compliance Order issued by DER will be superseded to the extent that it revokes a Beneficial Use Approval for the use of reject asphaltic material in the subbase and surface of roads and parking lots. Appellant has demonstrated a likelihood of prevailing on the merits of this aspect of the appeal, since a single violation of the Approval which caused no harm to the environment is insufficient to justify revocation.

ORDER

On January 10, 1990, William F. Cramer (Appellant) filed an appeal from a Compliance Order (C.O.) issued by the Department of Environmental Resources (DER) on December 18, 1989. Concurrent with the filing of his appeal, Appellant filed a Petition for Supersedeas. DER did not file a response to this Petition but did file a Pre-hearing Memorandum on February 8, 1990. A hearing on the Petition was held in Harrisburg on February 9, 1990, before Administrative Law Judge Robert D. Myers, a Member of the Board. The record consists of the pleadings, a transcript of 203 pages and 13 exhibits.

The evidence establishes that DER issued to Appellant on April 1, 1988 a Beneficial Use Approval[1] (Exhibit A-3) for the processing of reject asphaltic material on Appellant's farm in Perry County. The Approval authorized Appellant to process reject asphaltic material to be used (1) as a feed stock in the manufacture of asphaltic base materials, (2) as a supplement for asphalt production in asphalt plants, and (3) as a road surfacing material. Seven conditions incorporated into the Approval regulated the volume and duration of stored material on Appellant's farm. The Application (Exhibit A-2) which Appellant had filed on or about January 13, 1988, stated that the reject asphaltic material would consist primarily of shingles and rolled roofing obtained from a manufacturer of roofing products. Upon arrival at Appellant's farm, the material would first be unloaded; non-recyclable material then would be segregated and hauled to a permitted landfill; recyclable material would be run through a shredder and stockpiled for sale.

The Beneficial Use Approval was amended on September 21, 1989 to authorize an additional use for the material - as a subbase for road and parking lot construction - subject to depth limitations [2] (Exhibit A-4).

Richard L. Hench owns land in Juniata Township, Perry County, on which he is having a house constructed. Access to the home site is provided by a private lane that extends about 2000 feet from a public road. As it nears the point where the house is being constructed, the private lane goes downgrade for several hundred feet, bottoms out, and then goes upgrade for

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[1] This Approval was issued under the authority of DER's Interim Policy for the Beneficial Use of Residual Waste, dated September 11, 1987 (Exhibit A-1), developed to address requests for exemptions from the residual waste permit requirements of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 <u>et seq</u>.

[2] 3 feet for roads; 4 feet for parking lots.

several hundred feet to its terminus. In the area where the lane goes downgrade, a ravine exists on the left side and parallels the lane for about 150 feet. The ravine and the area immediately adjacent to it are wooded.

The private lane was unimproved during the autumn of 1989 and trucks hauling construction materials had difficulty reaching the home site. As a result, Hench contacted Appellant and arranged to use the reject asphaltic material as a subbase on a portion of the private lane. On December 14, 1989, Appellant and/or his employees delivered a number of loads of material and dumped them on the private lane. Because Appellant used 40 foot dump trailers which can easily tip over on a grade, the material was dumped on a relatively level area where the lane bottomed out.

Hench's excavator, Joseph W. Deihl, then spread the piles, smoothed the material out and packed it down with a bulldozer. In doing so, he spread the material to a depth greater than 3 feet over 600 linear feet of the lane. About 100 linear feet was adjacent to the ravine. Diehl's operations in this area caused some of the material to fall over the edge into the ravine.

Appellant, Hench and Deihl all testified that work on the lane had not been completed at the end of the work day on Thursday, December 14. Appellant had shown the Beneficial Use Approval to Hench and had orally informed Deihl of its terms. They all knew that the material could not be deeper than 3 feet. It was Deihl's intention to remove the topsoil from the portion of the lane going upgrade toward the house before placing the material there as a subbase. Once the topsoil was removed, he intended to push material into that area from where it had been placed on December 14, thereby reducing the depth to 3 feet. In the meantime, he placed a layer of dirt on top of the material in an effort to make it smooth enough to drive over. Deihl also intended to remove the material that had fallen into the ravine.

Deihl and Hench testified that additional work could not be done on Friday, December 15, because of cold weather that made it impossible for Hench to start his equipment. DER inspectors arrived on the site later that day and found no one there. Responding to a complaint, DER's David J. Richard (Resource Recovery and Planning Coordinator for the Harrisburg Region) and Mary M. Golab (a solid waste specialist) went to the Hench site. Their observations convinced them that the road work had been completed and that the material in the ravine had been dumped there deliberately. Instead of shredded material, it included large sheets of fiberglass and plastic, entire rolls of roofing material and bundles of shingles (Exhibit C-5). Richard and Golab concluded that there had been an illegal disposal of residual waste.

Hench was informed later that day by a Township Supervisor that there was a problem with the material in the ravine. On Monday, December 18, Appellant and Hench traveled to Harrisburg and met with Richard, Golab and Francis P. Fair (DER's Harrisburg Regional Monitoring and Compliance Manager in the Waste Management Program and the acting Regional Solid Waste Manager). They explained that the work on the lane had not been completed. When complete, the material would not exceed the 3 feet depth limit and all material would be removed from the ravine. The DER officials did not believe them and, as a result, handed Appellant the C.O. (Exhibit A-6) which had already been prepared.

The C.O. accused Appellant of dumping and/or disposing of solid waste in the ravine on the Hench property without a permit, in violation of sections 501(a) and 610 of the SWMA, 35 P.S. §§6018.501(a) and 6018.610. Appellant was ordered to (1) cease and desist and (2) remove and properly dispose of the

solid waste by January 5, 1990. The C.O., in addition, revoked the Beneficial Use Approval, effective December 18, 1989, and directed Appellant to halt all activities related to that Approval.

While this meeting was taking place in Harrisburg, additional work was being done at the Hench property. When Deihl still could not start his equipment, Hench secured the services of another excavator, Mr. Thebes, to complete the road work and to clean out the ravine. Despite working late into the night, Thebes was unable to complete the work on December 18. Efforts to remove the material that had fallen into the ravine were hampered by snow and frozen ground that made the slopes hazardous for a bulldozer operator.

On December 19 Richard, Golab and Fair (accompanied by another DER official, Joseph Kozlosky) went to the Hench property. They observed that the linear length of the lane covered with reject asphaltic material was twice what it had been on December 15. It had been extended upgrade toward the house and the material had been spread to a depth no greater than 3 feet. Moreover, the lane now had grades more closely alined to the existing topography. Topsoil had been placed on the bank of the ravine, but pieces of material still could be seen sticking out of it. These observations did not alter the conclusions these DER officials had reached previously - that the road work had been completed by December 15 and that materials had been disposed of illegally in the ravine.

All three DER witnesses testified that what Appellant did at the Hench property posed no threat of environmental harm. His failure to shred the material created an unsightly condition in the ravine, however. Appellant testified that, after being compacted with the bulldozer, 70% of the material

was no larger in size than material run through a shredder. The other 30%, consisting of larger pieces, provided greater stability to the road, in Appellant's opinion.

Finally, Appellant testified that DER's revocation of his Beneficial Use Approval forced him to shut down his business of re-using reject asphaltic material.

In order to be entitled to a supersedeas, Appellant must show, by a preponderance of the evidence, (1) that he will suffer irreparable harm, (2) that he is likely to prevail on the merits, and (3) that there is no likelihood of injury to the public or other parties. Where pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas cannot be granted: section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78.

The immediate cessation of business operations, as mandated by DER's C.O., will cause irreparable harm to Appellant: Elmer R. Baumgardner et al. v. DER, 1988 EHB 786; Frank Colombo et al. v. DER, docket number 88-420, Opinion and Order issued December 7, 1989. Since Appellant's actions at the Hench property created no pollution and posed no actual or threatened injury to the public health, safety or welfare, granting a supersedeas is not likely to injure the public or other parties. The only other consideration is the likelihood of Appellant's prevailing on the merits of the appeal.

On the basis of the evidence before us, we are satisfied that Appellant violated the terms of his Beneficial Use Approval by delivering unshredded material to the Hench property for use as a subbase for the lane. His Application for Beneficial Use Approval unambiguously states repeatedly that material to be used in road work would be shredded. The language of the Beneficial Use Approval reflects this understanding. It is true that, at the

time these documents were prepared, the parties contemplated the use of the material only in road surfaces and not in subbases. But the September 21, 1989 amendment which authorized its use as a subbase contains no language that, in the slightest, casts doubt upon the continued necessity to shred the material.

Appellant's argument that the larger pieces provided greater stability, even if true, does not excuse his disregard of an important aspect of his Approval. His attempts at rationalization are not persuasive. We can readily understand why shredding was an important element in DER's issuance of the Approval. The unsightliness of the large sheets of fiberglass, the rolls of roofing and the bundles of shingles that fell into the ravine is apparent from DER's photographs (Exhibit C-5). The area looked like a dump; reason enough for DER's inspectors to conclude that illegal disposal was taking place. If the material had been shredded, the unsightliness would have largely been eliminated.

While Appellant violated his Beneficial Use Approval by not shredding the material, we are not persuaded at this point that his Approval should have been revoked. Revocation of a permit or license on the basis of a single violation that posed no threat of environmental harm appears excessive to us. See, for example, Commonwealth, Department of Environmental Resources v. Mill Service, Inc. 21 Pa. Cmwlth. 642, 347 A.2d 503 (1975). It appears to us that Mr. Fair may have been prompted to take such harsh action because of problems DER previously had experienced with Appellant with respect to this same material. All of these problems pre-existed the issuance of the Beneficial Use Approval, however, and were not deemed sufficient to deny the issuance of that Approval. Fair testified that he considered Appellant to be "trustworthy" at the time the Approval was issued. In our judgment, this past

history furnished inadequate grounds for revocation and Appellant is likely to prevail on the merits of this aspect of the appeal.

In reaching our conclusions, we have not found it necessary to resolve the dispute about the completeness of the work on December 15, 1989. The issue is one of pure credibility and we can find no readily apparent basis for ruling one way or the other. DER, therefore, has failed to carry its burden of proving that the conditions existing on December 15 were intended to remain that way and were improved only because of DER's intervention.

ORDER

AND NOW, this 26th day of February 1990, it is ordered as follows:

1. The Petition for Supersedeas, filed by William F. Cramer on January 10, 1990, is granted insofar as it relates to the revocation of the Beneficial Use Approval.

2. This Supersedeas is issued with the express mandate that any reject asphaltic material used in the subbase or surface of a road or parking lot must first be shredded as described in the Application (Exhibit A-2) unless the Department of Environmental Resources waives that requirement in writing.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: February 26, 1990

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MAX FUNK, WILBUR E. JOHNSON, and WILLIAM GLOEKLER	:	
V.	:	**EHB Docket No. 87-078-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and ERIE ENERGY RECOVERY COMPANY, INC.	:	**Issued: March 1, 1990**

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

Synopsis

An appeal of a permit will be dismissed on grounds of mootness where the permit has expired and has not been extended. A second related appeal will also be dismissed where a request for extension of the plan approval was denied, no statute or regulation allowed for the extension once the plan approval had expired, and the introduction of new technology further necessitated the filing of a new application for a plan approval.

OPINION

This matter was initiated with the March 3, 1987, filing of a notice of appeal by Max Funk, Wilbur E. Johnson and William Gloeckler (Appellants) challenging the February 5, 1987, issuance of a solid waste permit (permit) and air quality plan approval (plan approval) by the Department of Environmental Resources (Department) to Erie Energy Recovery Company, Inc. (EERC). This appeal was initially docketed at No. 87-078-W. The plan

approval was also, by virtue of 25 Pa. Code §127.83, which incorporates by reference the Environmental Protection Agency's (EPA) PSD regulations (40 CFR §52.21) and which has been approved as part of Pennsylvania's State Implementation Plan under the Federal Clean Air Act, 40 CFR §52.2020(c)(57) and §52.2058, a permit to construct under the federal Prevention of Significant Deterioration (PSD) requirements. The permit and plan approval authorized the construction of a waste to energy facility in the city of Erie. The issues in this appeal were limited to those associated with the plan approval issued under the provisions of Section 6.1(a) of the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. (Air Pollution Control Act), Max Funk et al. v. DER and Erie Energy Recovery Company, Inc., 1988 EHB 1242.

The following facts do not appear to be in dispute. The plan approval required that construction of the facility be completed by June 30, 1989. Although the plan approval constituted a PSD permit as a result of 40 CFR §52.21(r)(2), the expiration date in the PSD permit was tied to commencement of construction and was August 5, 1988. In response to EERC's requests, the Department extended the PSD permit expiration date three times. On January 13, 1989, EERC submitted a revised application to amend the plan approval and to extend the expiration dates of both the plan approval and PSD permit by 18 months. (Ex. B to Permittee's Answer to Motion to Dismiss, November 17, 1989) The Department requested some additional information to process the PSD extension request. EERC admitted in its brief in opposition to the motion to dismiss that it was unable to get this information to the Department within the allotted time frame. (p. 2) EERC then requested another extension of the PSD permit on April 6, 1989, (See Status Letter of Attorney Dice, April 19, 1989) in order to submit the additional information

and to give the Department time to review and act upon the request for modification of the plan approval. (EERC Brief in Opposition, p. 2)

Although the plan approval expired on June 30, 1989, EERC did not request an extension until July 7, 1989. The Department responded on July 13, 1989, stating that a decision on EERC's July 7, 1989, request would not be made until the Department completed its review of the then-pending EERC request to extend the 18-month deadline for commencement of construction under the PSD regulations. The letter also noted that the PSD permit had already expired, that the additional information requested had not yet been received, and that if the PSD permit were extended by the Department, the Department intended to amend the plan approval and extend its expiration date in conformance with the construction schedule submitted with the PSD extension request. (Ex. D to EERC Answer to Motion to Dismiss, November 17, 1989) None of the parties appealed the Department's July 13, 1989, letter.

On July 20, 1989, Appellants filed a motion for summary judgment, contending that their appeal had become moot since the PSD permit had expired and the Department did not have discretion to renew an expired PSD permit.[1] Furthermore, Appellants argued that during the pendency of this appeal, EERC submitted a revision to the original plan approval application which included a major modification (the incorporation of dry scrubber technology) that would result in a significant net emissions increase and, therefore, would require a new plan approval and PSD permit. On August 1, 1989, EERC filed its brief opposing the motion for summary judgment. EERC contended that the appeal was not moot because, although the PSD permit had expired, the Department was

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[1] Appellants' motion refers only to the PSD permit. However, their brief in support of the motion refers also to the plan approval, and we will treat the motion as applying to both the PSD permit and the plan approval.

still considering whether to extend the PSD permit as it reviewed the application to modify the plan approval. EERC alleged that the issue before the Board was whether the decision to grant the plan approval was proper. EERC also argued that under 40 CFR §52.21 (2), the 18-month period for commencement of construction may be extended if justified, since the Department must have the flexibility to consider and review Best Available Control Technology (BACT) as it evolves and that an extension in this case would be appropriate, since the pending amendment would incorporate evolving technology.

On August 4, 1989, the additional information requested of EERC was submitted to the Department, (Permittee's Brief in Opposition to Appellants' Motion for Summary Judgment, p. 6), and on August 18, 1989, the Department denied EERC's request to extend the expiration date for the plan approval, concluding that it lacked the legal authority to do so. The letter stated that although Solid Waste Permit No. 101425 remained valid, EERC was not authorized to start construction of the proposed facility without the necessary plan approval and that a new plan approval meeting the requirements of the Department's Best Available Technology (BAT) guidelines and Chapter 127 would be required of EERC. The Department also advised EERC that its earlier letter of July 13, 1989, should be disregarded. On September 6, 1989, EERC appealed the Department's August 18, 1989, letter, and this appeal was docketed at No. 89-355-W.

In its Notice of Appeal at Docket No. 89-355-W, EERC claimed the Department's action was unreasonable, arbitrary, and not in accordance with law. EERC contended that the Department did have the legal authority to extend the permit, and that the August 18, 1989, letter was a reversal of the Department's prior written position and inconsistent with the previous

extensions of the solid waste permit, thus violating the constitutional principles of due process and fundamental fairness. Finally, EERC claimed the Department failed to consider the environmental, social, and economic impacts of its decision in violation of Article I, Section 27 of the Pennsylvania Constitution.

Although Appellants did not file a petition to intervene in the appeal at Docket No. 89-355-W, the Board, by order dated September 21, 1989, consolidated EERC's appeal with that of the Appellant's EHB Docket No. 87-078-W.

On October 20, 1989, the Department filed a motion to dismiss EERC's appeal at Docket No. 89-355-W as moot, since the plan approval had expired, construction had never commenced, and, due to a proposed modification in pollution control measures, such an extension would cover a plan approval that does not accurately describe the facility EERC intended to build. Further, the Department maintained that no provision of law allowed for the extension of a plan approval after it had expired. Appellants filed a response supporting the Department's motion on November 3, 1989.

On November 17, 1989, EERC responded to the Department's motion, arguing that the Department's letter of August 18, 1989, was an appealable action, since it was a reversal of a previously granted _de facto_ extension of the expiration dates pursuant to a request made on January 13, 1989. EERC claimed that the Department led it to believe in its July 13, 1989, letter that EERC was granted a _de facto_ extension of the plan approval pending the Department's review of the revised plan approval application, and that the Department had the authority to retroactively extend the plan approval.

The issue which must first be addressed before we decide either of these motions is whether the Department may lawfully extend either the plan

approval or the PSD permit after the expiration date has passed. Based on our reading of the applicable regulations, we must conclude that the Department may not extend an approval which no longer exists.

The regulations adopted pursuant to the Air Pollution Control Act at 25 Pa. Code §127.13 provide that

> Approval granted by the Department will be valid for a limited period of time. At the end of the time, if the construction, modification, reactivation or installation has not been completed, a new plan approval application or an extension of the previous approval will be required.

As for the PSD permit, the Department has incorporated the EPA regulations by reference at 25 Pa. Code §127.83. The EPA regulations provide at 40 CFR §52.21(r)(2) that

> Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The administrator may extend the 18 month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

Both of these regulations clearly empower the Department to grant extensions to plan approvals and PSD permits. However, they do not directly address the issue of whether an expired plan approval or PSD permit may be extended.

The Department's interpretation of these regulations is that the plan approval and PSD permits may not be extended once they have expired, and the Department urges us to give deference to that interpretation. We are required to defer to the Department's interpretation of its regulations unless that interpretation is nonsensical or contrary to the plain meaning of the

regulation. County of Schuylkill et al. v. DER and City of Lebanon Water Authority, EHB Docket No. 89-082-W (Adjudication issued November 24, 1989) and Department of Environmental Resources v. BVER Environmental, Inc., ___ Pa. Cmwlth ___, 568 A.2d 298 (1990). The Department's interpretation of these regulations is neither nonsensical nor contrary to their plain meaning.

The Department contends that these regulations do not authorize it to extend a plan approval or PSD permit which has expired. We agree, since those regulatory approvals no longer have any force and effect once they have expired. The issue of the effect of the expiration of a regulatory approval was considered by the Commonwealth Court in Wilson of Wallingford v. Tp. of Nether Prov., 85 Pa. Cmwlth. 104, 481 A.2d 692 (1984) wherein a writ of mandamus was issued by the Delaware County Court of Common Pleas directing Nether Providence Township to issue a building permit to Wilson. The Commonwealth Court held that the issuance of the writ was erroneous, since Wilson had no clear legal right to mandamus because the special exception/variance authorizing the issuance of the building permit expired two months before Wilson had sought the permit. The Court determined that when the special exception/variance expired, it went out of existence. 451 A.2d 692 at 695. We believe the same reasoning applies here--once the plan approval and PSD permit expired, they, too, went out of existence. It then follows that one cannot extend something which does not exist.[2]

Such an interpretation of these two regulations is also consistent

[2] EERC contended that the extension of the plan approval was warranted inasmuch as EERC sought an extension prior to its expiration. We find no support for this contention in the regulations adopted pursuant to the Air Pollution Control Act. Such an interpretation would frustrate the regulatory purpose, for any request for an extension, no matter how baseless, would toll the expiration of a plan approval during the pendency of the Department's review.

with the regulatory purpose expressed in 25 Pa. Code §127.1 that new sources control emissions to the maximum extent possible, consistent with the application of BAT. The underlying principle of BAT is that technology is continually evolving. T.R.A.S.H. Ltd. et al. v. DER et al., EHB Docket No. 87-352-W (Adjudication issued April 28, 1989). For the Department to extend a plan approval/PSD permit after its expiration, particularly where the control technology, as is the case here, bears little resemblance to that originally approved by the Department, flies in the face of this regulatory purpose. Furthermore, such an extension would be contrary to §6.1(a) of the Air Pollution Control Act, since the plans and specifications submitted originally with the plan approval and PSD permit applications do not reflect the control technology EERC now intends to construct.

We turn now to the two motions before us. First, we will dispose of Appellants' motion for summary judgment at Docket No. 87-078-W. Although this motion was captioned a motion for summary judgment, it is more properly treated as a motion to dismiss for mootness. Since both the PSD permit and the plan approval have expired and no extensions have been granted by the Department, the PSD permit and the plan approval no longer exist and this appeal is moot. Silver Spring Township v. Department of Environmental Resources, 28 Pa. Cmwlth. 302, 368 A.2d 866 (1977).

As to the Department's motion to dismiss[3] at Docket No. 89-355-W, EERC has argued that the Department reversed its prior position as expressed in its July 13, 1989, letter and that the Department's action was a violation of Article I, Section 27 of the Pennsylvania Constitution. Although the Department's July 13, 1989, letter is somewhat cryptic, it does appear to

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[3] This motion is probably more properly treated as a motion for judgment on the pleadings.

reverse the Department's previous position. However, this change of position is not relevant, for, as we discussed above, the Department had no authority to extend the plan approval once it had expired. As for EERC's claim of violation of Article I, Section 27, it provides us with no support for its argument, and we are aware of no interpretation of this constitutional provision which would authorize us to disregard the Department's regulations in order to compel the result suggested by EERC. Consequently, having upheld the Department's interpretation of its regulations, we must dismiss EERC's appeal of the Department's August 18, 1989, letter.

ORDER

AND NOW, this 1st day of March, 1990, it is ordered that:

1) The motion for summary judgment of Messrs. Funk, Johnson and Gloeckler at Docket No. 87-078-W, treated as a motion to dismiss, is granted, and their appeal is dismissed as moot; and

2) The Department of Environmental Resources' motion to dismiss the appeal of Erie Energy Resources Company at Docket No. 89-355-W is granted, and that appeal is dismissed.

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DATED: March 1, 1990

cc: **Bureau of Litigation**
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CONNEAUT CONDOMINIUM GROUP, INC. :
:
V. : **EHB Docket No. 86-553-R**
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: March 6, 1990**

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

By The Board

Synopsis

A real estate developer may neither place fill in a wetland nor dig ditches or channels in the wetland as part of its real estate development activities without first securing a permit for these activities from the Department of Environmental Resources under the Dam Safety and Encroachments Act. Where such activities occur without authorization by permit, they are unlawful under this Act. When such unauthorized activity occurs, the statute authorizes DER to issue appropriate orders to the developer. The DER Order directing that the ditches or channels be restored to their pre-excavation condition and that the fill material be removed from the wetland was not an abuse of DER's discretion under this enactment.

BACKGROUND

On September 22, 1986 the Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") issued an Order to Conneaut Condominium Group, Inc. ("CCG") to restore wetlands located in Salsbury Township, Crawford

County, to their pre-development condition. On September 29, 1986 the Environmental Hearing Board received both CCG's appeal from that Order and its First Interrogatories to the Appellee.

In response to this appeal, this Board issued Pre-Hearing Order No. 1 dated September 30, 1986. Amongst other requirements, the Order required CCG to file a Pre-Hearing Memorandum with this Board by December 15, 1986. CCG's Pre-Hearing Memorandum was to detail its factual and legal contentions, list its witnesses, address all expert testimony it might offer and identify and attach copies of all documents it would seek to introduce. (DER was directed to file a responding Pre-Hearing Memorandum within fifteen days of the filing by CCG.)

Thereafter, the parties engaged in discovery, including answering interrogatories, producing documents and the taking of depositions.

On January 22, 1987 we wrote to James H. Joseph, Esq., who is counsel for CCG, and advised him that his Pre-Hearing Memorandum was past due. Our letter also stated that unless this failure was remedied by February 2, 1987, it might cause the imposition of sanctions on CCG by the Board. No Pre-Hearing Memorandum was forthcoming from Attorney Joseph so a second letter dated February 11, 1987, (also sent to Attorney Joseph by certified mail) advised that sanctions would be imposed on CCG unless CCG's Pre-Hearing Memorandum was filed by February 23, 1987. Again, no Pre-Hearing Memorandum was filed for CCG. As a result of this failure to file, on March 11, 1987, we issued an order sanctioning CCG. Our Order provided that, rather than dismissing CCG's appeal, since DER has the burden of proof in this case, CCG would be barred from presenting a case-in-chief at the hearing on its appeal.

CCG filed a Motion to Vacate our Order of March 11, 1987. DER

responded opposing the Motion to Vacate. CCG's Motion to Vacate was denied by our Order of June 16, 1987. By order of June 17, 1987 we directed DER to file its Pre-Hearing Memorandum. DER filed it with us on August 24, 1987.

On July 27, 1988 we scheduled this matter for hearings to commence on September 22, 1988, before William A. Roth, who was then a member of this Board. We also issued the Pre-Hearing Order No. 2 to the parties on that date which directed them to file (a) a joint stipulation of any facts agreed upon and remaining legal issues to confront Mr. Roth in the upcoming hearing, and (b) the documents each would seek to introduce as exhibits. On September 21, 1988, DER filed its documents. No joint stipulation was filed. No documents were filed on behalf of CCG despite our Order.

Hearings were held on the appeal on September 22 and 23, 1988. On October 14, 1988, we ordered CCG to file a statement outlining the evidence and witnesses it would present when the hearings resumed. That Order also directed that a view be held on November 1, 1988. On October 26, 1988, CCG filed the statement required by our Order. The scheduled view of CCG's property was taken by Mr. Roth.

On January 4 and 5, 1989, the final two days of hearing were held by then Board Member Roth. At the close of the hearings, the Board orally ordered DER to file its post-hearing brief with us within three weeks after the transcript of these hearings was filed by the court reporter. CCG was directed to file its post-hearing brief within three weeks after receipt of DER's Brief. On February 22, 1989, DER filed its post-hearing brief. Long after the filing deadline for CCG's brief had expired, and when no post-hearing brief was filed on behalf of CCG as orally ordered at the hearing, we issued our written Order of April 26, 1989, stating that unless CCG filed such a brief by May 8, 1989, the Board would adjudicate this matter without it. On

June 16, 1989, no brief having been filed by CCG, we issued an order further sanctioning CCG pursuant to 25 Pa. Code §21.124, and saying we will "...as a sanction, proceed to adjudicate this matter without benefit of Conneaut Condominium's brief."

Thereafter, Mr. Roth left this Board without preparing an adjudication. However, we may adjudicate matters such as this from a "cold record." Lucky Strike Coal Co. et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). After a full and complete review of the record, we enter the following adjudication.

FINDINGS OF FACT

1. The Appellant is CCG, a Pennsylvania corporation which maintains offices at 1223 Grant Building, Pittsburgh, PA 15219. (Exhibit A-2)[1]

2. The Appellee is DER, which is the executive agency responsible for administering and enforcing the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (Encroachments Act); Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the Rules and Regulations promulgated thereunder. (C-2)

3. At least from sometime in May of 1985 through July of 1986, CCG engaged in the development of a condominium complex known as Lighthouse Cove Condominium, on a tract of land located between Route 322 and Conneaut Lake in Salsbury Township, Crawford County, Pennsylvania. (T-397 and 590, Exhibits

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[1] All references to exhibits in this adjudication which are "A-__" with a number inserted in the blank space are to exhibits introduced with the record by CCG, despite its failure to comply with Pre-Hearing Order No. 2. All references to exhibits in this adjudication which are "C-__" with a number inserted in the blank space are to exhibits introduced by DER. "T-__" is a reference to a page of the transcript, the four volumes of which are consecutively numbered.

C-3, C-26, C-35 and A-2)

4. A cattail marsh, approximately 4.0 acres in size, is located on a portion of this tract (Exhibit A-1, T-24). The major portion of this cattail marsh is located on that portion of the tract bounded on the west by Gibbs Road, on the north by Route 322, on the east by the condominiums and some undeveloped uplands and on the south by Conneaut Lake and the uplands on which the condominiums are built. (A-1, A-2 and C-35)

5. A wetland is a transitional area between uplands areas which are dry and a body of open water, such as Conneaut Lake. (T-603)

6. A wetland has certain characteristics which make it identifiable as such. These characteristics are: (1) the plant species growing there are predominantly those adapted for life in saturated soils, which types of plants are known as hydrophytes; (2) ground or surface water is present (it need not be there all year long); and (3) the soils have been saturated with water for a sufficient period of time so that they exhibit observable changes (hydric soils) (T-19, 603-604)

7. DER defines which areas are wetlands by observing the characteristics of the soils, vegetation and hydrology of the site. (T-19, 604)

8. If the plants on this site are hydrophytes, the area is a wetland. (T-19, 640)

9. The majority of the plants at this swamp site (80%) are cattails which are a type of hydrophytes called obligates because they grow in saturated soils. (T-20, 609) Other wetlands species such as silky dogwood, red osier dogwood, spirea, buttonbush, elm, willow and jewelweed are also present at the site. (T-609)

10. The photographs taken by DER, the United States Fish and Wildlife

Service (USFWS) and CCG all show a thick growth of cattails throughout the cattail marsh area. (A-13, A-14, A-17, C-10, C-17, C-21, C-25, C-30, C-34, C-35)

11. If soil is saturated during a majority of the growing season, the activity of soil microbes removes the oxygen from the water, resulting in a very slow rate of decomposition of plant matter. The slow decomposition rate causes plant matter to build up over time, which creates a peat or muck type soil. Muck type soils are characteristically very dark or black in color and characteristically have over 50% organic matter. (T-610)

12. The photographs taken by DER and the USFWS show very dark or black soils have been dug up by CCG in the marsh area. (C-6, C-7, C-8, C-9, C-10, C-14, C-15, C-16, C17, C-24, C-23, C-34)

13. David Putnam is a wildlife biologist for the USFWS (T-601) who first visited this site on August 20, 1979 and returned there at least annually thereafter. (T-605)

14. David Putnam observed hydric soils throughout the marsh area (T-609-611) from the edge of Gibbs Road (T-608) over to the uplands on which the condominiums were built (C-33) and down to the edge of Conneaut Lake (C-32).

15. At the marsh, Putnam also observed many birds and wildlife of the types associated with marsh areas, including muskrat, red-winged blackbirds and mallard ducks. (T-611, 616)

16. The soil conditions show that the marsh area is saturated with water nearly all of the growing season. (T-610)

17. DER's photographs of the site and those of the USFWS show water present much of the growing season. (C-4, C-9, C-10, C-11, C-15, C-21, C-32, C-33 and C-34)

18. Based on the soils, hydrology, and plant species it is clear the marsh area is a wetland. (T-128, 276, 519, 534, and 613)

19. From Putnam's first visit to the site in 1979 until the time when the condominium development started, there were no significant changes in the wetlands portion of the site. (T-612-613). In this period, there were no ditches around the periphery of the wetland as exist today. (T-105-106, 200, 607-608, 612-613) However, in April of 1981, a quantity of fill material was placed on a portion of the uplands on the site. (T-612)

20. No permit for creation of any encroachment in this wetland area was applied for by CCG or issued to CCG by DER. (T-664)

21. Andrew Kosturick ("Kosturick") is an excavation contractor who has lived in the Conneaut Lake area all his life. (T-515)

22. As Kosturick Construction, he was hired by Alfred William "Sonny" DeCapua of CCG to work on the condominium site. (C-22, C-27 and C-28)

23. Sonny DeCapua is treasurer of CCG and a member of its Board of Directors. (T-387-388)

24. Sonny DeCapua supervised development of this property for CCG. (T-316-317, T-534, T-546)

25. James Joseph appeared before the Board in this appeal as counsel for CCG. (CCG's Notice of Appeal) He is also president of Lighthouse Cove Condominium Association. (C-23) Joseph is also involved in CCG's development of this property. (T-34, 546)

26. In February, 1986, at CCG's request and before he started working for CCG, Kosturick gave CCG a bid to dig a ditch along Route 322, and then north to Conneaut Lake. (C-27, T-548-550)

27. After submitting a bid, Kosturick was given approval by CCG to begin his work (T-583) and started working at the condominium driveway's

intersection with Route 322 to excavate around the culvert pipe which is beneath the driveway entrance. (T-527)

28. Kosturick testified that he made the ditch for Mr. DeCapua in order to try to solve what they felt was a water flow problem. (T-531-532)

29. Kosturick testified he did a "smear" job alongside Route 322 to create this portion of the ditch, while grading out the area where a public water line had been installed previously to create a minimum grade for water flow. (T-535)

30. Photographs C-15 and C-16 show Kosturick's smeared ditch next to Route 322.

31. The weight of the dirt alongside Route 322 was so great that Kosturick could not excavate dirt in this area or his backhoe would tip over. Instead, he used back pressure from his backhoe's bucket to "smear" the dirt out from side to side to create the minimum grade. (T-539)

32. Kosturick tried to do this job and stay in the brush, but could not and had to put his backhoe on a "float" borrowed from an oil company to finish the job. (T-538)

33. When Kosturick's smearing work progressed along Route 322 from the driveway to Gibbs Road, he turned the corner with the ditch (onto Gibbs Road) and could actually excavate material, not just smear it. (T-539-540)

34. On February 19, 1986, Thomas D'Alfonso ("D'Alfonso"), a hydraulic engineer for DER, visited the site because he saw what he believed was excavation in a wetland. (T-276)

35. On February 19, 1986, D'Alfonso told Kosturick, whom he knew previously (T-278), that Kosturick's activity was in violation of the Encroachments Act because the area Kosturick was working in was a wetland. (T-277)

36. On February 20, 1986, D'Alfonso returned to site to talk with Mr. DeCapua about digging ditches in wetlands without a permit contrary to the Encroachments Act. (T-316)

37. After this meeting, he drafted a Notice of Violation of the Encroachments Act for his supervisor to send out in connection with the excavation project.

38. On February 25, 1986, Robert C. Thompson ("Thompson"), Engineering Supervisor for DER (T-394) and Mr. D'Alfonso's supervisor, sent the Notice of Violation in connection with CCG's activity in the wetland to James Joseph as president of Lighthouse Cove Owners Association. (T-329 and C-23)

39. On February 26, 1986, Mr. Joseph called D'Alfonso to request a meeting with DER at the condominiums regarding the February 25, 1986 letter. (T-329-332, 371-372, 418)

40. In response to Mr. Joseph's request, on March 4, 1986, a meeting was held at CCG's condominiums to discuss the wetlands issue. (T-369, 420) Present for CCG were Mr. Joseph and Mr. DeCapua. Present for DER were Khervin Smith, Thompson and LaRue Wyrich. (T-370)

41. Exhibit C-22 are Thompson's notes of this meeting. (T-417) According to his notes and recollection of the meeting, Mr. Joseph contended on CCG's behalf that DER had no authority to regulate CCG's trenching in the wetlands and Joseph wanted an opportunity to challenge the attempted regulation thereof in the Courts. (Exhibit C-22 and T-429)

42. According to Thompson's notes, at this meeting, either DeCapua or Joseph indicated CCG was contemplating expansion into the wetlands for recreational and residential uses of this property. (Exhibit C-22)

43. In the summer of 1986, after the on-site meeting with DER and CCG

representatives, Kosturick began to dig a ditch for CCG roughly parallel and adjacent to Gibbs Road from Conneaut Lake back to Route 322. (T-555-557)

44. Photographs C-7, C-13 and C-14 show work typical of what Kosturick said he did along Gibbs Road (T-541, 543)

45. During excavation adjacent to Gibbs Road, Kosturick hauled fifteen dumptruck loads of excavated dirt from the ditch excavation and spread it on the uplands area of this property. (T-544)

46. The portion of the ditch adjacent to Gibbs Road was at least five to six feet wide and the excavated soil was characterized by Kosturick as slop and peat moss. (T-545)

47. In addition to this ditching activity, elsewhere on the site David Putnam saw evidence that new fill material had been graded into the wetland near the condominium units and this is shown in a photograph which he took and which is Exhibit C-31. (T-638)

48. Kosturick admitted placing some fill in the wetlands (T-571) and that he knew this was a wetlands area. (T-559)

49. Kosturick knew a permit was needed to do this type of work in a wetlands but believed that getting a permit was not part of his job because he understood that CCG was to get all permits. (T-560-561)

50. Exhibit A-1, which is also Exhibit C-26, shows in red where the smear ditch was created and the excavated ditch was dug. (T-101-102)

51. DER's Order, while requiring restoration of all ditches (T-188-189), is not intended to preclude a reclamation plan which accounts for the need for a positive flow of water beneath the condominium driveway as long as the highway runoff is filtered through the wetlands. (T-188, 632)

DISCUSSION

Because of CCG's failure to comply with our Rules of Procedure and three separate but specific Orders of this Board in this appeal, this case is left in a peculiar position for adjudication. First, as a sanction for failing to file a pre-hearing memorandum as we ordered on September 30, 1986, and subsequently requested twice in writing, CCG was barred from presenting a case-in-chief by our Order of March 11, 1987. Despite this sanction, in the four days of hearings, counsel for CCG did cross-examine DER's witnesses at length and offered into the record various documents and photographs as exhibits on CCG's behalf. Counsel for CCG did not attempt to offer any rebuttal testimony, however.

A second sanction--considering this case without a post-hearing brief on CCG's behalf--was imposed on CCG by our order of June 16, 1989. This sanction was imposed because of the failure of CCG's counsel to file his brief after agreeing to do so at the hearing's conclusion (T-700-701) and after being advised of such a potential sanction by our order dated April 26, 1989. No post-hearing brief, even an untimely one, has ever been filed on CCG's behalf.

Accordingly, we must ask the question in light of the above: What specific issues are left for us to adjudicate? The answer to this question is that there are virtually none. In the Notice of Appeal filed on CCG's behalf and elsewhere prior to the hearing in this matter, CCG's counsel raised various legal arguments on CCG's behalf. If he had wanted us to consider them in adjudicating this matter, his procedure for doing so was to raise them in a post-hearing brief filed pursuant to 25 Pa Code §21.116(b). No such brief was filed; thus, all such legal and factual arguments are deemed to be abandoned. Lucky Strike Coal Company et al. v. Commonwealth, DER, supra. We must point

out further that any other approach by this Board in this case would make our orders imposing sanctions on CCG under 25 Pa Code §21.124 meaningless. Moreover, any other alternative would encourage parties before us or their counsel to ignore our orders and the rules of procedure essential for the functioning of the Board. This we will not do.

Having said the above, however, our inquiry is not over, as DER has the burden of proof in this appeal. Thus, we must at least satisfy ourselves that DER's actions in issuing this Order have a rational basis in the Encroachments Act and do not constitute an abuse of DER's discretion. We are satisfied that DER acted properly.

As enacted by the Legislature, the statute regulates any encroachment on or obstruction of any body of water by requiring in Section 6 that a permit be obtained from DER for any such structure or activity prior to undertaking same. 32 P.S. §693.6 The statement of scope in Section 4 of the Encroachment's Act provides:

> "The act shall apply to:
>
> ...
>
> (4) All water obstructions and encroachments other than dams, located in, along, across or projecting into any watercourse, floodway or body of water, whether temporary or permanent." 32 P.S.§693.4(4)

Thus, if CCG's actions encroached on or obstructed a body of water, since CCG's counsel stipulated it never sought or received a permit, CCG violated this act and DER could lawfully issue CCG this Order under Section 20 of the Encroachments Act. 32 P.S. §693.20

By definition in both the Encroachments Act and 25 Pa Code Chapter 105, which are the regulations promulgated under this Act, a "body of water" is defined to specifically include a "marsh" or a "wetland." Moreover, there is no doubt that the evidence established that the tract being developed by

CCG included over four acres of wetlands. The witnesses, including CCG's contractor, all testified they understood it was a wetland area.

DER's staff testified that DER defines wetlands by their soils, plant types and hydrology. Its staff and the witness from the USFWS all testified that by each of these tests, the cattail marsh is a wetland of the type regulated under this statute. The soils are hydric, the plant species are hydrophytic and the area is saturated with water most of the year. All three tests are thus met. Moreover, the photographic evidence in the record leaves no doubt that this is wetland.

The testimony and photographs also show CCG had its contractor working with his heavy equipment to ditch the wetlands. USFWS's David Putnam also testified to several places where new fill had been pushed into the wetlands. Andrew Kosturick, CCG's contractor admitted in testimony that in at least one area, he had put fill into the wetlands. It takes no great mental exertion to see placing fill material in a wetland is an encroachment into same. The fill is a "structure...which...changes...or diminishes...the cross section of [this]...body of water." This work by Kosturick on behalf of CCG is enough to give merit to DER's order insofar as it deals with the fill since the testimony was that Kosturick worked for CCG on this property.

In addition, on CCG's behalf and at its direction, Kosturick "smeared" a ditch roughly parallel with Route 322 to drain water. He then excavated a ditch roughly perpendicular to Route 322 and parallel (and immediately adjacent) to Gibbs Road from the "smeared" ditch all the way into Conneaut Lake. Moreover, this excavation occurred after CCG was told verbally and in writing by DER not to encroach on a wetland without first securing a permit. The next question to be asked is: Was this ditch excavated in wetlands? The answer is yes. Exhibit C-30 shows Gibbs Road has cattails growing right up to

its edge. USFSW's David Putnam, who took the photograph, also testified about the cattails' location. Similar testimony came from other DER witnesses and is obvious from the photographs introduced. It was the cattail swamp which was smeared along Route 322 and excavated along Gibbs Road.[2] Our final question concerns whether this ditch is an encroachment. The answer is again yes. "Any...activity which in any manner changes [or] expands...the...cross section of any...body of water:" is an encroachment under Section 3 of the Act. A ditch which is five feet wide and is dug with a backhoe or "smeared" by a backhoe, changes or expands the cross section of this wetland. A permit is required for any encroachment activity. Harveys Lake Borough Taxpayers Association v. DER et al. 1984 EHB 450, Donald T. Cooper v. DER 1981 EHB 78. As found above, one was not obtained. Thus, the portion of the DER Order as to this ditch was appropriate[3] and authorized by Section 20 of the Encroachments Act.

Accordingly we sustain DER's Order and deny this appeal therefrom by CCG.

CONCLUSIONS OF LAW

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

2. The Department has the initial burden of proof in the appeal from the issuance of an administrative order and it has met this burden.

3. Section 2 of the Encroachments Act recites that a portion of this

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[2] The photographic evidence in this regard was very effective.

[3] Since the Order directs restoration of the site to its status quo ante, and since CCG did not file a Brief objecting to this concept of relief and did not present evidence through cross-examination or rebuttal that the relief was an abuse of discretion, we will sustain the relief directed by DER.

Act's purpose is the regulation of obstructions and encroachments.

4. Section 3 of the Encroachments Act (32 P.S. §§693.3) defines a "Body of Water" as: "Any natural or artificial lake, pond, reservoir, swamp, marsh or wetland" and defines "Encroachment" as: "Any structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water."

5. The definitions of "Body of Water" and "Encroachment" and the permit requirements set forth in the Encroachments Act are repeated in the regulations found at 25 Pa. Code Chapter 105 as adopted by the Environmental Quality Board to implement the Encroachments Act. 25 Pa. Code §105.1 and 105.11 respectively.

6. Section 6(a) of the Encroachments Act (32 P.S. §693.6(a)) provides: "No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department."

7. The wetland/cattail swamp in this case is a body of water under the statute's definition.

8. CCG's filling of this wetland through grading done for it by Andrew Kosturick constitutes creation of an encroachment under this statute.

9. CCG's construction of a ditch along the edge of, but within, the wetland's borders, also constitutes creation of an encroachment under this statute.

10. CCG's creation of these two encroachments without the permit required under this act constitutes separate violations of the Encroachments Act.

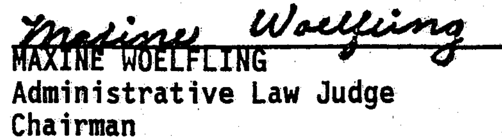
11. DER acted reasonably and did not abuse its discretion in issuing an order under this Encroachment Act to CCG, as the real estate's developer,

to restore the wetlands which were impacted by the activities undertaken on CCG's behalf.

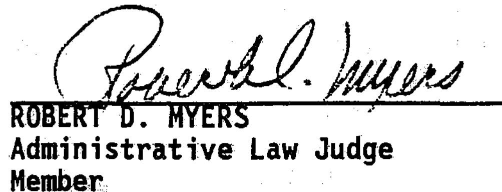
ORDER

AND NOW, this 6th day of March, 1990, it is ordered that the appeal by Conneaut Condominium Group, Inc. is dismissed.

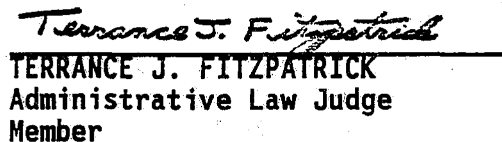
ENVIRONMENTAL HEARING BOARD



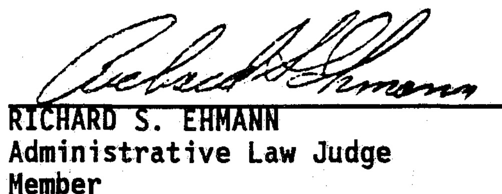
MAXINE WOELFLING
Administrative Law Judge
Chairman



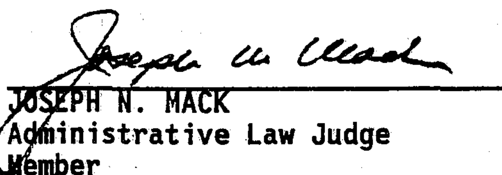
ROBERT D. MYERS
Administrative Law Judge
Member



TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 6, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
George Jugovic, Jr., Esq.
Western Region
For Appellant:
James H. Joseph, Esq.
Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BO

LAWRENCE BLUMENTHAL	:	
	:	
v.	:	**EHB Docket No. 89-230-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 6, 1990**

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is granted in a case in which the Department of Environmental Resources ordered the Petitioner to study and clean up lead contamination on the Petitioner's property. The Department lacked jurisdiction to issue the order because the evidence established that the Petitioner did not cause or contribute to the contamination, and did not know of the contamination when he bought the property, and because the Department is not authorized by the Solid Waste Management Act to assign responsibility based solely upon the Petitioner's ownership of the land on which the pollution exists.

OPINION

This proceeding involves an appeal by Lawrence M. Blumenthal (Blumenthal) from an order of the Department of Environmental Resources (DER) dated July 18, 1989, and amended on September 13, 1989. In the amended order, DER directed Blumenthal, his partner Charles Fruman, and Wayne Junk Company

(Wayne Junk) to take certain actions to study and clean up soil contaminated by lead at a site in Waynesboro, Franklin County.[1] The order alleged that the lead contamination was caused by Blumenthal's and Wayne Junk's breaking of automobile batteries on the property and burial of 20 to 30 tons of battery casings.

This Opinion and Order addresses the petition for supersedeas filed by Blumenthal on December 28, 1989. A hearing on this petition was held on January 11, 1990. In his petition, Blumenthal claims that he is likely to succeed on the merits of his appeal because DER has no proof that he disposed of hazardous waste at the site, and because Blumenthal did not know--at the time he and Fruman purchased the property--of the disposal of battery casings at the site by the previous owner. Blumenthal further argues on the merits of his appeal that DER lacks authority to impose responsibility upon him solely on the basis of his ownership of the polluted land, because such an action would exceed the limits of the Commonwealth's police powers, citing Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa. Commonwealth Ct. 443, 387 A.2d 142 (1977), aff'd sub nom National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980). In addition, Blumenthal argues that he will suffer irreparable injury if a supersedeas is not granted because he lacks the funds to clean up the site. Finally, Blumenthal contends that the public will not be harmed by a supersedeas because the property has been secured and there is no evidence of off-site contamination.

DER has filed an answer and two memorandums of law opposing

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[1] The July 18, 1989 order named Blumenthal and Fruman as responsible parties. The September 13, 1989 amended order added Wayne Junk Company as a responsible party. The latter order stated that Blumenthal, Fruman, "and/or" Wayne Junk were the owners of the property involved here, and that they also owned and operated Wayne Scrap Company, a scrap recycling company which operated at the same site. See also footnote 2, infra.

Blumenthal's petition for supersedeas. DER contends that Blumenthal is not likely to succeed on the merits of the appeal because he buried battery casings on the site, and because he knew the condition of the land when he purchased it. DER further argues that even if Blumenthal did not bury casings or know of the earlier burial of them, he is still responsible for cleaning up the site because he owns the contaminated land.[2] DER also argues that Blumenthal has not shown that the alleged financial hardship he may suffer constitutes irreparable harm. Finally, DER argues that a supersedeas may not be granted because pollution would be threatened while the supersedeas is in effect. See 25 Pa. Code §21.78(b).

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

1) irreparable harm to the petitioner,
2) the likelihood of the petitioner's prevailing on the merits, and
3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). In addition, a supersedeas may not be issued in cases where a nuisance or a significant amount of pollution, or other hazard to public health, would exist or be threatened while the supersedeas is in effect. 25 Pa. Code §21.78(b). Normally, a petitioner bears the burden of demonstrating that the above factors militate in favor of granting a supersedeas. Lower Providence Township v. DER, 1986 EHB 395. However, it is not necessary for the petitioner to establish irreparable injury and likelihood of injury to the public when it is shown that DER lacked the underlying authority

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[2] Technically, it appears that the land is now owned by Wayne Junk Company, Inc. pursuant to a deed executed by Blumenthal and Fruman in 1959 (T. 77-78, DER amended order, paras. A, C). However, Blumenthal has not raised the argument that he does not own the land in either his petition for supersedeas or his memorandum of law; thus, we will not consider the issue here.

to take the action at issue. Id., Ny-Trex, Inc. v. DER, 1980 EHB 355, Wabo Coal Co. v. DER, 1986 EHB 71. Berks Products Corp. v. DER, EHB Docket No. 89-351-F (Opinion and Order issued October 10, 1989).

Applying these standards to this case, a supersedeas is warranted because DER exceeded its jurisdiction in issuing the instant order. The evidence did not establish that Blumenthal either buried battery casings or knew at the time he purchased the property of the burial of casings by the previous owner. Furthermore, the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), does not authorize DER to order a person to clean up hazardous waste contamination solely on the basis that he owns the land on which the hazardous waste is situated.

The preponderance of the evidence at the hearing established that Mr. Blumenthal did not cause or contribute to the burial of battery casings which is the apparent cause of the lead contamination at the site. Battery casings were buried on the site by Max Zuckerman, who sold the site to Blumenthal and Charles Fruman in 1957. (Appellant's Exh. A, pp. 5-8, Transcript 8, 13) Mr. Blumenthal testified that he first learned of burial of the casings in 1959, when they began to work their way to the surface. (T. 39-40) Mr. Blumenthal denied that he had buried the casings, or that he knew at the time he purchased the property of Zuckerman's burial of the casings. (T. 9, 25)

DER's evidence did not discredit Mr. Blumenthal's testimony. DER solid waste specialist Lynn E. Manahan testified regarding the events preceding DER's order. He stated that he became involved with the site in August of 1988, when he inherited the case file from Bob Stewart. (T. 48-49) The statement in DER's order that Blumenthal disposed of batteries on the site was based upon information allegedly collected by Mr. Stewart (T. 65-67)

However, Mr. Stewart did not testify at the hearing. Furthermore, Mr. Manahan's testimony regarding his conversation with Blumenthal in November of 1988 did not establish that Blumenthal buried the batteries. Manahan testified that Blumenthal referred to the digging of a trench and burial of batteries by contractors Lee and Arthur Hamner. (T. 62) However, Arthur Hamner stated at his deposition that this work was conducted for Mr. Zuckerman, not Mr. Blumenthal. (Appellant's Exh. A, pp. 5-7)[3] Finally, Mr. Manahan did not testify that Blumenthal stated that he (Blumenthal) buried the batteries; Manahan testified that it was his "understanding" that Blumenthal had done so. (T. 62) We do not know whether this understanding was based upon what Blumenthal told him or whether it grew out of a preconceived notion which Mr. Manahan derived from reading Mr. Stewart's file.

Since the preponderance of the evidence indicates that Mr. Blumenthal did not cause the contamination, we must decide whether DER has authority under SWMA to order him to clean up the lead contamination based solely upon his ownership of the property. We find that DER lacks this authority.

The Board recently has rejected the argument that the SWMA authorizes DER to hold a person responsible for pollution on his property on the sole basis that the person owns the property. Newlin Corporation, et al. v. DER, Docket No. 83-237-W (Opinion and Order issued October 18, 1989). In Newlin (slip op. at 19), the Board quoted from Commonwealth, DER v. O'Hara Sanitation Co., ___Pa. Commonwealth Ct. ___, 562 A. 2d 973, , 976-977 (1989):

> Finally, DER argues that the O'Haras should be held responsible for violations of the Act that occurred on their property. We have concluded that the Act was not violated. Had we reached a different conclusion we would still affirm the Chancellor's order striking the O'Haras as defendants because DER relied

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[3] Mr. Hamner's deposition was admitted as an Exhibit with DER's acquiescence. (T. 5-7).

> only on the fact that the O'Haras owned the land at the time of the hearing. In doing so DER disregarded the requirements of the Act's provisions. DER offered no evidence that the O'Haras had any knowledge of the operations occurring on their land, that the operations did or may constitute dumping of solid waste or storage, treatment or processing of solid waste, or that the O'Haras had given OSC any permission to undertake such operations.
>
> (footnote omitted)

In addition, we note that much of the discussion of this issue in Blumenthal's and DER's briefs centered on cases interpreting Section 316 of the Clean Streams Law, 35 P.S. §691.316.[4] However, since DER's order was based solely upon the SWMA, that discussion is irrelevant to the question of whether the SWMA authorizes DER to assign responsibility on the bare fact of land ownership. This statutory construction argument must be addressed before it is necessary to determine whether the Act exceeds the constitutional limits of the Commonwealth's police powers. Moreover, as the Board pointed out in Newlin (slip op. at 19), the SWMA does not contain any provision which is similar to Section 316 of the Clean Streams Law.[5] DER's discussion in its brief of Sections 103, 401, 501, 602, and 611 of the SWMA, 35 PS §§6018.103, 6018.401, 6018.501, 6018.602, and 6018.611, while very thorough, does not persuade us that our conclusion in Newlin was incorrect.

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[4] See Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa. Commonwealth Ct. 443, 387 A.2d 142 (1977), aff'd sub nom National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), Western Pennsylvania Water Co. v. Commonwealth, DER, 1988 EHB 715, affirmed, ___ Pa. Commonwealth Ct. ___, 560 A.2d 905 (1989).

[5] Section 316 states, in relevant part:

Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

In summary, we find that the evidence introduced at the supersedeas hearing supports a finding that Blumenthal did not cause or contribute to the lead contamination on his property, and that he did not learn of the burial of the battery casings by his predecessor in title until after he had acquired the property. In addition, we find that the SWMA does not authorize DER to assign responsibility based upon the bare fact of land ownership. Therefore, it appears that Blumenthal is likely to succeed on the merits of his appeal. In addition, since it appears that DER lacked underlying authority to enter this order, we need not determine whether Blumenthal satisfied the other criteria for a supersedeas. Lower Providence Township v. DER, 1986 EHB 395, Ny-Trex, Inc. v. DER, 1980 EHB 355, WABO Coal Co. v. DER, 1986 EHB 71, Berks Products Corp. v. DER, EHB Docket No. 89-351-F (Opinion and Order issued October 10, 1989). Therefore, we will grant Blumenthal's petition.

ORDER

AND NOW, this 6th day of March, 1990, it is ordered that Lawrence Blumenthal's Petition for Supersedeas is granted, and DER's order is superseded pending the disposition of this appeal.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: March 6, 1990

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

INGRID MORNING	:	
	:	
V.	:	**EHB Docket No. 88-094-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 8, 1990**
and PIKE TOWNSHIP, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal from the "deemed approval" of a proposed amendment to an Official Sewage Facilities Plan because of DER's failure to act within the time limits established in 25 Pa. Code §71.16 is dismissed, when the proposed amendment is treated by DER as a supplement rather than a revision. DER has wide latitude in determining whether a proposed amendment is a supplement or a revision; the sanction of "deemed approval" applies only to a revision.

OPINION

Ingrid Morning (Appellant) filed this appeal on March 16, 1988, alleging that the failure of the Department of Environmental Resources (DER) to act timely upon a proposed amendment to the Official Sewage Facilities Plan (Official Plan) of Pike Township, Berks County, pertaining to the Hidden Hollow Subdivision, resulted in a "deemed approval" of the proposed amendment under the provisions of 25 Pa. Code §71.16. In an Opinion and Order issued October 6, 1988 (1988 EHB 919), the Board denied a Joint Motion for Judgment on the Pleadings for the reason, inter alia, that it was not clear whether DER treated the proposed amendment as a supplement or a revision. The "deemed

approval" sanction in 25 Pa. Code §71.16 applies only to DER's failure to act timely with respect to a revision.

In its Pre-Hearing Memorandum, filed on August 7, 1989, DER made clear that it considered the proposed amendment to be a supplement rather than a revision. On the basis of DER's statement, Appellant filed a Motion to Dismiss on September 25, 1989. Pike Township joined in Appellant's Motion on October 12, 1989. DER filed no response.

The Board has previously ruled that DER has wide latitude in deciding whether to treat a proposed amendment to a sewage facilities plan as a revision or a supplement: Maxwell Swartwood v. DER, 1979 EHB 248 at 254; Keim v. DER, 1985 EHB 63 at 83. The Swartwood decision was affirmed on appeal to Commonwealth Court: 424 A.2d 993 (1981). In the exercise of its wide latitude, DER has determined that the proposed amendment involved here was a supplement rather than a revision. As such, there is no "deemed approval" sanction for DER's failure to act in a timely manner. Since there was no "deemed approval," there was nothing from which Appellant could appeal.

ORDER

AND NOW, this 8th day of March, 1990 it is ordered that the appeal of Ingrid Morning is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 8, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

SOUTH HUNTINGDON TOWNSHIP BOARD OF SUPERVISORS	:	
V.	:	**EHB Docket No. 87-245-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 8, 1990**

ADJUDICATION

By the Board

Synopsis

The appeal by the South Huntingdon Township Board of Supervisors ("Township") from the Department of Environmental Resources' order directing the township to amend its Official Sewage Facilities Plan is dismissed. Township has not shown DER abused its discretion in issuing this order. Township has also failed to show any reason why the property owner's proposal of sewage treatment through use of a small conventional sewage treatment plant should not be conceptually approved as a revision of Township's Official Sewage Facilities Plan. Conceptual approval leaves to be addressed at a later date both the effluent limitations necessary to protect public health and specific treatment technology.

INTRODUCTION

This matter began on June 19, 1987, when Township filed a notice of appeal from the issuance by DER of an order to Township under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §750.1 *et seq.* ("SFA"). The DER order of May 26, 1987, directs Township to amend its Official Plan For Sewage Disposal within Township ("Official Sewage Facilities Plan") to authorize sewage disposal via installation of a "package" sewage treatment plant to serve property owned by Millstone Enterprises, Inc. on which Richard and Robert Birdseye ("Birdseye") operate an "adult" bookstore. This enterprise appears to be the singularly unpopular driving force behind this appeal.[1] After use of an on-lot subsurface disposal system and treatment of sewage with a septic tank-sand filter-chlorinator were both examined and rejected by Township, Millstone sought Township's conceptual approval for an installation of a small "package" sewage treatment plant which would discharge treated effluent to the surface waters of the Commonwealth. Township refused comment on this proposal so Millstone asked DER to order Township to amend its plan approving this concept. Prior to issuing such an Order, DER sought and received comments on this concept from Township. DER evaluated Township's comments pursuant to 25 Pa. Code §71.17 and based thereon, directed Township to approve the concept of use of this method of sewage treatment. No approval of the effluent limitations needed to protect public health as to the plant's discharge has been sought by Millstone or Birdseye or given by DER, nor has DER been solicited to approve or disapprove any proposals for the type of hardware needed to be installed to consistently

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[1] The nature of this enterprise has been talked around in the parties' pleadings and briefs without being identified except in Exhibit C-3. Issues of local opposition to such an enterprise in the township versus freedom of speech, etc. cannot and have not played any role in our review of DER's Order.

achieve any such limitations.

After the parties filed their respective Pre-Hearing Memoranda, counsel for Township and DER agreed to nineteen stipulations of fact which were received by this Board from the parties on March 9, 1989. Thereafter, on March 14, 1989, this matter came to be heard before the Honorable William A. Roth, formerly a member of this Board. At that hearing DER called only one witness to testify. Township offered no evidence except through cross-examination of DER's witness.

DER filed its post-hearing brief on August 21, 1989. Township's brief was received September 18, 1989 and DER's Reply to Appellant's Post-Hearing Brief was received on October 2, 1989.

Mr. Roth departed this Board without first preparing an adjudication.[2]

After a full and complete review of the record in this matter we enter the following findings of fact.

FINDINGS OF FACT

1. Appellant is Township, a second class township in Westmoreland County with an address of RD #1, Box 133, West Newton, PA. (Page 1 of DER's Order and Appellant's Notice of Appeal)

2. Appellee is DER, an executive agency of the Commonwealth of Pennsylvania vested with the authority and duty to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("Clean Streams Law"); the SFA; Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S.

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[2] This Board may issue an adjudication where the member who heard the testimony has departed without drafting the adjudication. Lucky Strike Coal Co. et al. v. Commonwealth, DER 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

§510-17 ("Administrative Code"); and the rules and regulations promulgated pursuant to these statutes. (Stipulation of Facts)[3]

3. No public sewage treatment facilities are presently available to serve property in the Yukon area of Township. (Stipulation of Facts and Exhibit C-3)

4. On February 20, 1985, Application No. C32108 for an on-lot sewage disposal system permit for a piece of property in the Yukon area of the Township owned by Millstone Enterprises, Inc..("Millstone"), was denied by Township. (Stipulation of Facts and Exhibit C-3)

5. On March 15, 1985, DER's Soil Scientist, Jay Weaver, evaluated the Millstone tract ("Site") for its suitability for an on-lot system and concurred with the Township that the site was unsuitable for any on-lot sewage disposal system. (Stipulation of Facts and Exhibit C-3)

6. On or about September 25, 1985, Millstone submitted to Township a Planning Module for an alternative means of sewage treatment for the site in Yukon. The proposed new system used a septic tank and sand filter with a chlorinated discharge. Millstone also sent a copy of this Planning Module to DER. (Stipulation of Facts and Exhibit C-3)

7. On or about September 27, 1985, Township denied Millstone's Planning Module, stating as the reason for denial that the system would be located in a floodplain. (Stipulation of Facts and Exhibit C-3)

8. On October 7, 1985, DER returned the Planning Module to Millstone with accompanying correspondence indicating that DER could not accept the Planning Modules without municipal approval. (Stipulation of Facts and

[3] The parties' joint stipulation of facts, which is also Board Exhibit No. 1, is hereinafter referred to as "Stipulation of Facts." As used in this adjudication NT followed by a number herein refers to pages of the hearing's transcript.

Exhibit C-2)

9. Under cover of a letter dated December 10, 1986, Millstone submitted a Planning Module to Township as a proposed revision to Township's Official Sewage Facilities Plan. The Planning Module proposed building a private sewage treatment plant at the site to serve a bookstore which is located thereon and operated by Birdseye. (Stipulation of Facts and Exhibit C-3).

10. Township did not adopt this proposal as a revision to the Township's Official Sewage Facilities Plan. (Stipulation of Facts)

11. On February 4, 1987, Millstone submitted a private request that DER order Township to revise its Official Sewage Facilities Plan to reflect approval of the concept that Millstone could install a private sewage treatment plant as the method of providing sewage treatment for wastes generated at the bookstore. (Stipulation of Facts and Exhibit C-3)

12. By letter dated February 24, 1987, DER notified Township of Millstone's private request to DER to order Township to revise its plan. (Stipulation of Facts and Exhibit C-4)

13. Pursuant to 25 Pa. Code §71.17, DER requested that within thirty (30) days, Township state any reasons why the DER should not issue such an order. (Stipulation of Facts and NT 21 and 22)

14. Township's response to DER expressed concern about the issuance of a permit for an interim holding tank, objected to Millstone's failure to file an application for a National Pollutant Discharge Elimination System ("NPDES") permit simultaneously with this request, and stated that the sewage treatment plant would be located within a floodplain. (Stipulation of Facts, Exhibit C-4 and NT 22)

15. Under procedures to administer the SFA and the Clean Streams Law,

DER cannot accept an NPDES permit application for Millstone's proposed plant until the Planning Modules have been officially adopted as a Plan Revision or supplement to the Township Official Sewage Facilities Plan. (Stipulation of Facts and NT 11)

16. The issue of the installation of the sewage treatment plant within a floodplain is not a planning issue, but is an issue reviewed within DER when NPDES and Part II Construction Permit Applications are received by DER from the permit applicant. (Stipulation of Facts and NT 25)

17. There are no applicable zoning or subdivision regulations covering the site. (Stipulation of Facts and NT 27)

18. On or about May 26, 1987, DER, pursuant to its authority under Sections 3, 203, 402 and 610 of the Clean Streams Law, Sections 5 and 10(1) of the SFA, and Section 1917-A of the Administrative Code, issued an order to Township to revise its Official Plan to reflect approval of a sewage treatment plant to be installed at the site in Yukon as set forth in Millstone's Planning Module. (Stipulation of Facts, Exhibit C-5 and NT 27 and 28)

19. Approximately six months after the order was issued to it, Township held a public hearing, and on November 26, 1987, issued a letter to DER declining to approve Millstone's proposal for sewage treatment as ordered by DER for the reasons contained in that letter. (Stipulation of Facts, Exhibit A-1 and NT 52 and 53)

20. Township has an Official Sewage Facilities Plan for the Yukon area of Township which was prepared on its behalf by Westmoreland County; that plan proposes the installation of a sewage treatment plant to serve the Yukon area. (Comm. Exhibit C-1 and NT 12 and 13)

21. Township has not implemented this Plan as to the Yukon Area. (NT-27)

22. By issuance of its order to Township, DER did not approve construction of a particular sewage treatment plant. It only approved the concept of treatment by this method. (NT 28 and 44)

23. Construction of any particular sewage treatment plant is a three-stage process in terms of DER review. The first stage involves the modification of the municipality's plan to show how sewage treatment and disposal will be accomplished. After this, a municipality or private person applies to DER for an NPDES permit and in this permit, when issued, DER sets treatment plant effluent limitations. Then, in the final stage, with those limits in hand, the applicant submits an application to DER for a Part II Construction Permit showing the proposed plant design. This sequence is followed because a plant cannot be designed until after the effluent limitations are established. (NT 11, 28, 29, 37, and 38)

24. Issues as to the degree of stringency of effluent limits or whether the plant design is adequate to achieve them are not considered by DER until applications are submitted for the NPDES and Part II permits. (NT 29)

25. In the event the permittee goes bankrupt, quits, abandons or ceases to operate the plant, once installed, DER may seek to have the municipality assume the responsibility for operating the plant. (NT 29 and 30)

26. In the future, DER would only ask Township to operate, maintain and repair a sewage treatment plant serving this site if the plant's permittee failed to do so and DER could not compel the permittee to do so. (NT 75)

27. Modification of the Official Plan is not a commitment of Township's tax revenue for purposes of treatment, plant operation and maintenance. (NT 30)

28. At the time DER issued its order to Township, it did not know whether or not it would ultimately be able to issue either an NPDES permit or

a Part II permit for a sewage treatment plant at this location. (NT 30)

29. In the future, DER could deny an application for an NPDES permit for a sewage discharge from this location. (NT 77)

DISCUSSION

Where DER issues an order to a municipality to revise its Official Sewage Facilities Plan, and the municipality appeals, it is the municipality which bears the burden of proof. Lower Providence Township v. DER, 1986 EHB 802. To prevail, Township must show an abuse of discretion or a violation by DER of a statute or regulation. Coolspring Township v. DER, 1983 EHB 151; Lower Providence Township v. DER, supra.

Township's Post-hearing Brief raises four separately numbered issues. They are:

> 1. DER's order seeks to preempt the Township's authority under the Second Class Township Code to act to preserve the health of its citizens.
>
> 2. DER's order seeks to preempt the Township's power to manage and control disposal of Township tax funds.
>
> 3. DER's order seeks to abrogate the Township's discretionary powers granted it under the Sewage Facilities Act, and
>
> 4. DER's insistence on approval of a revision to the Township's Official Plan creates constitutionally invalid spot zoning.

Because any issue not raised in Township's post-hearing brief is deemed waived under Lucky Strike Coal Co. et al. v. Commonwealth, DER, supra, our job is to examine these four issues.

Before reviewing the Township's arguments, we must clarify what we are dealing with by way of a plan revision. Pursuant to Section 5(a) of the SFA, 35 P.S. 750.5(a), the Township had to promulgate its official plan for how sewage services would be provided in such a reasonable time as DER prescribed.

This plan was proposed and specified construction of a municipal sewage system to serve this area. The plan was not implemented for the Yukon area of the Township. No such system was built. Since the plan was not implemented, there was no approved method of sewage disposal for Millstone's property, so as to present and future uses thereof, the plan was inadequate. Under 25 Pa. Code §71.12, municipalities must revise their plans when they are inadequate to meet sewage needs. Under 71.14, a property owner may seek an order from DER (such as that under appeal in the instant case) to a municipality to revise its plan on a showing that the existing plan is not being implemented or is inadequate even if implemented, to meet the property owner's needs (assuming a prior unsuccessful demand by the owner to the municipality to revise its plan to meet the owner's needs--which the municipality does not respond to).

In turn, as spelled out in the subsections of 25 Pa. Code §71.15, when DER receives such a request, it investigates it, and takes and evaluates municipal comments on the owner's request for such an order. Thereafter, it either rejects this request (thus finding there is good reason not to order such a revision) or issues its order requiring the municipality to revise its plan at least to the degree necessary to allow the property owner to utilize his property as planned.

Having said this, we must now turn to the issue raised in the Township's brief.

SPOT ZONING

It is difficult for the Board to see the merit in this argument as advanced by Township's counsel, in light of the Joint Stipulation of Facts submitted to this Board by DER and Township. (Exhibit B-1) According to paragraph 17 of that stipulation:

"17. There are no applicable zoning or subdivision regulations applicable for [Millstone's] site."

Having so stipulated, it appears to us that the only way such an argument holds merit is if we assume that Township is authorized to control "zoning" in the township through use of the planning requirements under the SFA and applicable regulations. Unfortunately, Township's counsel has pointed to nothing in the legislation and regulations and the Board can find nothing therein which authorizes their use for "zoning." In passing both this Act and the Clean Streams Law, the legislature did not suggest that the purpose of either statute was to address zoning matters.

The definition of "zoning" cited in Township's Brief suggests legislative decisions by Township on zoning but no role in implementing a comprehensive land development plan for either DER or Township under the SFA. This is because sewage planning and the planning involved in zoning are not identical. Moreover, DER is not contending it can overrule zoning laws through issuance of orders under the authority of these acts. Rather DER contends, and properly so, that zoning may be a local issue but sewage planning is not. Community College of Delaware Co. v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975) and Gerrit J. Betz v. DER, 1980 EHB 107. Clearly in sewage planning local land use and zoning requirements must be taken into account, but not to the exclusion of all other factors. It is one of many factors to consider and broader concerns than solely zoning issues are evaluated in the sewage planning process. See 25 Pa. Code §71.21 and 71.32.[4]

Finally even if we ignore all of the above, Township's argument is

[4] Even if a local zoning ordinance was in place, DER could preempt it insofar as it hinders DER's performance of its duties under the Clean Streams Law and Sewage Facilities Act. Butler Township Board of Supervisors v. Commonwealth, 99 Pa. Cmwlth. 239, 513 A.2d 508 (1986).

illogical. Township has in place an Official Sewage Facilities Plan for this portion of the Township. (NT 12 and 13) Township has failed to implement that plan to provide sewage disposal here. (NT 27) Ignoring this failure, Township's argument says Township should be able to "spot deny" plan revisions to the unimplemented plan, thus selecting on a case-by-case basis, who can develop their property, by controlling who can sewer their property. This is exactly the type of "spot zoning" which the courts have repeatedly struck down.

DER is not spot zoning through the mechanism of this Order. Township may wish to fight zoning battles with Millstone or Birdseye. If it does, it must do so elsewhere. It cannot do so in this appeal.

TOWNSHIP DISCRETIONARY AUTHORITY

With regard to this contention, Township argues that DER cannot abrogate the township's responsibility for planning under the SFA by requiring Township to adopt this specific revision to its plan. Township believes it has "technically competent discretion" to refuse amendment of its adopted but unimplemented plan.

Perhaps if Township's Official Sewage Facilities Plan were adopted and in the process of implementation this argument would have some attraction. At least if this were the case, we would have to pause to wonder why DER would approve any plan A and allow Township to partially complete its implementation, then direct it to implement plan B. Here, however, there is no evidence of commencement of implementation of Township's plan by Township. We have no proposal from Township of an alternative to that plan either. Thus Township's initial unimplemented plan, while undoubtedly important when created, is of questionable current validity _vis a vis_ this revision.

As should have been pointed out by DER's Briefs, the SFA does not vest

this Township with independent discretionary authority to refuse to amend its plans. Section 5 of the SFA, 35 P.S. §750.5 mandates adoption of a municipal plan and its revision when required by the rules and regulations or an order from DER to do so. DER's authority to issue such orders is found in Section 10(1) of this Act, 35 P.S. §750.10(1). As backup authority thereto, DER is empowered by Section 203(b) of the Clean Streams Law, 35 P.S. §691.203(b) to issue such orders to municipalities regarding sewage collection and treatment as are necessary to assure that there are adequate sewage systems to meet present and future needs. Neither piece of legislation gives the Township the last word on sewage planning. That word was given to DER. Accordingly, unless Township points to something specific, its unsubstantiated claim of technically competent discretion fails.

Further, DER's order only requires Township, in revising the plan, to approve the concept of this approach to treatment. DER's order does not remove the requirement that Millstone secure from DER both NPDES and Part II permits prior to building and operating this plant. The order does not prevent Township from appealing to this Board from any DER decision to issue either of these permits in the event Millstone applies for them. The order does not remove any obligation Millstone has to comply with any municipal or county ordinances to meet present and future sewage disposal needs or to comply with any other ordinances. Further, Section 10 of the SFA, 35 P.S. §750.10, places not only the power but also the duty on DER to order Township to submit its Official Sewage Facilities Plan, and revisions thereto and to implement those plans as revised. Thus, DER is legislatively mandated to act as it did here as long as this case's facts so warrant.

The facts warranted the order. Millstone initially sought approval for an on-lot system to serve this bookstore, but was properly denied a permit

for such a system by Township. Next Millstone sought Township approval of a planning module which would have revised Township's official plan when approved, to authorize the concept of sewage treatment for Millstone through a septic tank-- sand filter--chlorinator system. (If this would have been approved, Millstone could have then applied to DER for NPDES and Part II permits for that system.) Township rejected that module because the system would be in a flood plain. Having had its first two proposals successfully blocked by Township, in December of 1986 Millstone proposed to Township that Township approve a planning module through which Township's Official Sewage Facilities Plan would be revised to conceptually authorize treatment of Millstone's sewage in a small sewage treatment plant serving this property. When Township failed to act on Millstone's proposal, it sought an Order from DER to Township to approve it. DER's Order did not address any other issue. Nor does it authorize violations of the Clean Streams Law or the SFA by Millstone, Birdseye or others. Thus the sole question as to the alleged abrogation of Township's technical competence is its ability to reject this proposal for reasons relating to this concept rather than rejecting it because Township could be unhappy in the future if, in response to an application for permit, DER mandates specific effluent limitations or approves a particular treatment plant design.

Township has not offered any objections to use of this method of treatment to either DER or this Board. Moreover as we have previously stated, DER must exercise independent judgment in reviewing plan revisions. Township of Heidelberg et al. v. DER, 1977 EHB 226. While it must consider municipal comments on the proposal, its review thereof goes beyond such comments and here it considered the timely comments (see footnote 6) before issuing this Order. See Dwight L. Moyer Jr. et al. v. DER, Docket No. 86-641-W

(Adjudication issued August 10, 1989). Accordingly, Township must be held to have failed to meet its burden of proof in regard to this issue.

PREEMPTION OF CONTROL OVER DISBURSAL OF TAX DOLLARS

Township's Brief argues that DER's order requiring Township to approve this concept of sewage treatment is an attempted preemption of Township power to control disbursal of tax revenues. To reach this conclusion, Township argues that if Township approves this concept and then Millstone secures the two required permits from DER, Millstone can build this system. If thereafter, Millstone fails to operate or maintain it and DER is unsuccessful in forcing Millstone to again operate or maintain it properly, DER may require Township to maintain or operate the plant. In turn, Township says that if this occurs, it will cause the expenditure of these tax revenues and thus this order is seeking to preempt this power.

In dealing with such speculation, the old saying "If the dog had run faster, it would have caught the rabbit" comes to mind. Considering the chain of events, all of which must occur before these tax dollars need be spent by Township, it appears that at least at this time in this concept's life, Township's argument reaches too far.

Aside from the fact that it is speculative, the tax disbursal argument does not stand up to close examination. There is no question that DER has the authority under the Clean Streams Law and the SFA to order Township to take the steps necessary to revise its plan so that a property owner may build a sewage system to serve existing or future sewage disposal needs within the township. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976), Butler Township Board of Supervisors v. Commonwealth, supra. Further, it is clear that just because compliance with such orders may require the expenditure of tax money for preparation of the revisions or for municipal

construction and operation of a sewage system does not render the orders unlawful. Derry Township, supra, Butler Township Board of Supervisors, supra, Commonwealth ex rel Alessandrone v. Borough of Confluence, 427 Pa. 540, 234 A.2d 852 (1967). Finally, even if Township were to allege financial impossibility in an attack on this order, it is not a defense which may be raised at this time. Ramey Borough v. Commonwealth, DER, 15 Pa. Cmwlth. 601, 327 A.2d 647 (1974), aff'd, 466 Pa. 45, 351 A.2d 613 (1976)

In short, contrary to Township's argument, its control over its tax revenues is neither absolute nor in a vacuum. Its control over this money is not paramount to its obligations as a municipality to comply with legislative determinations of statewide goals and legislatively mandated systems to achieve them. Just as all of its citizens have obligations to Township, so it and they have obligations as to compliance with legislative mandates such as the SFA and the Clean Streams Law and the regulations promulgated thereunder, even if tax dollars must be expended to do so.[5]

PREEMPTION OF TOWNSHIP AUTHORITY TO PROTECT PUBLIC HEALTH

With this argument, Township suggests that its authority under Section 702 of the Second Class Township Code, 53 P.S. §65729, to make regulations to protect public health and safety and to act to secure public safety is jeopardized if the supervisors are required to approve this project without knowing what is to be built by way of a plant.

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[5] Many steps could also be taken by the Township to insure sufficient funds exist outside of tax revenues to operate and maintain this plant. As an example, a township might assume ownership and control over a treatment plant and bill the plant's customers at a rate sufficient to pay for the plant acquisition costs and the current operation and maintenance costs, as well as to create a financial reserve against future bad debts and plant replacement costs.

As set forth above, the only evidence introduced into the record shows that what is in dispute here is neither a DER decision on the degree of treatment necessary to protect public health nor whether DER, having specified the degree of treatment, has approved a treatment system which will consistently produce this degree of treatment. What is disputed is whether, having concluded on-lot systems and septic tank--sand filter--chlorinator systems are not suitable for this site, it is proper to conclude that (conceptually, only), conventional sewage treatment is a suitable treatment option. Of course, decisions on treatment technology and effluent limitations must be made before any system can be built. They are not in dispute now, however, because they have not been made yet. Moreover, as testified to by DER's Jack Crislip, DER cannot and will not make those decisions until an application for the NPDES permit and the subsequent application for the separate Part II permit have been submitted to it.

Also, as set forth earlier in this adjudication, a decision by DER on the merits of any application for either an NPDES or Part II permit is appealable to this Board. Any person or municipality with standing, who is aggrieved by DER's decision on such an application for permit, may then appeal. Thus, we repeat that if Township is dissatisfied as to effluent limitations when set or the "nuts and bolts" when and if approved, it is not prohibited from challenging those decisions at that time by a timely appeal here. Nor is it foreclosed by approval of this module from filing suit to enforce the Clean Streams Law as to any violations subsequently occurring at any sewage treatment plant Millstone may build, since under Section 601 of that legislation, 35 P.S. 691.601, Township is specifically empowered to

enforce that statute as to violations impacting on its residents.[6]

Finally, nothing in this order prohibits Township from passing any lawful regulations not in conflict with 25 Pa. Code §71.17 and the statutes, to promote health and safety in the Township pursuant to Section 702 of the Second Class Township Code.

Section 702, when quoted in full, authorizes Township:

> To make such regulations <u>by ordinances, not inconsistent with state laws or regulations</u>, as may be necessary for the promotion of the health, cleanliness, comfort and safety of the citizens of the township. (emphasis supplied)[7] 53 P.S. §65729

Thus under this statute, Township's power to act is not absolute. Township's power to act is preserved except where it refuses or fails to act in conformance with the laws of the Commonwealth. These laws include the SFA.

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[6] Township's Brief on this fourth issue references Exhibit A-1 as detailing the reasons that the module's concept should be rejected. We will not consider the issues raised therein in adjudicating this matter. As directed by the regulations, DER asked Township to comment on Millstone's proposal before it issued this Order and Township gave DER its reasons for opposing same (See Commonwealth Exhibit No. 4). Thereafter, when DER rejected these reasons and issued this order, Township set forth its reasons for appeal from DER's order in its Notice of Appeal and in its Pre-Hearing Memorandum. None of these three documents reference Exhibit A-1 and the points raised therein. These omissions alone are enough to warrant our finding that it cannot be brought up out of the blue at the hearing and post-hearing stage. Moreover, while allegations are made in Exhibit A-1, the only testimony on this Exhibit and its allegations is from DER's Jack Crislip. Crislip acknowledges DER received the document which is Exhibit A-1 and that he read it. He did not speak to the allegations themselves (NT 62). Since Township bears the burden of proof here according to <u>Lower Providence Township</u>, <u>supra</u>, for it to meet its burden of showing the Board that DER abused its discretion, the Township must do more than show that at some point <u>after</u> the order's issuance it sent Exhibit A-1 to DER.

[7] We are surprised that Township's counsel would base Township's argument on this statute and attempt to buttress his argument by quoting part of the statute while deleting the emphasized materials which are on point. When the deleted material is reinserted, it destroys any validity his argument might have otherwise had. Moreover, no attorney's credibility before this Board is enhanced when this type of conduct occurs.

And, although the burden of proof is Township's, no evidence has been offered on which to base a conclusion that the ordinance procedure outlined in Section 702 is inadequate to protect the health and safety of Township's residents or prevents Township from adopting or enforcing local ordinances enacted to accomplish this purpose.

Since Township has not offered grounds on which we can reverse DER, we must reject this appeal.

CONCLUSIONS OF LAW

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

2. Township has the burden of proving that DER abused its discretion in this case.

3. DER complied with the applicable statutes and regulations in issuing this order to Township.

4. DER did not engage in spot zoning by issuing this Order.

5. In issuing this order, DER did not abrogate any power granted Township under the Sewage Facilities Act.

6. Issuance of DER's order to Township did not preempt Township's power to manage and control township tax monies.

7. DER's order does not preempt Township's authority under the Second Class Township Code to protect the health of its citizens.

8. Township has not met its burden of proof that DER has acted in violation of law or abused its discretion in issuing this Order.

ORDER

AND NOW, this 8th day of March, 1990, it is ordered that Township's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

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Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 8, 1990

cc: Bureau of Litigation
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John W. Pollins III, Esq.
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M. DIANE SMI1
SECRETARY TO THE E

MANOR MINING & CONTRACTING CORPORATION	:	
	:	
V.	:	**EHB Docket No. 86-544-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 9, 1990**

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MOTION TO LIMIT ISSUES

By Terrance J. Fitzpatrick, Member

Synopsis

A motion filed by the Department of Environmental Resources (DER) for partial summary judgment and to limit issues is granted in part and denied in part. DER has authority under federal and state law to impose a water quality-based effluent discharge limitation which is more stringent than a technology-based limitation when setting forth requirements in a National Pollutant Discharge Elimination System (NPDES) permit. However, the Mass Balance Equation (MBE) is not approved of as a matter of law as the correct and appropriate method in deriving water quality-based effluent discharge limitations. Whether the limitation was properly derived is a question of fact. Finally, DER's application of the more stringent water quality-based effluent limitations did not deprive the permittee of its constitutional rights to due process and equal protection of the laws.

OPINION

This action involves an appeal of an NPDES permit, which was part of a comprehensive Coal Mining Activities Permit, issued by DER to the appellant, Manor Mining and Contracting Corporation (Manor). The permit, which was issued on August 20, 1986, contained discharge limitations for iron and manganese at certain of Manor's outfalls.

Manor filed its appeal of this NPDES permit on September 22, 1986, objecting to the effluent limitations for iron and manganese set forth in the permit. Subsequently, the parties stipulated to narrow the controversy to the imposition of water quality-based effluent limitations for manganese and iron discharges at a single outfall.

Manor contends in its appeal that the effluent limitations for these elements are specifically set by regulation, and that DER erred as a matter of law in requiring stricter effluent limitations than those ennunciated in 25 Pa. Code §89.52(c)(2) and (3), as promulgated under the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.[1] Manor alleges further that no factual or legal basis exists for the more stringent standard DER imposed, and so DER's action was not supported by substantial evidence. The appeal characterizes DER's action as a unilateral modification of a permit, which violates Manor's constitutional right to due process of law and equal protection.

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[1] 25 Pa. Code §89.52 (c)(2) and (3) sets out technology-based effluent limitations for discharges of manganese and iron:

> "Any discharge from the permit area shall comply with the following discharge limitations:
>
> . . .
>
> (2) There shall be no discharge of water containing a concentration of iron in excess of seven milligrams per litre.
> (3) There shall be no discharge of water containing a concentration of manganese in excess of four milligrams per litre."

On March 31, 1989, DER filed a Motion for Partial Summary Judgment which this Board now addresses.[2] Specifically, DER moved for summary judgment on the following points: (1) that DER has authority to impose water quality-based effluent limitations for iron and manganese which are more stringent than the technology-based limitations found in 25 Pa. Code §89.52 (c)(1)-(5), if supported by substantial evidence;[3] (2) that DER has authority at law to employ the MBE in deriving water quality-based limitations;[4] and (3) that DER's action did not violate Manor's constitutional rights to due process and equal protection of the laws.

In response to DER's motion for summary judgment, Manor filed an answer on April 20, 1989, arguing that issues (1) and (2) may not be disposed of on summary judgment because each involves disputed material facts and issue (3) may not be disposed of on summary judgment because to do so would deprive Manor of its constitutional right to a hearing on the merits.

This Board may grant summary judgment on an issue if the pleadings, depositions, interrogatories, admissions on file, and affidavits submitted show no genuine dispute as to any material fact, and the moving party is entitled to summary judgment as a matter of law. Pa. R.C.P. 1035 (b); Robert

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[2] DER's motion was styled as a "Motion for Partial Summary Judgment and Motion to Limit Issues." Since we are addressing the Motion for Partial Summary Judgment, it is unnecessary to rule on the Motion to Limit Issues.

[3] Water quality-based effluent limitations are designed to protect the designated uses of the receiving stream. The stringency of these limitations will vary case-by-case depending upon the degree of stringency necessary to protect the designated uses, and the amount of pollutants already in the stream. Technology-based effluent limitations, as the name implies, are based primarily upon the ability of pollution control technology to remove pollutants from a discharge.

[4] For a description of the MBE, see Mathies Coal Co. v. Commonwealth, DER, ___ Pa. ___, 559 A.2d 506, 509, note 3 (1989).

C. Penoyer v. DER, EHB Docket No. 88-168-M, Sept. 25, 1989. However, the Board must appraise the facts in a light most favorable to the non-moving party. Robert C. Pennoyer v. DER, 1987 EHB 131; Morco Corp. v. DER, EHB Docket No. 88-168-M, Sept. 25, 1989.

Applying the standards for summary judgment to the issues before this Board, we grant summary judgment as to issues (1) and (3), and deny it as to issue (2). We address each issue separately.

Issue (1): Whether DER has authority to impose water quality-based effluent limitations which are more stringent than the technology-based effluent limitations listed in 25 Pa. Code §89.52.

In determining whether or not DER is entitled to summary judgment on this issue, we must consider whether, as a matter of law, DER had authority to impose the stricter water quality-based effluent limitation, or whether resolution of this issue is encumbered by a factual dispute. An appraisal of the regulatory scheme promulgated to enforce the CSL indicates that DER is required to apply the stricter standard, whether water quality-based or technology-based, if such standard is derived in conformity with the regulations. DER is the administrative department of the Commonwealth which is "responsible for administering the provisions of the [CSL]; section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes. DER also administers the NPDES permit program established by the Federal Clean Water Act, 33 U.S.C.A. §1251 et seq., in accordance with the provisions of 33 U.S.C.A. §1342(b) and (c)." Municipal Authority of Twp. of Union v. DER, EHB Docket No. 86-422-M, October 25, 1989. Under the regulations implementing the CSL, DER's specific treatment requirements and effluent limitations for waste discharge are to be

established based on (in pertinent part) the more stringent of: 25 Pa. Code Chapter 93 water quality criteria (relating to water quality standards), federal technology-based limitations, or the treatment requirements and effluent limitations of Title 25. 25 Pa. Code §95.1. Under the regulations implementing the NPDES permitting program, the Environmental Quality Board (EQB) has provided that DER is not to permit a discharge from a point source into a navigable stream unless it complies with §§301 and 302 of the Federal Clean Water Act (CWA), 33 U.S.C. §§1311, 1312, or any more stringent limitation established pursuant to any other state or federal law or regulation. 25 Pa. Code §92.31. The CWA establishes that when a water quality-based effluent limitation is more stringent than a federal technology-based limitation, the water quality-based effluent limitation must be enforced. 33 U.S.C. §1311(b). Further, the federal act requires that effluent limitations to ensure compliance with state water quality standards must be incorporated into NPDES permits. 33 U.S.C. §§1311(b)(1)(c), 1361, Hence, the federal and state mandates require the application of the more stringent effluent limitations.

Manor argues that DER erred as a matter of law in applying a water quality-based effluent limitation instead of applying the technology-based limitations plainly set out in 25 Pa. Code §89.52. To support this allegation, Manor cites to East Pennsboro Township Authority v. DER, 18 Pa. Commw. 58, 334 A.2d 798 (1975). Manor's argument is unpersuasive. In East Pennsboro, the court did state that if the EQB establishes a regulation where a specific requirement or prohibition is set forth, then DER must enforce such a regulation. Id. at 803. This principle is not relevant to this case, however, because the technology-based effluent limitations set out in 25 Pa. Code §89.52 only apply if they are more stringent than the water quality-based

effluent limitations calculated pursuant to 25 Pa. Code Ch. 93. Acceptance of Manor's argument would effectively nullify the directives set out in 25 Pa. Code §§92.31 and 95.1, as well as in 33 U.S.C. §1311(b)(1)(c), which require that the more stringent limitation be applied.

We also disagree with Manor that summary judgment cannot be entered on this issue due to a factual dispute. Manor contends that, under 25 Pa. Code §93.5(a), DER must consider factors other than water quality criteria in setting an effluent limitation. This argument is well-founded, but misdirected. The issue we are addressing here is simply whether, assuming the water quality criteria have been applied properly, DER is required to apply the more stringent of the water quality-based effluent limitations and the technology-based limitations. Reserving the question of methodology for discussion of the next issue, it is clear that DER has authority to require the permittee to meet a properly derived water quality-based effluent limitation which is stricter than the technology-based limitations set forth in 25 Pa. Code §89.52.

Issue (2): Whether DER has authority, as a matter of law, to employ the MBE in deriving water quality-based limitations.

DER argues that its MBE is a proper method of deriving water quality-based limitations as a matter of law. DER urges that this conclusion is required by the holding in the recent Pennsylvania Supreme Court case, Mathies Coal Company v. DER, ___ Pa. ___, 559 A.2d 506 (1989). We disagree. In Mathies, the permittee argued that, under 25 Pa. Code §93.5, DER was required to consider two particular factors--the economic impact upon the permittee and the aquatic impact upon the receiving stream--in deriving a water quality-based limitation. As in the instant case, DER had used the MBE to derive the limitation in the Mathies permit. The Mathies court determined

that, under the facts of that case, the MBE encompassed the necessary factors for deriving the limitation, and DER could not be forced to consider specific factors which were not required to be considered by any other law or regulation. Id. at 507 and 511. DER's reliance on Mathies as a determination that the MBE passes muster as a matter of law is misplaced. First, the court made no such broad holding; its discussion of the MBE was confined to dicta in a footnote. Id. at 506, fn. 3. Second, the Mathies court considered the specific circumstances and data employed when it determined the propriety of applying the MBE for that limitation. This indicates that it is a question of fact as to whether the MBE is an appropriate method for deriving a water quality-based limitation in a given situation.

Since 25 Pa. Code §93.5(a) states that water quality criteria are only one of the major factors to be considered in establishing specific limitations, the methodology employed must be evaluated to determine whether or not the limitation was properly derived.[5] Since Manor has alleged that the MBE was not an appropriate method for determining the effluent limitation, this issue is thrown into material dispute, not meriting dismissal on summary judgment.

Issue (3): Whether DER's imposition of stricter standards in an NPDES permit violated Manor's Constitutional rights to due process and equal protection of the laws.

Manor alleges that DER's action constituted a "unilateral modification" of an existing permit, which deprived Manor of its rights of notice and opportunity to be heard. DER responds that its action constituted

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[5] Unfortunately, aside from water quality criteria, 25 Pa. Code §93.5(a) does not provide a clue as to what the "major factors" are. Moreover, under Mathies, consideration of these other factors is committed to DER's discretion.

a renewal of a permit and no hearing was required for it to set the effluent level. Regardless of whether DER's action constituted a permit modification or a permit renewal, Manor's due process rights are satisfied by its ability to appeal to this Board. East Pennsboro, supra. In addition, Manor's due process rights do not bar us from resolving legal issues via summary judgment. Lehigh Valley Power Committee v. Pa. PUC, ___Pa. Commw. ___, 563 A.2d 548 (1989).

In summary, we agree with DER that it is authorized to apply the more stringent of technology-based effluent limitations or water quality-based effluent limitations. We also agree with DER that its action did not contravene Manor's constitutional rights. Accordingly, we will grant summary judgment in DER's favor on these two issues. We will, however, deny DER's motion for partial summary judgment to the extent that it seeks a ruling that the MBE is approved as a matter of law.

ORDER

AND NOW, this 9th day of March, 1990, it is ordered that the Department of Environmental Resources' Motion for Partial Summary Judgment is granted in part and denied in part. Summary judgment is entered in favor of the Department on the issues of the Department's authority to establish water quality-based effluent limitations which are stricter than technology-based effluent limitations, and on whether DER's action deprived Manor of its constitutional rights to due process and equal protection of the laws. Summary judgment is denied on the issue of whether the Department has authority, as a matter of law, to apply a Mass Balance Equation in deriving water quality-based effluent limitations.

ENVIRONMENTAL HEARING BOARD

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Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
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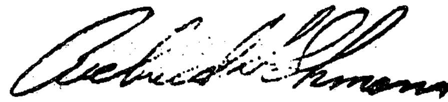

RICHARD S. EHMANN
Administrative Law Judge
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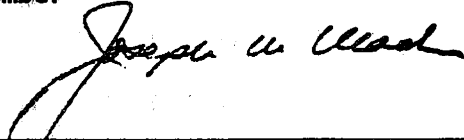

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 9, 1990

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M. DIANE SMITH
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KERRY COAL COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 86-640-M

Issued: March 9, 1990

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

By Robert D. Myers, Administrative Law Judge

Syllabus:

A private well experienced a significant increase in alkalinity during mining operations on nearby land. After monitoring the situation for six months, DER issued an Order finding the mine operator to be responsible and directing that a replacement water supply be provided. The mine operator appealed and, in the meantime, pulled the casing from the well and found holes in it. After the casing was replaced, the alkalinity level dropped dramatically and DER relieved the mine operator of further responsibility for the water supply. The Board holds that DER failed to carry its burden of proving that the private well was affected by the mining operations. The preponderance of the evidence suggested that (1) a defective casing was to blame, (2) the problem was localized to the specific property where the well was located, and (3) discharges from areas disturbed by the mining operations would have flowed away from the well rather than toward it. The Board

concluded that DER abused its discretion when it required the mine operator to replace the water supply.

Procedural History

This proceeding was initiated on November 24, 1986 when Kerry Coal Company (Kerry) filed a Notice of Appeal accompanied by a Petition for Supersedeas. These filings were directed against an Order issued by the Department of Environmental Resources (DER) on November 17, 1986 finding that Kerry's surface mining operation in Big Beaver Borough, Beaver County, had adversely affected the water quality in a well serving the residence of Mr. and Mrs. Robert McKim (McKims). Kerry was ordered to (1) provide an alternate temporary source of water to the McKims within 48 hours; (2) submit a plan detailing an alternate permanent source of water; and (3) provide the alternate permanent source of water within 45 days.

On December 12, 1986 Kerry and DER submitted a Consent Supersedeas, reciting that Kerry had complied with DER's first directive by furnishing bottled water to the McKims and providing that the remainder of the Order would be superseded so long as Kerry continued to furnish the bottled water. The Consent Supersedeas was approved by a Board Order dated December 30, 1986. Thereafter, the parties engaged in discovery and filed pre-hearing memoranda.

A hearing scheduled to begin on June 13, 1988 was cancelled when DER filed a Motion on May 27, 1988 seeking dismissal of the appeal on grounds of mootness, alleging that Kerry had complied fully with the Order of November 17, 1986. Kerry filed Objections to the Motion on June 2, 1988. After receiving legal memoranda from the parties, the Board issued an Opinion and Order on September 1, 1988 denying the Motion on the basis that, since DER had

not withdrawn its Order, the matter was not moot even though Kerry had fulfilled the terms of the Order (1988 EHB 765). DER's Petition for Reconsideration was denied by a Board Order dated November 30, 1988.

Hearings were scheduled and held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on April 25 and 26, 1989. DER's post-hearing brief was filed on July 7, 1989, and Kerry's post-hearing brief was filed on September 18, 1989. The record consists of the pleadings, a hearing transcript of 343 pages, a Stipulation of Facts and 18 exhibits.

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

Findings of Fact

1. Kerry is a corporation which has engaged in mining and selling bituminous coal since its organization in 1953. Its office is located at Portersville, Pennsylvania (N.T. 195-196)

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the rules and regulations adopted pursuant to said statutes (71 P.S. §61 and §510.1 et seq.)

3. In September 1983 Kerry commenced operations under Surface Mining Permit No. 04823005, authorizing it to operate a surface coal mine (McKee Mine) on a 153.3 acre tract of land in Big Beaver Borough, Beaver County (N.T. 18, 20-21; Stipulation of Facts ¶1; Exhibit K-F).

4. The McKee Mine is bordered on the south by Clark Run. Two hills rise north of Clark Run and extend northwestwardly for about 4,000 feet until

they merge. These two hills, rising more than 150 feet above the level of Clark Run, were extensively mined by Kerry to remove the Middle Kittanning (MK) and Lower Kittanning (LK) coal seams (N.T. 20; Stipulation of Facts ¶1; Exhibits C-1 and K-F).

5. Portions of the McKee Mine had been strip mined by unknown persons about 30 to 40 years ago to remove the MK and LK seams of coal. The site had not been reclaimed afterwards and spoil covered about 30 acres when Kerry began its operations in 1983. Water had accumulated in 4 low spots in or near the vale that separates the two hills. One of these accumulations was acidic (N.T. 33-35, 48-49, 203-207; Exhibits C-1 and K-F).

6. Kerry's operations on the more northern of the two hills (North Hill) proceeded from the vale in a northeasterly direction up the southwest slope toward the topographic high point on the Hill. (N.T. 41, 49-50; Exhibit K-F).

7. The overburden on the North Hill consisted of brown and black shale with alkaline-producing potential. The fireclay beneath the LK seam was at least 6 feet thick. The dip of the coal seams was slight and to the northwest with evidence of rolls; the strike was northeast - southwest (N.T. 21, 44-45, 62, 79-30, 130-131, 201-202).

8. The northeast slope of the North Hill drops about 150 feet in elevation until it reaches a perennial stream that flows southeast (Exhibit K-F).

9. Several residences are situated on this northeast slope, bordering a road identified as T-655 which runs along the slope parallel to the crest of the North Hill. The Carl McCandless residence, situated on the uphill side of T-655, is the closest to the McKee Mine and is bordered by it on three sides. The McKims' residence is situated on the downhill side of

T-655 nearly opposite the McCandless residence. The William McKim residence also is situated on the downhill side of T-655 and is immediately southeast of the McKims' residence (N.T. 35-38, 53-54; Exhibit K-F).

10. These 3 residences are served by private wells with the following characteristics:

Residence	Type	Surface elevation	depth	depth of casing
C. McCandless	drilled	1060'	100'	20'
McKims	drilled	1020'	50'	20'
W. McKim	dug	1020'	14'	3'

(N.T. 143-145, 219-220, 235; Exhibit K-C).

11. The surface elevation of the McKims' well was below the elevation of the MK seam but above the elevation of the LK seam. The well was drilled through spoil from previous strip mining operations to a depth below the elevation of the LK seam. The casing was installed to a point in the fireclay underlying the LK seam (N.T. 135-136, 210-212, 254-255).

12. The C. McCandless well was drilled through both the MK and LK seams. The casing was installed to a depth above the elevation of the MK seam (N.T. 143-144, 299).

13. The W. McKim well was dug in undisturbed soil to the top of the LK seam (N.T. 235).

14. Kerry's surface mining operations on the North Hill generally terminated at a final highwall on the southwest slope about 200 feet short of the topographic high point and did not disturb the northeast slope of the Hill. The only exception to this was a triangular-shaped parcel of land, extending along the southeastern-most crest of the Hill for about 300 feet and penetrating the northeast slope to a maximum extent of 175 feet (N.T. 49-52, 133-135, 208-210; Exhibit K-F).

15. Kerry auger-mined most of the face of the final highwall on the North Hill and removed both the MK and LK seams of coal. The auger holes generally were spaced about 3 feet apart and penetrated to a maximum depth of 250 feet. They followed the strike of the coal seams toward the northeast and were essentially horizontal. Auger holes sometimes serve as conduits for mine drainage. (N.T. 63-64, 66, 248-254; Exhibit K-F).

16. At the place where Kerry's surface mining operations on the North Hill terminated short of the topographic high point, the closest distances between the final highwall and the above-named residential wells were the following:

C. McCandless	500 feet
McKims	750 feet
W. McKim	875 feet

(Exhibit K-F).

17. At the place where Kerry's surface mining operations on the North Hill terminated on the triangular-shaped parcel of land northeast of the topographic high point, the closest distances to the above-named residential wells were the following:

C. McCandless	300 feet
McKims	550 feet
W. McKim	550 feet

(Exhibit K-F).

18. During Kerry's mining operations on the North Hill, at a time when the LK seam was being mined, the quantity of water in W. McKim's well diminished to the point where the water was only 11 inches deep. After the mined area had been backfilled, the quantity of water in the W. McKim well returned to normal (N.T. 236).

19. The McKims' well was located in a well pit, approximately 6 feet square and 5 feet deep, constructed of cinder block but with a concrete floor

and cover. In the pit were a pump, a pressure tank, a water softener and a brine tank. A drain on the north side of the pit led downhill toward the perennial stream northeast of the residence. This drain was intended to take away the discharge from the water softener and brine tank during recycling operations (N.T. 211).

20. In February or March 1986, the McKims complained to DER that the quality of their well water had changed. They had to use an increased amount of salt in their water softener to treat the water effectively, but thereby increased the sodium concentration in their treated water (N.T. 23-24, 76-77; Stipulation of Facts ¶5).

21. The mined area on the North Hill had been backfilled by Kerry several months previous to the McKims' complaint (N.T. 51).

22. As a result of the McKims' complaint, DER Mine Conservation Inspector John Davidson took samples of water from the McKims' well on February 12, 1986. The samples were taken from a hose bib that came directly off the pump and which involved untreated water (N.T. 24-25, 27; Exhibit C-2).

23. DER Hydrogeologist Nancy Pointon investigated the McKims' complaint by visiting the site on March 6, 1986 (N.T. 78). While there, she

(a) discussed the complaint with the McKims (N.T. 77):

(b) examined the well pit (N.T. 77);

(c) had John Davidson take another sample of untreated water from the well (N.T. 77; Exhibit C-2);

(d) talked with the McKims' neighbors and secured samples of water from their wells where possible (N.T. 77); and

(e) walked the mining site (N.T. 77).

24. After reviewing data in DER's files, relevant publications and her own observations, Ms. Pointon concluded:

(a) that the water samples of the McKims' well taken on February 12 and March 6, 1986 revealed a significant increase in iron and alkalinity when compared to water samples taken by Kerry and by DER on September 8 and November 15, 1982, respectively, prior to mining (N.T. 87-88; Stipulation of Facts ¶7; Exhibits C-2 and C-5);

(b) that her field examination and the maps indicated that the McKims' well is supplied by an aquifer associated with the MK and LK coal seams (Exhibit C-5);

(c) that groundwater flow at the site appeared to be controlled by topography since the dip of the coal seams was relatively flat (N.T. 81; Exhibit C-2);

(d) that the recharge area for the McKims' well was the upland area to the west which had been mined and backfilled by Kerry (N.T. 83; Exhibits C-5 and K-F);

(e) that, because of the shallow depth of the McKims' well, seasonal groundwater variations could be affecting it (Exhibit C-5); and

(f) that the existing data was insufficient to determine if the change in water quality in the McKims' well was caused by Kerry's mining activities (N.T. 88; Exhibit C-5).

25. Ms. Pointon recommended that the McKims' well be sampled each month for a period of 6 months (N.T. 88; Exhibit C-5).

26. John Davidson took samples of water from the McKims' well on April 14, May 20, June 24 and October 10, 1986. The May and October samplings involved both untreated and treated water; the April and June samplings involved only untreated water (N.T. 24-28, 90-91; Stipulation of Facts ¶6; Exhibit C-2).

27. John Davidson also took water samples of the C. McCandless well on March 6, 1986 (N.T. 53-55; Exhibit C-2).

28. Quarterly monitoring points for Kerry's surface mining operations included, inter alia, the C. McCandless well, the Powell well, the Hopper well, and upstream (AA) and downstream (BB) points on the perennial stream at the northeast base of the North Hill. Water samples had been taken at these points by Kerry on 13 identical dates from September 19, 1983 up to July 21, 1986, and submitted to DER (N.T. 55, 58, 142, 309-313; Exhibits K-L3, K-L5, K-L6, K-L7 and K-L8).

29. John Davidson had taken water samples from Kerry's Sedimentation Pond A on 19 separate occasions from September 15, 1983 up to October 29, 1986, and had taken 6 samples of pit water on the McKee Mine on 4 separate occasions from August 15, 1984 up to August 6, 1986 (N.T. 28-31, 96-97, 178-184; Exhibits C-4 and C-7).

30. According to the water samples taken of the McKims' well from April 1986 up through October 1986, the alkalinity remained fairly constant but still significantly higher than pre-mining levels (N.T. 91; Exhibit C-2).

31. According to the water samples taken from a time prior to mining up through October 1986:

(a) the alkalinity of the C. McCandless well remained fairly constant (N.T. 57, 141; Exhibits C-2 and K-L5);

(b) the alkalinity of the Powell well remained fairly constant or decreased somewhat (N.T. 58-59, 142; Exhibit K-L6);

(c) the alkalinity of the Hopper well remained fairly constant except for 2 low readings in November 1985 and January 1986 (N.T. 59-60, 142; Exhibit K-L3);

(d) the alkalinity of the receiving stream at point AA, upstream from the McKee Mine, fluctuated but exceeded the pre-mining level only on one occasion - June 8, 1984 (N.T. 163-164; Exhibit K-L7); and

(e) the alkalinity of the receiving stream at point BB, downstream from the McKee Mine, fluctuated but never exceeded the pre-mining level (N.T. 164-165; Exhibit K-L8).

32. According to the water samples taken before and during Kerry's surface mining operations:

(a) the alkalinity of Sedimentation Pond A fluctuated with a slight increasing trend (N.T. 150-153; Exhibit C-4); and

(b) the pit water was consistently alkaline but with fluctuating levels (N.T. 153-154; Exhibit C-7).

33. Alkalinity in the W. McKim well did not change during 1986 when alkalinity in the McKims' well was being monitored (N.T. 141).

34. After being informed by DER of the increase in alkalinity in the McKims' well, Vernon Kerry, President of Kerry, examined the McKims' well and the location of the leach bed for their septic system. Mr. Kerry suspected that there was a hole in the well casing which permitted water discharged from the water softener and brine tank to enter the well. He reported this to John Davidson and Nancy Pointon sometime prior to November 17, 1986, and suggested that a bacteria check of the untreated water would test the soundness of the casing (N.T. 61, 158, 176, 212-213, 215).

35. DER did not test the water in the McKims' well for bacteria or use any other means to determine the soundness of the well casing (N.T. 67, 158).

36. Nancy Pointon reviewed all of the available data in early September 1986 and reached the following conclusions:

(a) seasonal groundwater variations did not affect the alkalinity levels in the McKims' well (N.T. 91);

(b) the alkaline nature of the surface water on the McKee Mine site was consistent with the increased alkalinity in the McKims' well (N.T. 91-96, 98-99);

(c) disturbing and redistributing alkaline overburden during mining and reclamation operations allowed a greater dissolution of the strata into the surrounding surface and groundwaters (N.T. 110; Exhibit C-6);

(d) there were no disturbances in the recharge area for the McKims' well during the relevant time period except for Kerry's surface mining operations (N.T. 109-110, 171);

(e) a discharge from the McKims' septic system, even if leaking into the well, would not raise the alkalinity levels to the extent noted (N.T. 109-110, 172-173);

(f) the absence of similar increases in alkalinity in other residential wells could be explained by the following circumstances:

(1) the C. McCandless well was drilled deeper than the McKims' well and could be drawing water from a different aquifer that dilutes the alkalinity (N.T. 108, 143-144, 168-169);

(2) the depth of the Powell well was unknown, making it impossible to determine which aquifer was supplying it (N.T. 108);

(3) the Hopper well was remote from the McKims' well, had a different recharge area and was in a different hydrologic system (N.T. 108-109, 160-161, 173-174);

(4) the W. McKim well was hand dug only into a shallower aquifer than the McKims' well and was being influenced by surface water (N.T. 108, 144-146);

(g) a permanent change in water quality had occurred in the McKims' well (N.T. 91); and

(h) Kerry's surface mining operations on the McKee Mine had caused the change (N.T. 110; Exhibit C-6).

37. Having concluded that Kerry's surface mining activities at the McKee Mine had brought about a permanent change in water quality in the McKims' well, DER issued on November 17, 1986 the Order from which this appeal was taken (Stipulation of Facts ¶8).

38. Prior to the issuance of the Order on November 17, 1986, Nancy Pointon reviewed the latest available water samplings and was satisfied that they supported her prior conclusions (N.T. 119).

39. Upon receiving DER's Order of November 17, 1986, Kerry began supplying bottled water to the McKims (N.T. 215-216).

40. Convinced that there was a hole in the well casing, Kerry proposed to DER that the casing be removed and examined (N.T. 216).

41. With the consent of the McKims, Kerry removed the casing from their well sometime in 1987 and found several holes in it at a location that would have been just above the fireclay that underlay the LK seam (N.T. 217-218, 221; Exhibits K-H, K-I and K-J).

42. A water sample taken of the McKims' well before removal of the casing showed total coliform bacteria in concentrations higher than the limits for safe drinking water (N.T. 217).

43. Kerry replaced the casing with a new steel casing sunk to the same relative depth as the old one (N.T. 219-220, 261-262).

44. Water samples of the McKims' well taken on August 3 and 12, 1987, after the casing had been replaced, showed a significant decrease in

alkalinity from the prior water samples taken on March 17, 1987, before the casing had been replaced (N.T. 227; Exhibits C-2, K-D and K-E).

45. In the Autumn of 1987, DER authorized Kerry to cease supplying bottled water to the McKims and informed Kerry that it did not have to perform any additional remedial work (N.T. 227-228; Stipulation of Facts ¶9).

46. James S. Whipkey, an employee of Copple-Rizzo and Associates and an expert in geology and hydrogeology, was retained by Kerry to study conditions on and adjacent to the McKee Mine site (N.T. 288-296). After completing his study, Mr. Whipkey concluded:

(a) that the recharge area for the McKims' well did not extend southwestwardly beyond the topographic high point on the North Hill and, therefore, did not include the area disturbed by Kerry's mining operations on the southwest slope of the North Hill (N.T. 297-298);

(b) that any water in the auger holes, which were essentially horizontal, would have moved down dip, i.e. to the northwest, and not toward the McKims' well (N.T. 315-318);

(c) that the temporary diminution of water in the W. McKim well that occurred when Kerry was mining the North Hill was the result of a draw-down effect caused by Kerry's pumping of pit water which brought about a reversal of the normal groundwater flow pattern (N.T. 318-320);

(d) that the significant increase in alkalinity in the McKims' well was not matched by similar increases in any other sampling points, strongly suggesting that the cause was localized to the McKims' property (N.T. 298-305); and

(e) that the increase in alkalinity in the McKims' well was not caused by Kerry's mining operations on the McKee Mine (N.T. 305-307).

47. A water sample of the McKims' well taken on April 14, 1989 showed an alkalinity level as high as those found in the water samples taken during 1986 and early 1987 (N.T. 104-105; Exhibits C-2 and C-8).

DISCUSSION

DER has the burden of proof in this proceeding: 25 Pa. Code §21.101(b)(3). In order to prevail, it must show by a preponderance of the evidence that its Order of November 17, 1986 was lawful and a sound exercise of discretion. DER's statutory authority to issue an order for replacement of an affected private water supply is contained in SMCRA, 52 P.S. §1396.4b(f), and is undisputed by Kerry. Kerry disputes ardently, however, DER's assertion that the Order was a proper exercise of this statutory authority.

To justify the issuance of the Order, DER had to show that Kerry affected the McKims' well. The evidence clearly establishes (1) that the McKims' well is in close proximity to the McKee Mine, (2) that the McKims' well has a surface elevation lower than the areas mined by Kerry on the North Hill, (3) that topography is the primary factor affecting groundwater flow in the area, (4) that the water in the McKims' well reflected a significant increase in alkalinity after Kerry mined the North Hill, and (5) that the water encountered during Kerry's mining of the North Hill was alkaline in nature.

If this were the only evidence in the record, we would have little difficulty concluding that DER had made out a prima facie case. Other evidence exists, however, that undermines DER's position. Of greatest significance is the fact that holes existed in the McKims' well casing and the fact that the alkalinity level of the water dropped dramatically after a new casing was installed. DER attempts to discount the significance of this evidence by showing that the alkalinity level had risen again by April 1989,

despite the new casing which had been in place only about 1-1/2 years. In seeking to minimize the impact of the replacement of the casing, DER forgets that, based on that impact, it authorized Kerry to cease supplying the McKims with bottled water and relieved Kerry from any further responsibility for the McKims' water supply. Obviously, DER was satisfied that replacement of the casing had solved the problem. Why should the Board not reach the same conclusions?[1]

There are circumstances apart from the defective casing that cast doubt on DER's position. The isolated nature of the occurrence is one of these. During the same time period when the McKims' well was experiencing alkalinity levels more than double the pre-mining concentrations, the other monitoring points were reporting levels that remained fairly constant and comparable to pre-mining measurements. These monitoring points consisted of other private wells (at least one of which was closer to the mining operations on the North Hill than the McKims' well) and on-site and off-site bodies of surface water. While DER suggests that these other wells may have been drawing from different aquifers than the McKims' well, it presented no hard evidence to prove the point.

Another circumstance is the direction of groundwater flow. In order for water affected by Kerry's mining operations to flow from the McKee Mine into the McKims' well, it had to flow in an east to northeast direction. The hydrogeologists agreed that topography was the primary influence on groundwater flow and structure was the secondary influence. Since the coal seams and the underlying fireclay all dipped toward the northwest, structure

[1] Nothing in the record suggests that DER, on the basis of the April 14, 1989 water sample, reversed its 1987 action releasing Kerry from further responsibility.

would have influenced groundwater to flow away from the McKims' well. The only topography that could have directed groundwater from the McKee Mine toward the McKims' well was the northeast slope of the North Hill. Kerry did not mine this slope, however, or disturb it in any fashion except for a small area at the southeastern-most crest of the hill.

DER has failed to prove how drainage from this small area could have migrated to the McKims' well and significantly increased alkalinity levels there without being intercepted first by the C. McCandless well directly in its path and at one-half the distance. Even if the C. McCandless well draws partially from a deeper aquifer that dilutes the alkaline water, as DER suggests, some increase in alkalinity levels should have occurred if discharges from the McKee Mine were percolating through the northeast slope of the North Hill. Instead, the 17 alkalinity measurements in the water samples taken from the C. McCandless well between September 8, 1982 (pre-mining) and December 13, 1988 (post-mining) reflect levels that are only slightly fluctuating[2] and that, with one minor exception, are all below pre-mining concentrations.

Considering all of the evidence, it is apparent that it preponderates in favor of Kerry and that DER has failed to carry its burden of proof that Kerry was responsible for affecting the McKims' well. Accordingly, the Order of November 17, 1986 was an abuse of DER's discretion.

CONCLUSIONS OF LAW

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

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[2] The only variant is an unusually low level measured on September 19, 1988.

2. DER has the burden of proving, by a preponderance of the evidence, that its Order of November 17, 1986 was lawful and a sound exercise of discretion.

3. DER has statutory authority under SMCRA, 52 P.S. §1396.4b(f), to order a mine operator to replace a private water supply affected by his mining operations.

4. The McKims' private water supply was affected by dramatic increases in alkalinity.

5. The preponderance of the evidence suggests that the McKims' well was affected because of a defective casing.

6. The preponderance of the evidence suggests that the McKims' well was affected by factors local to the McKims' property.

7. The preponderance of the evidence suggests that alkaline waters discharged from areas on the McKee Mine disturbed by Kerry's mining operations would flow away from the McKims' well rather than toward it.

8. DER has failed to prove that the McKims' well was affected by Kerry's mining operations.

9. DER abused its discretion in issuing the Order of November 17, 1986.

ORDER

AND NOW, this 9th day of March, 1990, it is ordered that the appeal of Kerry Coal Company is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 9, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

JOSEPH L. NOWAKOWSKI	:	
	:	
v.	:	**EHB Docket No. 88-115-F**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 9, 1990**

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

Two appeals will be dismissed where the Appellant ignores Board orders to file a more specific pre-hearing memorandum and fails to demonstrate its willingness to prosecute its appeals.

OPINION

This matter involves two appeals, which have been consolidated, of bond forfeitures which the Department of Environmental Resources (DER) imposed on the Appellant, Joseph L. Nowakowski (Nowakowski). In its February 29, 1988 letters to Nowakowski, DER stated that the forfeitures were based on, among other things, Nowakowski's failure to backfill and grade two of his mine sites in Luzerne County, Pennsylvania.

This Board issued Pre-Hearing Order No. 1 on April 6, 1988, requiring Nowakowski to file his pre-hearing memorandum by June 20, 1988. Upon Nowakowski's request, we extended the deadline to August 19, 1988. Nowakowski did not actually file his pre-hearing memorandum until September 1, 1988,

after receiving this Board's warning that sanctions might be imposed for his failure to comply with the August 19 deadline.

On September 2, 1988, DER filed a motion to compel Nowakowski to file a more specific pre-hearing memorandum, alleging that the pre-hearing memorandum provided little information regarding the factual and legal basis of Nowakowski's appeal. Nowakowski did not file a response to DER's motion; therefore, we granted the motion on October 18, 1988. Nowakowski failed to file a more specific pre-hearing memorandum by November 9, 1988--as required by our October 18, 1988 order. Ultimately, this Board sent two notices of default to Nowakowski, informing him that his failure to file a more specific pre-hearing memorandum may lead to sanctions, including the dismissal of his appeals. The second default notice set the final date for compliance at December 12, 1988. Nowakowski's attorney responded on December 8, 1988 with a letter stating that he could not file a more specific pre-hearing memorandum because his client had not given him the necessary information. The attorney noted that he had offered Nowakowski to DER for deposition.

This order addresses DER's December 16, 1988 motion to dismiss Nowakowski's appeals. DER asserts as grounds for dismissal Nowakowski's failure to comply with an order of the Board and failure to prosecute his case. The motion alleges that Nowakowski has repeatedly failed to file a sufficient pre-hearing memorandum, to answer DER's interrogatories, and to cooperate in setting deposition dates. On December 28, 1988, Nowakowski's attorney filed a letter acknowledging receipt of the Motion to Dismiss, and repeating that he was not in a position to file a more specific pre-hearing memorandum and that he had offered Mr. Nowakowski to DER for deposition.

For the reasons which follow, we will grant DER's motion to dismiss Nowakowski's appeals.

The Board has the authority to apply sanctions when a party under its jurisdiction ignores its orders. 25 Pa Code §21.124. Such sanctions have often included dismissal when parties have failed to comply with Board orders regarding the filing of pre-hearing memoranda. Johnston v. DER, 1982 EHB 405 (no response by appellant to two default notices merited dismissal, although DER had the burden of proof); Penn Minerals Co. v. DER, 1986 EHB 798 (failure to file pre-hearing memorandum after extensions of time and two letters of default merited dismissal); Mid-Continent Insurance v. DER, 1986 EHB 964 (failure to file pre-hearing memorandum after two default letters and five months' time had passed merited dismissal); Thompson v. DER, 1989 EHB Docket No. 88-399-M (repeated failure to comply with Pre-Hearing Order No. 1 merited dismissal).

In the instant case, Nowakowski has refused to file a more specific pre-hearing memorandum, as ordered by the Board. In addition, Nowakowski's response to DER's Motion to Dismiss did not dispute that Nowakowski has failed to answer DER's interrogatories; thus, we accept this assertion as true. Although we are reluctant to dismiss appeals such as these, where DER has the burden of proof, Nowakowski's continuing refusal to comply with our order to file a more specific pre-hearing memorandum and his failure to respond to DER's interrogatories overrides this concern. See Penn Minerals Company v. DER, 1986 EHB 798. Therefore, we will grant DER's Motion to Dismiss.

ORDER

AND NOW, this 9th day of March, 1990, the Department of Environmental Resources' motion to dismiss is granted and the appeals of Joseph L. Nowakowski at Docket Nos. 88-115-F and 88-116-F are dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 9, 1990

cc: Bureau of Litigation
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For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
David W. Saba, Esq.
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nb

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M. DIANE SMITH
SECRETARY TO THE BOA

BIG B MINING COMPANY	:	
	:	
V.	:	**EHB Docket No. 83-215-G**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 12, 1990**

OPINION AND ORDER
SUR
PAYMENT OF COUNSEL FEES, COSTS AND EXPENSES

By Robert D. Myers, Member

Synopsis

A petition for attorneys fees and other costs cannot be granted under section 4(b) of Pa. SMCRA where the petitioner is the permittee and the underlying proceeding was an appeal from the denial of a permit application. Construing section 4(b) of Pa. SMCRA consistently with regulations adopted by the Department of the Interior to implement a similar provision under Fed. SMCRA, the Board rules that a permittee is not eligible for cost recovery in permit application proceedings.

OPINION

On September 16, 1983, the Department of Environmental Resources (DER) denied the application of Big B Mining Company, Inc. (Big B), filed pursuant to the Pennsylvania Surface Mining Conservation and Reclamation Act (Pa. SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et

seq., for a permit to conduct surface mining on a tract of land in Washington Township, Butler County, known as the Gould Site. The denial was based, in part, on DER's determination that Big B had not demonstrated, as required by 25 Pa. Code §95.1, that its discharges into the Silver Creek Watershed would comply with DER's effluent limitations and had not demonstrated social and economic justification for its failure to comply. Big B filed an appeal from DER's action, docketed at 83-215-G.

On July 25, 1985, DER denied Big B's repermitting application for a 2-acre portion of the Fleming Site which abuts the Gould Site. The basis for the denial was essentially the same as that given with respect to the Gould Site. Big B filed an appeal from this action of DER, docketed at 85-330-G. The two appeals subsequently were consolidated at docket number 83-215-G.

After a hearing on the merits, the Board issued an Adjudication on October 26, 1987 (1987 EHB 815) ruling, inter alia, that Big B had shown economic justification for degrading water quality in the Silver Creek Watershed and that its discharges would not preclude existing water uses. This Adjudication was affirmed by Commonwealth Court on February 23, 1989 (____ Pa. Cmwlth. _____, 554 A.2d 1002).

On March 13, 1989, Big B filed with the Board a Petition for Payment of Counsel Fees, Costs and Expenses seeking recovery of $43,875.00, representing 292.50 hours of legal time expended through the appeal stage at a rate of $150.00 per hour. While the Petition does not contain any statutory citation, Big B's brief filed on April 20, 1989, makes clear that the claim is based solely on section 4(b) of Pa. SMCRA, 52 P.S. §1396.4(b). DER opposed Big B's Petition in a Response filed on April 5, 1989 and a brief filed on May 8, 1989.

Subsection (b) of section 4 of Pa. SMCRA, 52 P.S. §1396.4(b), is a comprehensive provision dealing with public notice of the filing of applications (for permits or bond releases), objections to applications, public hearings on objections, appeals to this Board and further appeals to court. In the midst of these clauses is the following:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this section.

By referring to proceedings pursuant to this "section" rather than "subsection," the Legislature apparently intended the Board's discretionary power to encompass all proceedings arising under section 4. That section, with its multiple subsections, paragraphs and subparagraphs, covers the gamut from permit applications to bond releases. Included at section 4(a)(2)G and H are application requirements for avoiding acid mine drainage, siltation and other stream pollution; and for complying with other environmental statutes, including the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. DER's denial of Big B's applications was based on Big B's alleged failure to satisfy these requirements, specifically the anti-degradation provisions of 25 Pa. Code §95.1(b) adopted under the CSL. Big B's appeals from these denials, as a person adversely affected by DER's actions, constitute "proceedings pursuant to this section" (section 4).

Our assessment of Big B's eligibility cannot end at this point, however. We must satisfy ourselves that the costs and expenses were "reasonably incurred" and that awarding them to Big B will be a proper exercise of our "discretion." Unfortunately, the Legislature has provided no direct expressions of its intent to guide us in performing this task. There are no statutory definitions of the crucial words and no statements of purpose

that shed any light on the subject. No regulations have been adopted by the Environmental Quality Board to implement this statutory provision. [1] This void forces us to ascertain legislative intent by considering (1) the occasion and necessity for the statutory provision, (2) the circumstances under which it was enacted, (3) the mischief to be remedied, and (4) the object to be attained: Statutory Construction Act, Act of December 6, 1972, P.L. 1339, as amended, 1 Pa. C.S.A. §1921(c).

In order for Pennsylvania to retain primary jurisdiction over surface mining, it had to conform its statutes and regulations to the Federal Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87), 30 U.S.C.A. §1201 et seq. (Fed. SMCRA), and the regulations adopted thereunder by the Department of the Interior (Interior). In an effort to accomplish this conformation, Pennsylvania adopted in 1980 major revisions to Pa. SMCRA, to the CSL and to other regulatory statutes. Section 4(b) of Pa. SMCRA, in its present form, was added at that time by the Act of October 10, 1980, P.L. 835. Section 17 of the Act contained the following language:

> It is hereby determined that it is in the public interest for Pennsylvania to secure primary jurisdiction over the enforcement and administration of [Fed. SMCRA], and that the General Assembly should amend [Pa. SMCRA] in order to obtain approval of the Pennsylvania program by the United States Department of the Interior. It is the intent of this act to preserve existing Pennsylvania law to the maximum extent possible.

One of the major Congressional concerns in adopting Fed. SMCRA was securing citizen participation in the regulatory program. As expressed by the Senate in S. Rep. No. 95-128, 95th Cong. 1st Sess. at p. 59:

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[1] Compare this situation with the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 et seq. (Costs Act) and its implementing regulations at 4 Pa. Code §2.1 et seq., where the parameters and procedures are spelled out in admirable detail.

> The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State regulatory authority or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing...While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the Act.
>
> In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill,...then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.

For similar sentiments expressed by the House, see H. Rep. No. 95-218, 95th Cong., 1st Sess. at p. 88.

To implement the policy expressed in the above-language, Congress inserted costs provisions in section 520(d), 30 U.S.C.A. §1270(d), and section 525(e), 30 U.S.C.A. §1275(e), of Fed. SMCRA. The former deals with court proceedings; the latter with administrative proceedings.

Section 525(e) reads as follows:

> Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary [of the Interior] to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either

> party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

Regulations adopted to effectuate this provision at 30 CFR §840.15 refer to 43 CFR §4.1290 et seq. Section 4.1294 specifies which parties may be entitled to receive awards and which parties may be ordered to pay them. Most of the named proceedings are enforcement actions; the only one remotely applicable to permit issuance is in subsection (b) where it is stated that costs may be awarded against the Office of Surface Mining ((OSM)) in favor of any person, "other than a permittee or his representative," who initiates or participates in "any proceeding" under Fed. SMCRA and who achieves at least some degree of success on the merits. A permittee is entitled to an award only in two types of proceedings: (1) where OSM acts in bad faith by issuing a cessation order, a notice of violation or a rule to show cause why a permit should not be suspended or revoked (subsection (c)); and (2) where a third person acts in bad faith by initiating or participating in an enforcement proceeding (subsection (d)). Interior has defended this unequal treatment of permittees on the basis of the Congressional declaration (quoted above) that expresses a clear preference for the costs claims of private citizens (see 43 FR 34385 - August 3, 1978 and 50 FR 47223 - November 15, 1985).

Interior reviewed the regulatory program subsequent to the 1980 statutory amendments and gave its conditional approval to Pennsylvania's primary jurisdiction. Finding 27.1 (47 FR 33058 - July 30, 1982) consisted of the following:

> Unlike 30 CFR 840.15 and Section 525(e) of [Fed. SMCRA], Pennsylvania law does not adequately provide for awarding attorney's fees. Although Section 307(b) of [the CSL] provides that costs and expenses, including attorney's fees, can be awarded by the Environmental Hearing Board for any proceeding brought under the Act, Section 4(b) of [Pa. SMCRA]...only authorize attorney's fees for administrative proceedings involving permit approval or bond release.

> Therefore, approval of the Pennsylvania program is conditioned upon the addition of language to its laws or other program amendment providing that costs and expense, including attorney's fees, can be awarded for any proceeding brought under the aforementioned laws.

The approval was conditioned, inter alia, on assurances that the award of costs and expenses, including attorney's fees, would be "no less effective than 30 CFR 840.15 and in accordance with Section 525(e) of [Fed.] SMCRA" (47 FR 33080 - July 30, 1982).

Because of the language employed by Interior in its conditional approval of Pennsylvania's program, the Board has followed the Federal regulations in ruling on costs applications under section 4(b) of Pa. SMCRA, even though those regulations technically are not binding on us: James E. Martin v. DER, 1986 EHB 101 at 106; Jay Township et al. v. DER, 1987 EHB 36 at 42; Kwalwasser v. DER, 1988 EHB 1308 at 1311. Following those precedents in this case would result in a denial of Big B's Petition. The underlying proceedings are appeals from permit denials. A permittee is not eligible to recover costs in proceedings of this sort, according to 43 CFR §4.1294(b). Proceedings in which the permittee does have some limited eligibility, proceedings described in 43 CFR §4.1294 (c) and (d), involve enforcement actions rather than permit denials and, thus, are not applicable here.

Such a result seems paradoxical, at first blush, since the only type of administrative proceedings in which permittees have some limited eligibility (enforcement proceedings) would not be covered by section 4(b) of Pa. SMCRA and, in fact, would not be covered by any other provision of Pa. SMCRA. This was the defect Interior found in the Pennsylvania program when it gave its conditional approval, although Interior probably was more concerned with the effect upon private citizens than upon permittees.

So far as the Board is aware, Pennsylvania has made no "addition of language to its laws or other program amendment" to comply with Interior's conditional approval. However, section 307(b) of the CSL, 35 P.S. §691.307(b), referred to approvingly by Interior, does provide for the award of costs in enforcement proceedings. We are aware that most enforcement actions taken by DER against surface mine operators rely both on Pa. SMCRA and the CSL.[2] In actual practice, therefore, mine operators will not be prejudiced by our application of the Federal regulations in permit proceedings such as this one.

In denying Big B's Petition, we are also persuaded by several other factors. First, the Legislature made it very clear that, in enacting the 1980 amendments to Pa. SMCRA, it wanted to change existing Pennsylvania law only to the extent necessary to comply with Fed. SMCRA. Existing Pennsylvania law did not permit a mine operator to recover costs in a permit application proceeding. The Federal regulations make it plain that no change in Pennsylvania law was necessary in that respect. Consequently, it is reasonable to conclude that the Legislature did not intend the provisions of section 4(b) of Pa. SMCRA to apply to mine operators in permit application proceedings.

Second, the only subsequent Pennsylvania legislation dealing with the recovery of costs is the Costs Act (referred to in footnote 1), enacted two years after the 1980 amendments to Pa. SMCRA. While this legislation provides a mechanism for the recovery of costs generally in administrative proceedings,

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[2] We do not know, but it may be that this explains why Interior has not continued to insist on a legislative change in Pa. SMCRA. Interior may be satisfied that, in practice, the costs provisions of Pa. SMCRA and the CSL, together, are "no less effective" than under Fed. SMCRA.

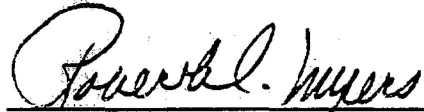
it omits permit application proceedings from its scope. This omission is a further expression of legislative intent not to provide for the award of costs in such situations.

Finally, the recent affirmance of our Kwalwasser decision, supra, by Commonwealth Court (No. 311 C.D. 1989, Opinion and Order dated February 1, 1990) convinces us that our approach to these cases is sound. Without getting involved in a discussion of legislative intent, the Court nonetheless held that the Board did not abuse its discretion in adopting an eligibility requirement from the Federal regulations in ruling upon a costs application under section 4(b) of Pa. SMCRA.

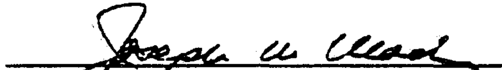
ORDER

AND NOW, this 12th day of March, 1990, it is ordered that the Petition for Payment of Counsel Fees, Costs and Expenses, filed by Big B Mining Company, Inc. on March 13, 1989, is denied.

ENVIRONMENTAL HEARING BOARD*



ROBERT D. MYERS
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 12, 1990

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Western Region
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Bruno A. Muscatello, Esq.
Butler, PA
For the Intervenor:
Michael J. Boyle, Esq.
Pittsburgh, PA

Maxine Woelfling, Chairman, was recused and did not participate in this decision.

Richard S. Ehmann, Member, was also recused.

Terry J. Fitzpatrick, Member, concurred in the result and filed a separate opinion.

sb

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M. DIANE SMITH
SECRETARY TO THE BO

BIG B MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 83-215-G
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 12, 1990

CONCURRING OPINION OF TERRANCE J. FITZPATRICK, MEMBER

While I agree with the conclusion of my colleagues that this petition should be dismissed, I cannot agree with their reasons for reaching that result. Therefore, I file this concurring opinion.

As the majority opinion notes, section 4(b) of the Pennsylvania Surface Mining Conservation and Reclamation Act (Pa. SMCRA), 52 P.S. §1396.4(b) provides that, upon the request of "any party," this Board may in its discretion order payment of costs and counsel fees. As the majority opinion also notes, this language applies to proceedings arising under section 4 of Pa. SMCRA--that is, proceedings involving permit applications and bond releases.

I do not agree with my colleagues that we may follow the interpretation of the Federal regulations to the point that we preclude permittees from ever recovering costs under section 4(b) of Pa. SMCRA. Although we have in the past turned to the federal regulations for guidance in interpreting section 4(b), it is clear that we are not bound by those regulations. Robert Kwalwasser v. DER, 1988 EHB 1308, 1311. In my view, the majority's interpretation of section 4(b) cannot be squared with the language of that section that "any party" may request costs and counsel fees. Since I view the

language of section 4(b) as unambiguous, I do not believe it is appropriate to delve into the intentions of the General Assembly. See 1 Pa. C.S. §1921(b).

I do, however, agree with the majority's conclusion in this case. In exercising our discretion to grant costs and counsel fees under section 4(b), the Board should only grant counsel fees to a permittee where the permittee shows that DER or a third party acted in "bad faith." This is the standard which is applied under the federal regulations in those limited instances (enforcement actions brought by either the regulatory agency or a third party) where a permittee may recover such costs. See 43 CFR §4.1294(c), (d). I do not believe it would be inconsistent to borrow the bad faith standard from the federal regulations, while, at the same time, refusing to follow the federal regulations' blanket preclusion on recovery of costs by permittees in application proceedings. Borrowing the bad faith standard would be a permissible exercise of the Board's discretion since it does not conflict with state law, whereas barring permittees from ever recovering costs in application proceedings would be, in my view, inconsistent with the express language of section 4(b) of Pa. SMCRA, 52 P.S. §1396.4(b).

Since the permittee in this case has not alleged that DER acted in bad faith, I would deny the petition.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: March 12, 1990

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M. DIANE SMITH
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ROBERT K. GOETZ, JR.	:	
	:	
V.	:	**EHB Docket No. 89-509-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 13, 1990**

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

In an appeal from a civil penalty assessment, the appellant is prohibited, by the doctrines of issue preclusion and res judicata, from litigating the facts underlying the assesment when he failed to appeal an Administrative Order containing some of those facts and lost an enforcement proceeding in the Commonwealth Court based on the remainder of those facts. The only issue remaining to be litigated is the reasonableness of the amount of the civil penalty assessed.

OPINION

This appeal stems from the September 29, 1989 assessment by the Department of Environmental Resources (DER) against Robert K. Goetz, Jr. (Appellant) of a civil penalty in the amount of $19,500. The penalty, assessed pursuant to section 605 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, 35 P.S. §6018.605, was related to Appellant's alleged unpermitted disposal and burning of solid waste (demolition material) on his land in Franklin Township, Adams County.

On December 11, 1989, DER filed a Motion to Limit Issues, to which Appellant has filed no response. DER's Motion alleges that on May 17, 1989, DER issued an Administrative Order to Appellant, containing findings that Appellant had disposed of solid waste on his land without a permit and containing directions to cease such activities and to perform remedial measures within certain time limits. Appellant did not challenge this Administrative Order by filing an appeal with this Board. When Appellant failed to comply with the Administrative Order, DER filed a petition for enforcement in the Commonwealth Court of Pennsylvania (No. 255 Misc. Docket 1989). After a hearing, the Court entered an Order on November 20, 1989, finding that Appellant had engaged in the unpermitted burning and disposal of demolition waste on his land and directing Appellant to cease such activities and to perform certain remedial measures.

DER argues (1) that, having failed to appeal the Administrative Order, Appellant is now precluded from litigating issues pertinent to that Order, and (2) that the findings of Commonwealth Court in its Order of November 20, 1989 are res judicata as to the Appellant. These arguments are correct: Delta Mining Company, Inc. v. DER, 1988 EHB 301; Clark v. Troutman, 509 Pa. 336, 502 A.2d 137(1985). Since the civil penalty assessment was based on the violations detailed in the Administrative Order and on Appellant's failure to comply with the Administrative Order (see paragraph M of the Assessment of Civil Penalities), the facts underlying the assessment are no longer in issue. The only issue remaining is the reasonableness of the amount of the assessment.

ORDER

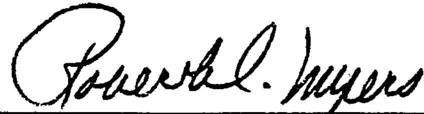
AND NOW, this 13th day of March, 1990, it is ordered as follows:

1. The Motion to Limit Issues, filed by the Department of Environmental Resources on December 11, 1989 is granted.

2. The only issue to be litigated is the reasonableness of the amount of the civil penalty assessed against Robert K. Goetz, Jr. on September 29, 1989.

3. The Department of Environmental Resources shall file its pre-hearing memorandum on or before March 30, 1990.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: March 13, 1990

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M. DIANE SMI
SECRETARY TO THE I

DONALD W. DEITZ	:	
	:	
v.	:	**EHB Docket No. 88-525-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 14, 1990**

OPINION AND ORDER
SUR
MOTION FOR JUDGMENT ON THE PLEADINGS

By Joseph N. Mack, Member

Synopsis

A motion for judgment on the pleadings will be granted where admissions in the pleadings (pre-hearing memorandum) establish the case for the Commonwealth.

OPINION

This matter originated when the Department of Environmental Resources (DER) issued an assessment of civil penalty to Donald W. Deitz on November 18, 1988 for a discharge from the Jack Brothers No. 9 Mine which occurred on July 28, 1988; Deitz operates the Jack Brothers No. 9 Mine pursuant to Mine Drainage Permit No. 2768BSM25. An appeal by Deitz was timely filed on December 21, 1988 which was dual in nature, to wit: It denied that there was

an unauthorized discharge of mine drainage, and it alleged further that if the discharge did take place, it was corrected within 48 hours as required by a consent decree entered by Deitz and DER in the Commonwealth Court in 1987.

In his April 12, 1989 pre-hearing memorandum, Deitz says:

> "Because there is a legal question as to the affect (sic) of the order of court, it is felt that a factual hearing is not necessary. The case is one of legal interpretation."

Deitz also admits in his pre-hearing memorandum that there was a non-complying discharge from the Jack Brothers No. 9 Mine and argues that DER is barred from assessing a civil penalty for the discharge by an order of the Commonwealth Court dated November 4, 1987.

At this point, DER filed a motion for judgment on the pleadings, arguing that the consent decree does not by its terms preclude the assessment of a civil penalty nor does it preclude DER from pursuing other remedies. DER argues further that the Deitz pre-hearing memorandum does not contest the fact of the discharge nor does it question the amount of the civil penalty.

Deitz, although given notice of DER's motion and the opportunity to respond, chose not to answer DER's motion for judgment on the pleadings.

A motion for judgment on the pleadings is proper and should be granted where no material facts are in dispute and a hearing is pointless because the law is clear on the issue. In ruling on a motion for judgment on the pleadings, the Board will regard all facts pleaded by the non-moving party as true. Upper Allegheny Joint Sanitary Authority v. DER, EHB Docket No. 88-084-W, (Opinion issued March 15, 1989). See also DER v. Summerhill Borough, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978).

Deitz herein contends that the court order bars the imposition of civil penalties; we do not agree.

In the order, Deitz agreed to submit revisions to his mine drainage permit, to construct water treatment facilities and to comply with the effluent limitations contained in 25 Pa.Code §87.102. The balance of the order dealt with non-complying discharges, specifying a 48-hour notice and joint sampling to determine the severity and continuation of discharges. The order concluded by stating that if the effluent violation exist after the 48-hour notice and retesting, certain bonds may be immediately collected by DER.

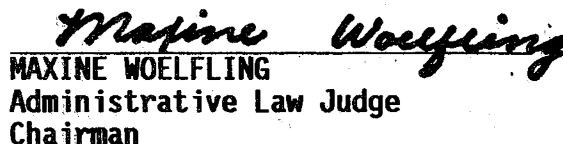
The order does not at any point indicate that DER waives any of its rights to pursue alternate remedies nor does it indicate that the order is the sole remedy for the parties; consequently, DER is not barred from assessing civil penalties. See DER v. Leechburg Mining Company, 9 Pa.Cmwlth. 297, 305 A.2d 764 (1973).

Since DER was not barred from assessing a civil penalty for a discharge which Deitz admits did not comply with 25 Pa.Code §87.102, we find the motion for judgment on the pleadings well taken.

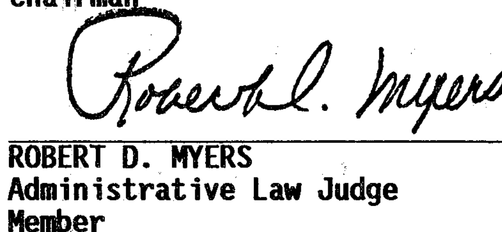
O R D E R

AND NOW, this 14th day of March, 1990, it is ordered that the Department of Environmental Resources' Motion for Judgment on the Pleadings is granted and the appeal of Donald W. Deitz is dismissed.

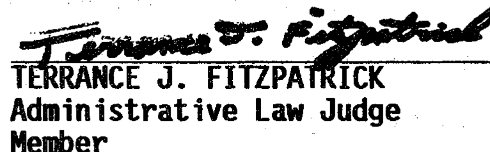
ENVIRONMENTAL HEARING BOARD



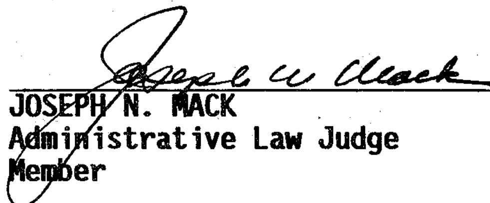
MAXINE WOELFLING
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

Mr. Ehmann has recused himself in this matter.

DATED: March 14, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

ROHM AND HAAS DELAWARE VALLEY INC.	:	
v.	:	**EHB Docket No. 86-608-M**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

RAYMOND PROFFITT	:	
v.	:	**EHB Docket No. 89-053-M**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and ROHM AND HAAS DELAWARE VALLEY,	:	
INC., Permittee	:	**Issued: March 19, 1990**

OPINION AND ORDER SUR
MOTIONS TO DISMISS APPEALS

By Robert D. Myers, Member

Synopsis

A motion by a permittee-appellant to dismiss an appeal as moot because the permit to which it relates has been superseded by a replacement permit will be granted even though an intervenor intends to file an application for costs and attorneys' fees. The dismissal of the appeal will not prevent the intervenor from filing such an application. An appeal from the replacement permit, docketed as a skeleton appeal under 25 Pa. Code §21.52(c), will not be dismissed because the third party-appellant did not file the required information for more than 7 months. The Board had made no request for the information and all parties had agreed to general continuances while settlement discussions took place. The petitioner had not objected to the delay and had not been prejudiced by it.

OPINION

The appeal docketed at 86-608 was filed by Rohm and Haas Delaware Valley, Inc. (Rohm and Haas) on October 30, 1986 to contest some of the provisions of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0012769 issued to Rohm and Haas by the Department of Environmental Resources (DER) on September 30, 1986, and pertaining to discharges at Rohm and Haas's plant in Bristol Township, Bucks County (1986 Permit). Along with its Notice of Appeal, Rohm and Haas filed a Petition for Supersedeas, seeking a relaxation of certain permit limitations during pendency of the appeal. The Petition was resolved by a stipulation, entered into between Rohm and Haas and DER and approved by the Board on May 1, 1987, relaxing certain permit limitations until November 2, 1987. By a series of amendments to the stipulation, the compliance date was extended from November 2, 1987 to January 31, 1989. On that date, a new NPDES Permit No. PA 0012769 (1989 Permit) was issued and the prior permit was revoked.

Raymond Proffitt (Proffitt) had been allowed to intervene in the appeal docketed at 86-608 by a Board Opinion and Order issued February 26, 1988 (1988 EHB 135). On March 2, 1989, Proffitt filed an appeal (docketed at 89-053) for the purpose of challenging provisions of the 1989 Permit. This appeal was docketed as a skeleton appeal under 25 Pa. Code §21.52(c), at Proffitt's request, since the reasons for the appeal were not specified.[1] As the permittee in a third party appeal, Rohm and Haas automatically became a party to Proffitt's appeal docketed at 89-053.

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[1] Profitt incorporated by reference the objections he had previously expressed to the 1986 Permit and stated that, if ongoing settlement negotiations failed, he would develop his objections with more precision through the discovery process. Our decision is not to be construed as an endorsement of this procedure.

A Board Order dated September 20, 1989 gave the parties to both appeals until October 13, 1989 to file objections, if any, to consolidating the appeals. On that date, Proffitt filed an Amended Notice of Appeal at 89-053 and a statement expressing no objections to consolidation. On October 17, 1989, Rohm and Haas filed Objections to Consolidation and Motions to Dismiss both appeals. Proffitt opposed these motions in his November 2, 1989 response. Rohm and Haas filed a supplement to its Motions on December 4, 1989. In a letter dated December 6, 1989, DER took a position best described as neutral.

<u>86-608</u>

The appeal docketed at 86-608 is Rohm and Haas's appeal and should be dismissed, at Rohm and Haas's request, unless the rights of another party will be adversely affected. The only objecting party, Proffitt, concedes that the provisions of the 1986 Permit have been superseded by those of the 1989 Permit. Even if some of those provisions still applied, however, Proffitt would not be able to litigate them. His intervention was specifically confined to challenging "any further temporary or permanent relaxation of the limitations contained in [the 1986 Permit] with respect to Outfall 009." Since the relaxation of those limitations expired on January 31, 1989, there is nothing further for Proffitt to challenge.

Proffitt's argument that the appeal at docket number 86-608 should not be dismissed because the issue of attorneys' fees and costs remains unsettled also is without merit. No application for costs and attorneys' fees has been filed and, appropriately, should not be filed until the appeal has been given final disposition. Our dismissal of the appeal docketed at 86-608 will not affect Proffitt's right to file such an application, if he can bring himself within the scope of a relevant statutory provision.

89-053

Rohm and Haas seeks to have the Board dismiss the appeal docketed at 89-053 because Proffitt did not "perfect" the appeal in a timely manner. Rohm and Haas has misconstrued our procedural rules as they relate to skeleton appeals.[2] 25 Pa. Code §21.52(c) states as follows:

> An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51 of this title will be docketed by the Board as a skeleton appeal. The Appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal.

One of the content requirements of §21.51 is a statement of the Appellant's specific objections to DER's action, set forth in separate numbered paragraphs. Proffitt did not satisfy this requirement in his Notice of Appeal and requested that it be docketed as a skeleton appeal.

To be docketed as a skeleton appeal, however, the appeal had to be "perfected" in accordance with §21.52. In other words, a notice of the appeal had to be served on Rohm and Haas as stipulated in §21.52(b). Attached to Proffitt's Notice of Appeal was a certification that notice had been given to Rohm and Haas on March 2, 1989, by first class mail. If this occurred as certified, the appeal was "perfected." Rohm and Haas has made no allegation that service was not made as certified.

Once the appeal was filed, perfected and docketed as a skeleton appeal, Proffitt was obligated to file his specific objections "upon request from the Board." The Board made no such request, and Proffitt's filing of his specific objections on October 13, 1989 cannot be considered untimely.

Rohm and Haas contends that it has been harmed by the delay. If

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[2] These rules were discussed at some length in McCutcheon v. DER, 1988 EHB 1114.

that, in fact, occurred, Rohm and Haas must bear the responsibility for it. The transmittal letter accompanying Proffitt's Notice of Appeal[3] indicated that (1) a settlement was imminent; and (2) if it did not materialize, the issues would be formulated with more precision through the discovery process. The discovery period extended initially to May 23, 1989. On the day prior to this date, Proffitt filed a Motion for Continuance which was unopposed by Rohm and Haas and DER. A general continuance was granted as a result.

When settlement negotiations among the parties failed to resolve the dispute, the Board ordered them to submit by July 27, 1989 a proposed schedule for completing discovery and filing pre-hearing memoranda. On that date, Proffitt (with the agreement of Rohm and Haas and DER) requested another continuance. This request was granted with the stipulation that a status report be filed by September 15, 1989. The status report filed on that date reported that an agreement still had not been reached. As a result, the Board issued its Order of September 20, 1989 (referred to above), requiring the parties (1) to respond by October 13 if they opposed consolidation; and (2) to file by October 27 their joint proposal for deadlines for discovery and for the filing of pre-hearing memoranda. Proffitt's Amended Notice of Appeal, containing his specific objections, and Rohm and Haas's Motions to Dismiss were filed in response to this Order.

It is apparent that the delay occurred with Rohm and Haas's consent. If it truly was being prejudiced by this passage of time, it was obligated to communicate that fact to the Board. Its failure to do so until after Profitt's specific objections had been filed amounts to a waiver.

The Board also is not moved by Rohm and Haas's complaint that the

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[3] Rohm and Haas's legal counsel was noted as receiving copies of the letter.

terms of the 1989 Permit required it to proceed with design and construction of treatment facilities without knowing the specific nature of Proffitt's objections. Again, if this was causing harm, it was Rohm and Haas's responsibility to bring it to the Board's attention instead of specifically agreeing to general continuances. Aside from that, we note that the 1989 Permit required Rohm and Haas to complete design and submit a Part II Application for a Water Quality Management permit by January 3, 1989, to receive bids by July 3, 1989, and to award contracts by September 1, 1989. This schedule either did not contemplate any litigation of permit conditions or was indifferent to such litigation. In either case, the schedule was so condensed that Rohm and Haas could not reasonably expect to be able to make any considered judgment on the likely outcome of such litigation before making substantial commitments pursuant to the 1989 Permit.

Consolidation

Since the appeal docketed at 86-608 will be dismissed, as noted above, there will no longer be multiple appeals to consolidate.

ORDER

AND NOW, this 19th day of March, 1990, it is ordered as follows:

1. Rohm and Haas's Motion to Dismiss the appeal docketed at 86-608 is granted and the appeal is dismissed.

2. Rohm and Haas's Motion to Dismiss the appeal docketed at 89-053 is denied.

3. The parties shall submit by April 3, 1990, a proposed schedule for completion of discovery and filing of pre-hearing memoranda.

ENVIRONMENTAL HEARING BOARD

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Chairman

ROBERT D. MYERS
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Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
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Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 19, 1990

cc: **Bureau of Litigation**
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Kenneth A. Gelburd, Esq./Eastern
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M. DIANE SMITH
SECRETARY TO THE BO

THERESA YORK	:	**EHB Docket No. 89-522-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
EUREKA STONE QUARRY, Permittee	:	**Issued:** March 19, 1990

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

By Maxine Woelfling, Chairman

Synopsis

A motion for sanctions is granted and an appeal is dismissed where the appellant fails to file her pre-hearing memorandum as required by the Board's order, does not respond to discovery requests, and does not answer the motion for sanctions.

OPINION

This matter was initiated with the October 31, 1989, filing of a notice of appeal by Theresa York seeking the Board's review of the Department of Environmental Resources' (Department) issuance of Mine Drainage Permit No. 5975SM3A1 and Mining Permit No. 300725-5975SM3-01-0 to Eureka Stone Quarry, Inc. (Eureka). The permits, which were issued by the Department on September 26, 1989, authorized Eureka to conduct a quarrying operation, known as the Daleville Quarry, in Covington Township, Lackawanna County.

As is its usual procedure, the Board, on November 2, 1989, issued Pre-Hearing Order No. 1, which, *inter alia*, required Ms. York to file her pre-hearing memorandum on or before January 16, 1990. When Ms. York failed to file her pre-hearing memorandum by the required date, the Board, in a letter dated January 22, 1990, notified her that she was in default of this obligation and that sanctions could be applied under 25 Pa.Code §21.124 if the pre-hearing memorandum were not filed on or before February 2, 1990. Ms. York did not file her pre-hearing memorandum by February 2, 1990, and the Board, in a letter dated February 13, 1990, advised Ms. York that sanctions would be applied unless her pre-hearing memorandum were filed by February 23, 1990. As of the date of this opinion, Ms. York has not filed her pre-hearing memorandum.

In the meantime, Eureka filed a motion for sanctions on February 12, 1990, seeking the dismissal of York's appeal for failure to comply with Pre-Hearing Order No. 1 and failing to respond to Eureka's discovery requests in violation of the Board's rules of practice and procedure. The Board advised Ms. York by letter dated February 20, 1990, that any response to Eureka's motion must be filed on or before March 5, 1990. To date, Ms. York has not responded to Eureka's motion.

We will grant the relief requested by Eureka. Ms. York has failed to abide by the Board's pre-hearing order, despite being given ample opportunity to file her pre-hearing memorandum. Furthermore, her failure to respond to Eureka's discovery requests and her failure to respond to Eureka's motion for sanctions demonstrate that she has no intention of prosecuting her appeal. Consequently, the sanction of dismissal is appropriate. Right of Way Paving Company, Inc. and American Insurance Company v. DER, 1988 EHB 1134.

O R D E R

AND NOW, this 19th day of March, 1990, it is ordered that Eureka Stone Quarry's motion for sanctions is granted and the appeal of Theresa York is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 19, 1990

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For Permittee:
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M. DIANE SMITH
SECRETARY TO THE BC

RUSHTON MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-213-F**
	:	**(Consolidated Appeal)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 20, 1990

OPINION AND ORDER SUR
MOTION FOR STAY OF PROCEEDINGS AND
EFFECT OF BOARD'S ORDER

By Terrance J. Fitzpatrick, Member

Synopsis:

A motion for Stay of Proceedings and Effect of Board's Order is denied because the moving party failed to allege facts which would satisfy the criteria for granting a stay.

OPINION

This proceeding involves forty-six appeals, which have been consolidated, from the issuance of coal mining activity permits by the Department of Environmental Resources (DER). The reason for consolidation was to resolve common issues regarding the legality of certain "standard conditions" inserted into the permits by DER. On January 22, 1990, we issued an Opinion and Order which granted the Appellants' motion for partial summary judgment and declared the standard conditions invalid because they were not promulgated as regulations in accord with the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §1102 et seq.

On February 1, 1990, DER filed a motion to amend the Board's order of January 22, 1990. Specifically, DER requested that we include a statement in our order that our ruling involved a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the matter. DER requested insertion of this language because it believed that our order was interlocutory, and it wished to have Commonwealth Court review the order.[1] See 42 Pa. C.S. §702(b). On March 5, 1990, we issued an order granting DER's motion to amend.

This Opinion and Order addresses DER's "Motion for a Stay of Proceedings and Effect of Board's Order" filed on February 7, 1990. In this motion, DER requests the Board to stay its January 22, 1990 order pending Commonwealth Court's determination whether to accept DER's interlocutory appeal.[2] DER contends that the Board should stay its decision, pending Commonwealth Court's decision whether to accept the appeal, in order to preserve the status quo. DER asserts that the Board's order will have a "significant effect" on how DER administers its coal mining programs. DER further asserts that the Appellants have operated under the challenged permit

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[1] We note that DER has also filed a petition for review from our order in Commonwealth Court, Docket No. 376 C.D. 1990. This appears to be based upon the belief that our order could be construed as a final order rather than an interlocutory one. It is not necessary for us to address whether our decision was interlocutory or final in deciding the instant motion for a stay.

[2] DER asserts that if Commonwealth Court accepts its interlocutory appeal, this acceptance will operate as an automatic stay of the Board's order pursuant to Rule 1736(b) of the Pennsylvania Rules of Appellate Procedure. The Appellants disagree that Rule 1736(b) applies here, citing Department of Education v. Postlewait, 84 Pa. Commonwealth Ct. 568, 482 A.2d 57 (1979), and Colston v. Department of Community Affairs, 104 Pa. Commonwealth Ct. 165, 521 A.2d 513 (1987). We will not address this question because it does not affect our decision on whether a stay is appropriate.

conditions for up to four years, and that the grant of a stay will not prejudice the Appellants.

The Appellants filed a response to DER's motion. The Appellants contend that a stay is not justified because DER has not alleged facts to show whether DER is likely to succeed on the merits of its appeal, whether DER will be irreparably injured, how a stay will affect others, and whether a stay will affect the public interest. Finally, Appellants contend that while they have complied with the challenged permit conditions prior to the Board's ruling, this compliance was under protest and does not warrant forcing them to continue to comply with the permit conditions.

In deciding whether to grant a stay or supersedeas, the Board considers the following factors:

(i) Irreparable harm to the petitioner,

(ii) The likelihood of the petitioner prevailing on the merits, and

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

Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(d), Chambers Development Co., Inc. v. DER, 1988 EHB 68, 77, affirmed, 118 Pa. Commonwealth Ct. 97, 545 A.2d 404 (1988).

Applying these factors in this case, a stay is not warranted because DER has not alleged facts which, if found to be true, would warrant a stay. DER's motion does not allege that it is likely to succeed on the merits of its appeal to Commonwealth Court. In addition, DER's allegations that our order will have a "significant effect" on its administration of its coal mining programs, and that a stay will not prejudice the Appellants, are also insufficient. Even if the Board's Order does have a significant effect on DER's regulation of coal mining, we cannot assume that this effect constitutes

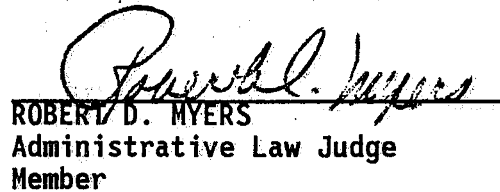
"irreparable injury." Furthermore, the fact that the Appellants have operated under the challenged permit conditions for four years does not establish that they would not be prejudiced by requiring them to continue to comply with the conditions pending Commonwealth Court's action on DER's appeal.

In summary, we find that DER's motion for a stay fails to allege a sufficient basis for granting a stay; therefore, we will deny the motion.

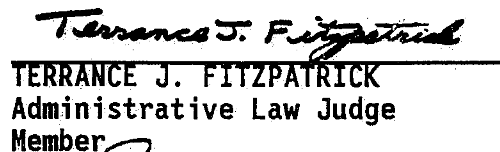
ORDER

AND NOW, this 20th day of March, 1990, it is ordered that the Department of Environmental Resources' Motion for Stay of Proceedings and Effect of the Board's Order is denied.

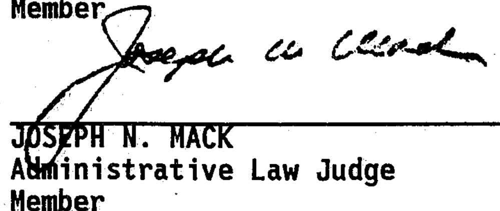
ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 20, 1990

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

ANDREW SAUL	:	
	:	
v.	:	**EHB Docket No. 88-436-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 21, 1990**
and CHESTER SOLID WASTE ASSOCIATES,	:	
Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS FOR LACK OF STANDING

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss for lack of standing is granted because the Appellant failed to allege that he will suffer any specific injury as a result of the action which has been appealed.

OPINION

This proceeding involves an appeal by Andrew Saul (Saul) from an action of the Department of Environmental Resources (DER) dated September 23, 1988. In this action, DER approved a plan submitted by the Chester Solid Waste Associates (CSWA) to construct six municipal waste incinerators in the City of Chester, Delaware County. The approval was granted pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq.

This Opinion and Order addresses the motion to dismiss for lack of

standing filed by CSWA on March 7, 1989. In this motion, CSWA states that Saul lives in Moylan-Rose, Pennsylvania, which is located ten miles from the proposed incinerators. CSWA alleges that Saul cannot demonstrate that he will be substantially, immediately, and directly affected by DER's action; therefore, he lacks standing to appeal. DER filed a letter advising the Board that it joined in CSWA's motion to dismiss.

Saul filed a response to CSWA's motion on March 27, 1989. Saul argues that CSWA's assertion that he lives ten miles from the site does not constitute a basis for challenging his standing. Saul asserts (response, pp. 1-2) that his interest is substantial because "whatever affects the natural environment within the borders of a county affects the county itself, i.e. those who inhabit the county," citing Franklin Township et al. v. Commonwealth, DER, 499 Pa. 162, 452 A.2d 718 (1982). Saul also quotes language from Franklin Township and William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975) in support of his claim that his interest in this appeal is "direct" and "immediate."

In order to have standing to appeal, a person must have a "substantial interest" which will be "directly" and "immediately" affected by the decision which has been appealed. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280-284 (1975). Saul has failed to allege sufficient facts to satisfy this test. CSWA's motion to dismiss asserted that Saul lives ten miles from the proposed incinerators and that he will not be affected. Saul's response neither contests that he lives ten miles from the site nor alleges any specific type of injury which the incinerators will cause him. Instead, Saul argues in his response that he has standing as a matter of law since he lives in the same county where the proposed incinerators will be located, citing Franklin Township.

We do not agree with Saul's argument. In Franklin Township, the Supreme Court held that a county and a township had standing to appeal a permit for a toxic waste landfill to be located within the bounds of those government units. The Court emphasized the duties of local government for the "protection and enhancement of the quality of life of its citizens" 452 A.2d at 721. Nothing in Franklin Township implies that every person residing in a county has automatic standing to appeal any DER permit granted within that county. A person has standing to appeal only if he asserts, among other things, that the granting of the permit will cause him to suffer some specific type of harm.[1] In the present case, Saul's response to the motion to dismiss does not assert any specific type of harm which he will suffer as a result of the proposed incinerators. Additionally, our review of Saul's notice of appeal and pre-hearing memorandum reveals no allegations of specific harm to Saul; instead, these documents focus on the broad public policy issues of the merits of incineration versus other methods of waste disposal. We may not delve into these issues unless they are raised by an appellant who alleges sufficient facts to establish his standing.

In summary, Saul has not alleged specifically that he will be injured by the DER action he has appealed; therefore, we will grant CSWA's motion to dismiss for lack of standing.

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[1] For example, in Max Funk v. DER, 1988 EHB 745, the Board found that the appellants had standing based upon their allegations that they lived in the dispersion area of a proposed incinerator and that they would suffer possible health effects from pollutant emissions. In that case, the appellants all lived within one-half mile of the proposed incinerator.

ORDER

AND NOW, this 21st day of March, 1990, it is ordered that Chester Solid Waste Associates' motion to dismiss for lack of standing is granted, and the appeal of Andrew Saul at EHB Docket No. 88-436-F is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 21, 1990

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GERALD BOOHER :
:
V. : **EHB Docket No. 89-204-MJ**
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: March 21, 1990**

OPINION AND ORDER SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues will be denied where it requires the Board to interpret language differently from the Commonwealth Court.

OPINION

On July 18, 1989, Gerald E. Booher of R.D. #1, Box 36, Shirleysbury, PA, filed this appeal from a $20,000 assessment of civil penalties imposed by the Department of Environmental Resources (DER) pursuant to §605 of the Solid Waste Management Act, 35 P.S. §6018.605. The assessment was issued in connection with a notice of violation citing unpermitted storage/processing/ disposal of tires. At this point, DER has filed a motion to limit the issues which would bar the appellant from contesting the unappealable notice of violation. In prior cases before us, DER has taken the same position as it takes in this case, i.e. unless there has been an appeal from the Notice of Violation there can not be an appeal from the civil penalty. This position was sustained by the Board in several cases. For example, see Sugar Hill

Limestone v. DER, 1987 EHB 933.

However, on November 15, 1988, the Commonwealth Court decided Kent Coal Mining Company v. DER, 121 Pa. Cmwlth. 149, 550 A.2d 279 (1988), which does not involve the Solid Waste Management Act, but rather the Surface Mining Conservation and Reclamation Act (SMCRA). The procedural situation was similar in that Kent Coal Mining Company had not appealed a compliance order issued to the company on October 11, 1985, but had taken an appeal from the civil penalty assessment of November 1, 1985. The court in developing its opinion closely examined the language of the statute and specifically §18.4 SMCRA and 25 Pa Code §86.202(a). That language provides in 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.... (emphasis provided)

The court concluded that this language was to be interpreted in its clearest fashion and granted Kent Coal Mining Company the right to contest the violation as well as the penalty upon its appeal of the penalty assessment.

The instant case arises under the Solid Waste Management Act (SWMA) and the procedural aspects are the same. In this case, there was a "Notice of Violation" issued to Gerald Booher on January 10, 1989, which was not appealed. On July 16, 1989, DER assessed a penalty for the violation previously noticed. The language we must interpret in the SWMA, 35 P.S. §6018.605 reads as follows:

> ....the person charged with the penalty shall have 30 days to pay the proposed penalty in full, or if the person wishes to contest either the amount of the penalty or the fact of the violation, the person shall within such 30-day period file an appeal of such action with the Environmental Hearing Board.

It is clear that the operative language in the 35 P.S. §6018.605 SWMA and the

§18.4 and 25 Pa Code §86.202(a) SMCRA dealing with the rights of the appellants is the same, and would declare that the same result be accomplished.

ORDER

AND NOW, this 21st day of March, 1990, the Motion to Limit Issues is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 21, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

NESHAMINY WATER RESOURCES AUTHORITY and COUNTY OF BUCKS, INTERVENOR	:	
V.	:	**EHB Docket No. 88-088-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and NORTH PENN WATER AUTHORITY and NORTH WALES WATER AUTHORITY, Permittees	:	**Issued: March 23, 1990**

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR LACK OF STANDING
AND PETITION TO INTERVENE

Synopsis

When a municipality takes back from an authority a project previously assigned to the authority; and when, as a consequence, the authority conveys to the municipality the water allocation permits issued to the authority; and when the authority has no other interest in the project or the permits, the authority is subject to being dismissed as an appellant in appeals filed by the authority from the issuance of the permits, in which appeals the municipality is also an appellant.

Environmental organizations previously denied participation in two appeals from the issuance of water allocation permits, by reason of their failure to establish standing, will not be permitted to intervene in two other appeals from the issuance of the same permits. Another environmental organization is denied intervention when it fails to demonstrate a direct, immediate and substantial interest in the narrow issues involved in the appeals.

OPINION

These consolidated appeals, filed on March 14, 1988 by Neshaminy Water Resources Authority (NWRA), involve two water allocation permits issued by the Department of Environmental Resources (DER) on February 12, 1988. The "A" Permit (WA-0978601A) was issued to NWRA; the "B" Permit (WA-0978601B) was issued to North Penn and North Wales Water Authorities (NP/NW). The aggregate water allocations in these two permits are identical to those contained in Permit 0978601 issued to NWRA on November 1, 1978.[1] This original Permit was amended, extended several times, and finally revoked by the issuance of the "A" and "B" Permits. DER's action of February 12, 1988 accomplished a transfer to NP/NW of a portion of the water allocations original granted to NWRA. The transfer was requested by NWRA and NP/NW in obedience to rulings of the court of Common Pleas of Bucks County in Sullivan et al. v. County of Bucks et al., No. 83-8358; and North Wales Water Authority et al. v. Neshaminy Water Resources Authority et al., No. 84-3273 (Sullivan case).

On July 5, 1988 the County of Bucks filed a Motion seeking to be substituted for NWRA as the appellant or, in the alternative, to be allowed to intervene in its own right. The Motion alleged that, on May 11, 1988, the County's Board of Commissioners adopted Ordinance No. 76, indicating the County's intention to take back from NWRA[2] the Reservoir and Park System Project (including, inter alia, the water allocation permits). When NWRA refused to convey the Project to the County, the County instituted an action

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[1] These permits are part of the Point Pleasant Diversion Project which has been the subject of much litigation before this Board and in the courts since 1982.

[2] NWRA is a Pennsylvania municipality authority formed by the County of Bucks in 1966.

in Mandamus in the Court of Common Pleas of Bucks County (County of Bucks v. Neshaminy Water Resources Authority et al., No. 88-04029-05-5). On May 26, 1988, the Court entered peremptory judgment in favor of the County and ordered NWRA to convey the Project to the County. Because the "ownership" of the Project was still somewhat unsettled, the Board denied the County's substitution request but granted intervention on September 6, 1988.

The parties proceeded with discovery and the filing of pre-hearing memoranda. A hearing scheduled to begin June 14, 1989 was cancelled, at NWRA's request, because of the unavailability of a fact witness, and rescheduled to begin October 17, 1989. On September 28, 1989, a joint request for a continance was filed by NP/NW, DER and Bucks County, alleging that a transfer of the Project from NWRA to Bucks County was imminent. While this request was pending, Bucks County advised the Board on October 5, 1989 that NWRA had executed and delivered to the County an instrument of conveyance that included the water allocation permits. NP/NW advised the Board on the same date that a Motion to Dismiss NWRA for lack of standing would be filed without delay. The Motion was filed on October 10 and the hearing was cancelled the following day.

MOTION TO DISMISS

In its Motion, NP/NW alleges, inter alia, (1) that, by executing and delivering the instrument of conveyance, NWRA transferred to Bucks County all property connected with the Project, including the water allocation permits; (2) that NWRA no longer has any legal interest in the water allocation permits or the water allocations they represent; and (3) that NWRA, therefore, lacks standing to continue with these appeals.

NWRA never really developed its reasons for opposing NP/NW's Motion, but asserted that it continues to have rights and obligations relating to the

Neshaminy watershed. Thus, it continues to have a direct interest in these appeals. DER joined in NP/NW's Motion, pointing out that, although the "A" Permit was still in NWRA's name, NWRA's conveyance to Bucks County divested it of any interest in the allocation. Bucks County also joined in NP/NW's Motion, advising that steps were being taken to secure a transfer of the "A" Permit into the County's name.

While NWRA remains the nominal permittee, the real party in interest is Bucks County which now "owns" the Project. To stay in the case as an active participant, NWRA must show that it has been "aggrieved" by DER's action, that it has a "substantial," "immediate" and "direct" interest in the water allocations made in the "A" and "B" Permits: William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Although NWRA asserted that it continues to have rights and obligations relating to the Neshaminy watershed, it never identified them or explained how they conferred standing. Mere existence as a municipality authority is not enough; and, in the absence of any evidence of other interests, we can only conclude that NWRA no longer has standing.

Since a permittee is automatically a party to any appeal from the issuance of the permit and since NWRA still is the nominal permittee on the "A" Permit, we will not grant NP/NW's Motion until the "A" Permit has been transferred into the County's name. In the meantime, however, NWRA's participation in these proceedings will be suspended and Bucks County will be recognized as the real permittee.

Petition to Intervene

On November 6, 1989 a Petition to Intervene was filed by 10[3] environmental organizations (Petitioners). The Petition makes clear that it is being filed because of the likelihood that NWRA would be dismissed from the case, leaving no party to represent the interests of the Petitioners. NP/NW filed an Answer opposing the Petition on November 28, 1989. The County of Bucks joined in NP/NW's Answer on December 4, 1989. Petitioners filed a Reply on February 5, 1989, and supplemental brief on March 1, 1989.

Before reaching the merits of the Petition, it is necessary to look at the Petitioners. Three of them (Del-Aware Unlimited, Inc., Montco AWARE and Friends of Branch Creek) were appellants in appeals docketed at 88-075 and 88-076, filed to contest the same two water allocation permits involved here. Six others (Environmental Defense Fund, Natural Resources Defense Council, American Littoral Society, Pennsylvania Sierra Club, Pennsylvania Federation of Sportsmen's Clubs and STAND[4]) sought to intervene in those two appeals. On June 28, 1988 the board denied intervention because the organizations did not set forth facts showing a direct, immediate and substantial interest in the subject matter of the appeals (1988 EHB 547). A Petition for Reconsideration of this ruling was denied on September 6, 1988 (1988 EHB 769).

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[3] The 10 listed in the heading and on Exhibit "A" are Environmental Defense Fund, Natural Resources Defense Council, American Littoral Society, Pennsylvania Sierra Club, Pennsylvania Federation of Sportsmen's Clubs, STAND, Del-Aware Unlimited, Inc., Montco AWARE, Pennsylvania Trout Unlimited, and Friends of Branch Creek. In paragraph 1 of the Petition, 11 organizations are listed - the 10 already named plus Friends of the Earth in the Delaware Valley. In the Reply filed on February 5, 1990 to NP/NW's Answer to the Petition, only 10 organizations are mentioned - Friends of the Earth in the Delaware Valley being omitted. We will treat the Petition as involving only the 10 organizations.

[4] Friends of the Earth in the Delaware Valley also was included.

On November 16, 1988 the Board issued an Opinion and Order sur Motions to Dismiss (1988 EHB 1097), dealing with a variety of issues in a number of appeals relating to the Point Pleasant Diversion Project, including the appeals docketed at 88-075 and 88-076. Part of the Order required the appellants to file with the Board, within 30 days, specific factual allegations on standing. When the appellants failed to do so, the Board dismissed the appeals docketed at 88-075 and 88-076 by an Order dated January 5, 1989.

For these same organizations now to seek intervention in these appeals is presumptuous, to say the least. Having failed once to allege a sufficient interest to justify intervention or standing, Petitioners are not entitled to another opportunity to do so - without some compelling circumstance to justify it. No such circumstances exist.[5]

Our reproach does not apply to one of the organizations - Pennsylvania Trout Unlimited (P.T.U.) - because it was neither a party nor a proposed intervenor in the other appeals. Its request for intervention will be considered on the merits.

25 Pa. Code §21.62(d) requires a petition to intervene to set forth, inter alia, the interest of the petitioner and the evidence the petitioner intends to present. The Petition before us contains only the vague general allegation that "each of the petitioning organizations has members who live on the stream to be affected by the issuance of the permit(s) and/or who use or enjoy the stream (see "exhibit B"), and/or are present or future customers of NP/NW, and/or users of the national and historic environment of the area." No "exhibit B" is attached to the Petition, and we have no other information to

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[5] Our disposition would be equally applicable to Friends of the Earth in the Delaware Valley.

show how P.T.U.'s members are likely to be affected by DER's issuance of the "A" and "B" Permits.

P.T.U. misconceives the issues involved in these appeals. The evidence it proposes to present deals overwhelmingly with the alleged impact of the diverted waters upon the Neshaminy watershed in the broadest possible sense. This diversion was first authorized on November 1, 1978 when Permit 0978601 was issued to NWRA. The impact of the diversion was an appropriate issue for litigation with respect to that permit at that time. P.T.U. did not file an appeal from the issuance of that permit, however, and is precluded from litigating that issue in the proceeding before us.

Our Opinion and Order of November 16, 1988 (1988 EHB 1097), referred to above, discussed this very point beginning at page 1102. We there held that, since the issuance of the "A" and "B" Permits amounted only to a division of the original Permit and a transfer of part of the total allocation to NP/NW, the only issues to be litigated in the appeals docketed at 88-075 and 88-076 were the following: (1) whether DER's action deprived NWRA of any legally cognizable right to control the use of the flowing streams and lakes in Bucks County, and (2) whether NP/NW satisfied the statutory requirements for a water allocation permit. Those same issues are the only ones properly involved in the appeals before us at 88-088.

P.T.U. lists only one item of proposed evidence that even closely relates to either of these issues - evidence that DER erred in granting to NP/NW water rights which were preserved for Bucks County and NWRA by prior agreement. This evidence obviously would be relevant, but we are at a loss to understand how P.T.U. could be aggrieved by this alleged DER error. It would seem that, if any entity would be aggrieved, it would be the County of Bucks. County of Bucks already is a party to these appeals. Are we to presume that

P.T.U. is more qualified to represent the County's legal position than is the County's duly elected Board of Commissioners? Obviously not.

P.T.U. has not demonstrated a direct, immediate and substantial interest in the narrow issues involved in these appeals. Accordingly, it is not entitled to intervene.[6]

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[6] What we have stated with respect to P.T.U. would be equally applicable to the other environmental organizations.

ORDER

AND NOW, this 23rd day of March, 1990, it is ordered as follows:

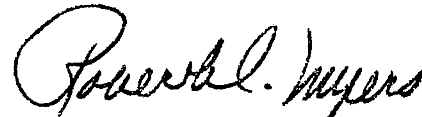
1. NWRA is subject to dismissal as an appellant, for lack of standing, upon the transfer by DER of Water Allocation Permit WA-0978601A into the name of the County of Bucks.

2. Action on NP/NW's Motion to Dismiss NWRA for lack of standing is deferred until such transfer is accomplished.

3. Pending such transfer, NWRA is suspended from participation in these appeals and the County of Bucks is recognized as the real appellant in interest.

4. The Petition to Intervene, filed on November 6, 1989 by the environmental organizations therein named, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: March 23, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Louise Thompson, Esq.
Eastern Region
For the Appellant:
Jennifer R. Clarke, Esq.
Philadelphia, PA
For the Intervenor:
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Langhorne, PA
For the Permittee:
Jeremiah J. Cardamone, Esq.
Ann Thornburg Weiss, Esq.
Ft. Washington, PA
For Petitioning Intervenor:
Robert J. Sugarman, Esq.
Philadelphia, PA

sb

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M. DIANE SMITH
SECRETARY TO THE BO

PHILADELPHIA ELECTRIC COMPANY et al.	:	
	:	
V.	:	**EHB Docket No. 88-309-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES et al.	:	**Issued: March 23, 1990**

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL

By Robert D. Myers, Member

Synopsis

When a municipality authority has been the sponsor of a water diversion project by reason of undertakings assigned to it by the municipality that organized it; and when the municipality takes back the undertakings previously assigned to the authority, the authority no longer possesses the direct, immediate and substantial interest necessary to continue an appeal filed from the issuance of a permit related to the project.

OPINION

One of these consolidated appeals was filed by Neshaminy Water Resources Authority (NWRA) on August 12, 1988 and docketed at 88-311. It challenged the July 14, 1988 issuance by the Department of Environmental

Resources (DER) of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0054909 to North Penn and North Wales Water Authorities (NP/NW).[1]

On October 6, 1989, NP/NW filed a Motion to Dismiss NWRA's appeal for lack of standing. The Motion alleges that (1) NWRA is a municipality authority organized by the County of Bucks, (2) NWRA became the project sponsor of the Point Pleasant Diversion Project by reason of undertakings assigned to it by the County, (3) On May 11, 1988 the County's Board of Commissioners adopted Ordinance No. 76, signifying the County's intention to take back from NWRA the undertakings related to the Point Pleasant Diversion Project, (4) when NWRA resisted the County's efforts, the County instituted an action in Mandamus in the Court of Common Pleas of Bucks County (County of Bucks v. Neshaminy Water Resources Authority, No. 88-04029-05-5), (5) on May 26, 1988, the Court entered peremptory judgment in favor of the County and ordered NWRA to return to the County the undertakings previously assigned to it, (6) on September 28, 1989, NWRA executed and delivered to the County an "Instrument of Conveyance," returning to the County the undertakings related to the Point Pleasant Diversion Project and the property associated therewith, and (7) NWRA no longer has any legal interest to challenge the NPDES Permit issued to NP/NW.

NWRA has filed no response to this Motion, but has filed a response to a similar motion filed by NP/NW in appeals consolidated at 88-088 which also involve the Point Pleasant Diversion Project. In that response, NWRA simply alleged that it continued to have rights and obligations with respect

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[1] This Permit pertains to the Point Pleasant Diversion Project which has been the subject of much litigation before this Board and in the courts since 1982.

to the Neshaminy watershed, but never specified what they were or how they gave it standing to continue with those appeals. As we have held in our Opinion and Order disposing of the motion in 88-088 (issued simultaneously herewith), mere existence as a municipality authority is not enough. Some undertakings assigned to the authority must give rise to a direct, immediate and substantial interest in the subject matter of the pending appeal. Once the authority has been stripped of such undertakings, as has occurred with respect to NWRA, it no longer possesses the necessary interest. Accordingly, its appeal will be dismissed for lack of standing.

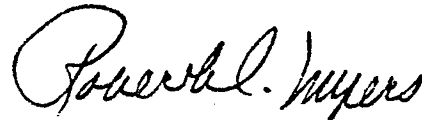
ORDER

AND NOW, this 23rd day of March, 1990, it is ordered as follows:

1. The appeal docketed at 88-311, previously consolidated at 88-309, is unconsolidated.

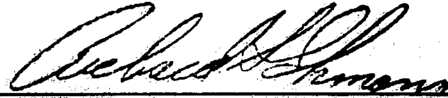
2. The appeal docketed at 88-311 is dismissed for lack of standing.

ENVIRONMENTAL HEARING BOARD

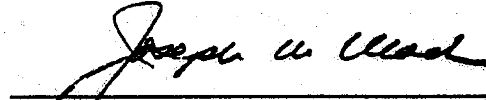


ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 23, 1990

cc: Bureau of Litigation
Library: Brenda Houck
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For the Commonwealth, DER:
Janice V. Quimby-Fox, Esq.
Eastern Region
For Appellants:
Bernard Chanin, Esq.
Jennifer R. Clarke, Esq.
Robert J. Sugarman, Esq.
Jeremiah J. Cardamone, Esq.

Maxine Woelfing, Chairman, was recused and did not participate in this decision.

sb

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M. DIANE SMI
SECRETARY TO THE E

TOWNSHIP OF HARMAR	:	
	:	
v.	:	EHB Docket No. 90-003-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 23, 1990

OPINION AND ORDER
SUR PETITION TO INTERVENE

Synopsis

In an appeal from the grant of a surface mining permit, the adjoining property owner will be allowed to intervene in order to represent certain special interests that may not coincide with the general interests of the appellant township.

OPINION

This proceeding involves an appeal from the action of the Department of Environmental Resources (DER) in issuing a surface mining permit to Minerals Technology, Inc. (MTI) for a site in Harmar Township, Allegheny County. The initial appeal was taken by Harmar Township, the township wherein the permitted area lies. On February 7, 1990 a petition to intervene was filed by BauerHarmar Coal Corporation (BauerHarmar).

The question of intervention in proceedings before the Board is governed by 25 Pa.Code §21.62, which makes the grant or denial of intervention

a matter of discretion with the Board. The Board has, however, granted intervention where the intervenor can demonstrate a direct, substantial and immediate interest in the outcome of the litigation. Franklin Township v. DER, 1985 EHB 853.

BauerHarmar in its petition alleges three things: first, that it is the owner of the adjoining property; second, that the operation permitted will affect the air, water, land and noise on their property; and third, that the operation will take place using easements over or through the BauerHarmar property. We will deal with each of these separately.

We will grant the intervention on the first basis, i.e., the proximity of the BauerHarmar property to the permitted area of MTI. Kriss v. DER, 1988 EHB 698. With the second basis, we are somewhat uncomfortable because the Township Appellant raises exactly the same issues in nearly identical language. We do not propose to permit identical testimony in the record; we therefore direct BauerHarmar not to duplicate the testimony of the Appellant and to confine itself in its testimony to the aspects of the air, water, noise, and nuisance that are peculiar to it. The third basis for intervention, i.e. easements or rights of way, are not in the purview of the Board and we will not hear evidence on these matters.

With these limitations, the Board enters the following order.

O R D E R

AND NOW, this 23rd day of March, 1990, the petition of BauerHarmar to intervene in the within matter is granted, subject to the limitations expressed in this opinion. With this intervention, the caption of this case shall be:

HARMAR TOWNSHIP, **Appellant** **and BAUERHARMAR COAL CORPORATION,** **Intervenor** **v.** **COMMONWEALTH OF PENNSYLVANIA,** **DEPARTMENT OF ENVIRONMENTAL RESOURCES,** **Appellee** **and MINERALS TECHNOLOGY, INC.,** **Permittee**	:	**EHB Docket No. 90-003-MJ**

Bauerharmar shall file its pre-hearing memorandum in this matter within 10 days after receipt of the Township of Harmar's pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 23, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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For Permittee:
F. Regan Nerone, Esq.
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For Petitioner:
Joseph R. Brendel, Esq.
Pittsburgh, PA

rm

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M. DIANE SMI
SECRETARY TO THE

ROBERT H. GLESSNER, JR.	:	
	:	
v.	:	**EHB Docket No. 82-198-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 26, 1990

OPINION AND ORDER
SUR MOTION TO DISMISS

By the Board

Synopsis

An appeal is dismissed for failure to prosecute where the appellant failed to appear at the hearing on the merits and present any evidence in support of his appeal.

OPINION

This action was initiated by the filing of a notice of appeal on August 12, 1982 by Robert H. Glessner, Jr. from a letter notice ordering him to abate an acid discharge and an iron discharge on or from an unreclaimed surface coal mine in Stoneycreek Township, Somerset County, Pennsylvania. This mining operation was authorized by Mining Permit No. 221-2.

Appellant filed a pre-hearing memorandum on November 1, 1982. From that date until the spring of 1988 the Department of Environmental Resources

(DER) and the appellant sought methods of controlling and treating the discharges which were the subject of the order.

On May 24, 1988, the Board scheduled a hearing on the merits for October 3, 4 and 5, 1988 before Board Member William A. Roth. The office of the Board was unable to get any response from the appellant and issued a second order of hearing on September 26, 1988 which directed the appellant, Robert H. Glessner, Jr., to contact the Board by telephone immediately upon receipt of the order. The order also stated that failure to attend the hearing could result in sanctions, including dismissal of the appeal.

On the first day of scheduled hearing, Robert H. Glessner, Jr. did not appear. (TR-3)[1] Mr. Roth then stated on the record that Robert H. Glessner, Jr. had phoned the office of the Board in response to the Board's order of September 26, 1988 and informed the Board that he did not plan to attend the hearing. (TR-5). Mr. Roth further stated that on Friday, October 1, 1988 the Board was contacted by Attorney Wilbert Beachy of Somerset, Pennsylvania who represented himself as attorney for the appellant in other matters (TR-6). He did not enter an appearance or seek to do so. He did not seek a continuance. He indicated that he would contact the appellant over the weekend and the Board on Monday, October 3, 1988. On Monday, October 3, 1988 Mr. Roth held a conference call with Mr. Beachy and Mr. Roda, counsel for DER. At that time Mr. Beachy advised the Board that he was not entering an appearance nor requesting a continuance and that he had contacted Robert H.

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[1]Indicates Hearing Transcript, page 3.

Glessner, Jr., that Mr. Glessner understood the situation and that he, Beachy, felt the due process rights of Glessner had been adequately protected. (TR 6-7).

During the course of the hearing on the merits DER made a motion to dismiss this appeal for failure to prosecute (TR 94). Mr. Roth explained that he, as a single Board Member, could not grant the motion.

In an appeal of this nature, i.e. from an order, the burden of proof rests with DER. The violations alleged are of an acid discharge and an iron discharge, both of which are in excess of the limits established under the applicable laws and regulations and conditions of the permit.

In its testimony, DER established that the pre-mining examination of the permitted area showed no discharge on the premises and, further, that the nearby waters of the Commonwealth showed no acid and only a trace of iron. (TR 18-22). DER went on to establish that the acid concentration in the discharges from the mine site and in the unnamed tributary adjoining the mining permit was sufficient to lower the pH to 3.7 from a neutral 6.2. (TR-35), (DER Ex. 16). This violation of the water quality standards was continuing, i.e. demonstrated by tests on August 16, 1988 and September 9, 1988 prior to the hearing and, by the testimony of DER, the discharges were not being treated in any manner. (DER Ex. 16).

There is nothing in any part of the transcript or exhibits which refutes the evidence of DER and, therefore, the Board does hereby grant the motion to dismiss and enters the following order.

O R D E R

AND NOW, this 26th day of March, 1990, it is ordered that the motion of the Department of Environmental Resources to dismiss the appeal of Robert C. Glessner, Jr. for failure to prosecute is granted.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Mr. Ehmann has recused himself in this matter.

DATED: March 26, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Marc A. Roda, Esq./Central Region
Martin H. Sokolow, Jr., Esq./Central Region
Appellant pro se:
Robert H. Glessner, Jr.

rm

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M. DIANE SMITH
SECRETARY TO THE BOA

SPANG & COMPANY	:	**EHB Docket No. 87-042-E**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 27, 1990

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

By Richard S. Ehmann, Member

Synopsis:

The appeal of Spang & Company from the Department of Environmental Resources' order to close three hazardous waste lagoons is dismissed. The evidence offered by DER showed that Spang's treatment process produced a sludge of a type which is a listed hazardous waste and that this sludge was discharged to these impoundments. The Board finds that DER's calculation of the amount of the closure bond without consideration of the time value of money was not an abuse of discretion.

INTRODUCTION

This appeal involves a challenge by Spang & Company ("Spang") to an Order dated January 6, 1987, from the Department of Environmental Resources ("DER") to Spang modifying Spang's amended proposal for closure of three lagoons at the Spang manufacturing facilities located at East Butler in Butler County. Spang's timely appeal challenged DER's determination that these lagoons contained hazardous wastes and thus had to be closed in accordance with the requirements of the Solid Waste Management Act, the Act of July 7,

1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq*, ("SWMA") and the applicable regulations found generally at 25 Pa.Code §75.260 *et seq*. In summary, DER's Order to Spang modifying Spang's closure plan sought a thirty year post-closure bond from Spang, required the lagoons' contents and contaminated soil to be placed in a capped and covered pit (which was also to have a groundwater interception trench around it), and required post-closure site care by Spang.

After the appeal was filed the parties engaged in discovery and skirmished before the Board over discovery related issues. They also engaged in settlement negotiations which, obviously, did not resolve all of their disputes. Thereafter, both Spang and DER filed detailed Pre-Hearing Memoranda setting forth their respective factual and legal contentions. At the parties' request, the time for discovery was extended by this Board first to March 31, 1988, and then to April 30, 1988, and to June 30, 1988, and finally to September 30, 1988.

On December 16, 1988, we issued our Pre-Hearing Order No. 2 scheduling this matter for a hearing on its merits on March 1, 2, and 3, 1989, before former Board Member William A. Roth. As part of that Order, we also directed the parties to file a joint Stipulation of such issues, facts, and exhibits on which they could agree.

Pursuant to Spang's Motion, on February 27, 1989, we authorized Ohio Attorney Steven F. Faeth to appear *pro hac vice* in this proceeding in addition to Spang's local counsel. On February 28, 1989, we received an Amended Pre-Hearing Memorandum filed on Spang's behalf.

On April 21, 1989, the transcripts of the March hearings were filed with the Board. We then ordered the filing of Post-Hearing Briefs by both parties. By order dated June 21, 1989, we extended the briefing schedule to accommodate the request to this effect by counsel for the parties.

On June 22, 1989, DER filed its Post-Hearing Brief. On July 21, 1989, Spang filed both its Brief and a Petition to Reopen the Record for purposes of introducing further evidence.[1] Subsequently, on August 11, 1989, and in response to this Petition, DER filed its Response to the Petition to Reopen the Record. DER's Response opposed reopening on the grounds that Spang had failed to show that using due diligence Spang could not have presented this evidence at the March, 1989 hearing. Such a showing is required for this Board to grant such a Petition under 25 Pa.Code §21.122(a)(2). Lower Providence Township v. DER, 1986 EHB 391. Thereafter, with Mr. Roth's departure from this Board, this case was reassigned to Board Member Richard S. Ehmann. By Order dated November 3, 1989, we directed that Spang file affidavits setting forth all of the facts which Spang contends show that even with due diligence Spang could not have presented this evidence in March. Spang made this submission on November 13, 1989, and DER filed its response thereto on November 20, 1989.

By Order dated November 27, 1989, we denied Spang's Petition. Spang's Petition failed to demonstrate that it could not (with due diligence) have presented this evidence at the March hearings. We will not consider the evidence thus proffered by Spang, a portion of which is also attached to Spang's Post-Hearing Brief and is referenced therein, in writing this Adjudication.

Although Mr. Roth, who presided at the hearings, did not write this Adjudication, we are nevertheless confident that we can adjudicate this matter

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[1] On August 14, 1989, DER filed its Response Brief.

from this "cold record," as we are empowered to do. Lucky Strike Coal Co. et al v. Commonwealth, DER, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988). After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Spang is the owner and operator of a manufacturing and research facility located at East Butler, Pennsylvania. Spang's general business at the East Butler facility is the manufacturing of products for the electronics and the telecommunications industry. (Stip)[2]

2. The manufacturing operations at the Spang facility consisted of a Magnetics Division and a Manufacturing and Tool Division. (Stip)

3. The Manufacturing and Tool Division manufactured oil country drill pipe joints and welded such joints to oil country drill pipe (the "Drill Pipe Plant") from 1977 through August, 1985. The Drill Pipe Plant was idled in 1985 and remained idle until it was permanently discontinued in 1986. (Stip)

4. The Drill Pipe Plant included a copper electroplating line, which utilized copper cyanide in solution to copper plate the drill pipe joints. (Stip)

[2] References herein to Stip. are from the Stipulation of Undisputed Facts signed by counsel for both parties, which is also Board Exhibit No. 1.

Plating Line Operation

5. Pipe to be copper plated was delivered to the electroplating line where it was electropolished to remove any grease and various machining material. (T-335)[3]

6. After electropolishing, the pipe was cold water rinsed and then acid etched for further cleaning and again rinsed in cold water. (T-335)

7. After this cleaning, the pipe was plated in a solution consisting of copper nuggets, copper cyanide, potassium cyanide, potassium hydroxide, and neochel (a rochelle salt). (T-46, T-208, and C-3)

8. After plating, the now plated pipe joints were rinsed in tanks No. 7 and 8, which contained cold water. (T-335) The rinse process in these tanks was designed to remove any portion of the plating solution carried out of the plating bath on the pipe. (T-211)

9. The materials in these tanks consisted of water and a diluted plating solution. (T-336-337)

10. Cadmium, chromium and nickel were not present in this rinse water, except in incidental trace amounts. (T-337)

Plating Rinse Treatment

11. Prior to the initial operation of the copper plating line, Spang designed and installed a wastewater treatment system, the purpose of which was to reduce cyanide in the electroplating process rinse wastewater. (Stip)

12. During the years when Spang ran its electroplating line, it treated the rinsewater from tanks No. 7 and 8 to destroy any cyanide carried

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[3] "C-___" followed by a number indicates a Commonwealth offered document. "A-___" followed by a number reflects a document offered by Spang. All documents identified in these Findings of Fact are identified in the transcript. References to "T-___" followed by a page number are references to a page in the three volumes of hearing transcripts which are consecutively numbered.

into the rinsewaters from the plating line prior to discharge of this rinsewater into Lagoon A. (T-211 and T-392)

13. Normally, rinsewater from these tanks was pumped from the accumulation sump under the plating line into either treatment tank 1 or treatment tank 2, depending on which one was empty at the time. (T-392) The tanks each had a 600 gallon capacity. (C-17)

14. A Spang employee would then add sodium hypochlorite, or bleach, to the rinse water and agitate it with the intent of destroying the free cyanide in the tank by oxidizing it into gases of carbon dioxide and nitrogen. (T-392, C-2 and C-22)

15. Spang's employees added bleach until chemically treated paper showed that sodium hypochlorite remained in the tank. (T-393)

16. The bleach step in this chemical process changed cyanide to cyanate. (C-17)

17. Thereafter, Spang's employees drew a sample of the liquid and sent it to Spang's internal laboratory for analysis. That laboratory analyzed it to see if the free cyanide had been destroyed. (T-393, C-3, C-17, C-22)

18. When the employees operating the treatment system received a laboratory report showing no free cyanide, the next step in the treatment process was begun. (T-392, C-2)

19. Since sodium hypochlorite is highly alkaline (T-212), sulfuric acid was added to the tanks to adjust the pH of the liquids downward to a more neutral range. (T-221, T-393, C-2, C-17)

20. Spang's 1979 operating manual called for pH adjustment back down to 7.0 - 7.5, but the 1982 manual changed this to 8.0 - 8.5. (T-50, T-393, C-2, C-3)

21. After downward pH adjustment, the liquid in the tank was allowed to sit at least overnight, after which it was emptied. (T-393, C-2, C-17)

22. Until April of 1984, the contents of the tank were discharged through pipes at the bottom of the tank, either to an outside equalization storage tank and then discharged to the Lagoons, or, after the outside tank's removal, discharged directly into Spang's Lagoons. (T-357, C-2, C-3, C-22)

23. Spang's copper plating log reflects at least one incident in 1982 when the treatment tank's contents went directly into the Lagoon. (C-27)

Sludge Generation

24. In April, 1984 Spang modified its treatment system at the suggestion of DER's Carl Hursh to incorporate a settling process in the treatment tank to remove any sludge generated by Spang's treatment techniques. (Stip, T-79-81, C-11)

25. Prior to 1984 any sludge generated in the treatment tanks would have been discharged to Lagoon A simultaneously with the wastewater discharge (T-357, C-22) because the entire contents of these tanks were sent to the Lagoons. (T-357)

26. In April of 1984 Spang installed two plastic discharge lines that eliminated the need to discharge the tank contents from the bottom of either treatment tank. The new lines were located nine inches above the tank's bottom so that sludge would not be drawn off. The treated water still went to the ponds but the two tank bottom drains were connected to a drum so that any sludge could be collected and hauled off site for disposal. (T-83, C-11, C-12, C-17)

27. After the April, 1984 change in the treatment technique (the addition of "settling"), sludge in the treatment tank was drawn into drums and

delivered to Ashland Chemical Company, a licensed transporter and disposer of hazardous wastes, and disposed of off-site. (Stip, C-18, C-20, C-23)

28. On May 14, 1985, and October 20, 1985, Spang shipped 310 pounds of material and 387 pounds of material, respectively, which Spang identified as Hazardous Wastes Class F006 on two separate Hazardous Waste Manifest forms. (C-18, C-20)

29. The two manifested 1985 shipments consisted of filters, oil dry and sludge from the cyanide destruction unit; but on neither occasion was the actual weight attributable to each of the various components of the shipment determined. (C-18, C-20, C-23)

30. DER does not have physical evidence which establishes that any sludge was generated by Spang's treatment process prior to the 1984 piping change at the treatment tank.

31. The treatment process employed by Spang from 1977 to the end of the plating operations is a type which generates sludge. (T-213, T-223)

32. Other than the 1984 piping change at the treatment tank, Spang made no other changes to the copper plating line or rinsewater treatment process in the period from 1980 through August, 1984. (T-359)

33. There was no evidence offered to the Board as to the sludge removal efficiency of the settling process incorporated in the treatment system in 1984 by Spang.

34. The post-1984 discharge from Spang's treatment tank might have contained sludge, depending on the efficiency of the settling (clarification) process. (T-157-158)

35. Where clarification is 96% to 98% efficient,the post-clarification effluent is not considered sludge by the United States Environmental Protection Agency ("EPA"). (T-159)

36. Sludge is defined as a solid/semi-solid material that is not dissolved in solution but may be in suspension in a treatment plant's effluent and is exclusive of that effluent. (T-150 and 25 Pa.Code §75.260)

The Lagoon System

37. All treated rinse water and all sludges generated by Spang treatment process before 1984 would flow from Spang's in-plant treatment tank to Lagoon A where settling occurred. Lagoon A's effluent flows into Lagoon B where further settling occurs. Lagoon B's effluent discharges to adjacent Bonnie Brook Creek. (Stip and C-27)

38. Lagoons A and B receive wastewaters from sources at Spang other than just the electroplating line. (T-330)

39. The other discharges to these lagoons add oxides of manganese, zinc and iron, powdered nickel, nickel alloys, and the residue from cleaning of nickel steel. (T-330)

40. The Lagoons were constructed as shallow surface impoundments surrounded by a low earthen retaining wall or dike. Lagoons A and B were lined with a 10 mil plastic liner when they were built (T-43); however, the liners have substantially deteriorated. (T-125, C-33, C-34)

41. Lagoon C is an unlined impoundment constructed to accept sludge dredged from Lagoons A and B. It did not receive a direct discharge of wastes from the electroplating treatment facility. (Stip, T-43, T-333, C-27)

Spang's Representations as to its Activities

42. On March 7, 1984, Spang submitted to DER a form called Notification of Hazardous Waste Activity which indicated Spang generated F006 type hazardous waste. (C-8)

43. Also on March 7, 1984, Spang submitted to DER a Part A Hazardous Waste Permit Application which indicated Spang was a generator of 13,944

gallons of F006 hazardous wastes annually. The application stated the processes associated with that waste included a treatment tank and lagoons and included pictures of Spang's lagoons and the copper plating line's treatment tanks. (T-69, T-70, C-9)

44. By letter dated April 3, 1984, DER notified Spang that, in DER's opinion, since companies which treat hazardous wastes are required to have a permit to do so, Spang's options were to get its hazardous waste delisted (determined to be non-hazardous), secure a permit to operate the lagoons as hazardous waste treatment facilities, remove the sludge before it reaches the lagoons, or close the lagoons pursuant to 25 Pa.Code §75.264. (C-10)

45. In response to DER's letter, Spang decided to try to secure a delisting of its lagoon sludges. (T-73, T-74, C-11, C-13)

46. A delisting petition is a written presentation by a company seeking a determination of non-applicability of hazardous waste regulations to specific wastes, which wastes are otherwise within the description for wastes listed by EPA as hazardous wastes. (T-74, T-161-163)

47. Based on the results of analyses of samples of the lagoon sludge, EPA advised Spang it would not be able to approve the delisting of this sludge. EPA's decision was based on the high concentrations of nickel in the lagoon sludge and caused Spang to abandon preparation of its petition. (T-414)

48. By letter dated June 13, 1985, Spang advised EPA, after describing its electroplating waste treatment technology, that:

> Past operating procedures were the same as above with one exception. After the rinse water was treated with the sodium hypochlorite and adjusted for pH, the contents were pumped to the lagoon, including the sludge from the bottom. The operating personnel believed that the test results showing no free cyanide meant that all cyanide was gone. As soon as this error was discovered the

tank was modified to raise the dump pick-up to a location above the sludge level so only water would be transferred and operating procedures were revised to assure that the sludge was completely settled out. This was done in April, 1984. (C-22)

49. A generator's Waste Material Profile Sheet submitted by Spang to Waste Management, Inc. says Spang's cyanide rinse water contained 60 ppm of free cyanide. (C-29)

Spang's Closure Plan

50. Spang attempted to develop a Lagoon closure plan since all process wastewaters previously sent to Lagoon A are now discharged to a publicly owned treatment works and the Lagoons are no longer in use. (Stip)

51. On August 20, 1985, Spang submitted to DER the first of what was to be several proposed closure plans for all three of its lagoons. (C-27)

52. Spang submitted a closure plan to the Department consisting of a cap to the Lagoons with an impervious plastic cover, then fill, compact, grade, contour and seed and mulch. (Stip)

53. Spang has also installed four groundwater monitoring wells. Well No. 1 is upgradient of the impoundments while Well Nos. 3 and 4 are downgradient. (Stip)

54. There is an abandoned oil or gas well located near the Lagoons. (Stip)

55. The Department issued a letter and order dated January 6, 1987, which stated that Spang's closure plan was inadequate and substituted the Department's own closure plan which required insurance and bonding. (Stip)

Lagoon Sludge Analysis

56. Analyses of samples of the sludge in Lagoons A and C for Spang by Free-Col Laboratories, which analysis results were submitted by Spang to DER, show cyanide to be present in the sludge in both Lagoon A and Lagoon C.

In Lagoon A cyanide was found in amounts ranging from 2.51 mg/kg to <.12 mg/kg. In Lagoon C the amounts vary from .34 mg/kg to <.11 mg/kg. (C-27)

57. Samples of Lagoon A sludge and Lagoon C sludge collected on November 20, 1984, and analyzed for Spang by Free-Col Laboratories show cyanide in Lagoon A sludge as high as 31.7 mg/kg and Lagoon C sludge as high as 43.0 mg/kg on a day weight basis. (C-39, C-40, C-48)

58. DER laboratory analyses of a portion of these November 20, 1984 samples of sludge collected on November 20, 1984, show cyanide in Lagoon A as high as 197.2 mg/kg, and as high as 117.9 mg/kg in Lagoon C, but a different analysis technique was used by DER. (C-38, C-40)

59. Some hazardous wastes have found their way into Lagoon B. (C-2)

60. Analyses of samples collected on September 29, 1986, by Lancy Laboratories for Spang of sludge in Spang's Lagoon B confirm cyanide is in this lagoon's sludge. (C-41).

61. Spang's lagoons received hazardous wastes generated by the electroplating operation.

The Closure Bond

62. DER's closure Order issued to Spang required that Spang submit a post-closure care bond to DER in the amount of $326,000. (T-129, T-130, C-36, and Exhibit A to Appellant's Notice of Appeal)

63. DER's post-closure bond calculation was based upon the expectation that the yearly post-closure costs would amount to $10,893 and was arrived at by multiplying this amount by 30 years. (T-134, T-135)

64. In setting the bond figure of $326,000, DER did not take the time value of money into consideration. (T-186)

DISCUSSION

While Spang raised a substantial number of issues both in its Notice of Appeal and its Pre-Hearing Memorandum, the first sentence in Spang's Post-Hearing Brief says:

> The single issue to be determined by this Board in this appeal is whether the operation of the copper plating line at the Spang & Company (Spang) East Butler manufacturing facility generated F006 sludge and, thus whether the surface impoundments which received the treated wastewater from the copper plating line should be classified as hazardous waste management units.

Spang's Post-Hearing Brief goes on to say its Amended Notice of Appeal was filed because Spang agreed to close its lagoons in compliance with all applicable hazardous waste laws and regulations (eliminating many previously raised issues). It goes on to say Spang is challenging DER's order as to monitoring, maintenance and financial assurance because the lagoons did not receive hazardous wastes and thus less onerous closure standards should apply. Assuming *arguendo* the Board finds hazardous wastes were placed in the lagoons, Spang's Post-Hearing Brief also suggests that DER's post-closure bond amount was not properly calculated because "the time value of money" was not considered in the calculation.

A party is deemed to abandon those contentions of law not raised in its Post-Hearing Brief. Lucky Strike Coal Company et al. v. Commonwealth, DER, *supra*. In light of this holding and the statements in Spang's Post-Hearing Brief as to issues, there are but two issues for us to address.

Did Spang Discharge Hazardous Wastes Into Its Lagoons?

The first question is whether Spang discharged hazardous wastes into its lagoons. The evidence shows that it did.

Spang built Lagoons A and B as a portion of the industrial waste water treatment facilities at its East Butler manufacturing operations. They were excavated from the soil at the site, lined and placed in use as a portion of the treatment facilities serving several different manufacturing operations conducted by Spang in East Butler.

From 1977 until Spang shut down its copper plating operation in 1985, Spang admits the lagoons received wastewater from Spang's electroplating operations. Neither DER nor Spang suggest this wastewater was untreated. Exactly the opposite is true. DER and Spang agree that Spang did treat the wastewater prior to its discharge into the lagoons. Indeed, it is this treatment which generates the dispute between DER and Spang. DER contends the treatment process creates a sludge, which, at least up until 1984, was discharged into Lagoon A and carried over into Lagoon B. Spang agrees sludge was generated after 1984 and contends DER has not proven that sludge was generated and reached the Lagoons before 1984.

DER has the burden of proof in this matter because it took the step of issuing this Order to Spang to take the closure steps outlined therein. 25 Pa.Code §21.101(b)(3), T.C. Inman, Inc. et al. v. DER, 1988 EHB 613. In deciding this case we must evaluate whether DER abused its discretion or acted artibrarily in issuing this Order. Pennsbury Village Condominium v. DER, 1977 EHB 225.[4]

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[4] Spang's Post-Hearing Brief includes as attachments, documents not introduced into the record of this proceeding and argument based thereon. This material is the same as that Spang sought to have placed in the record through its Petition to Reopen the Record. Board Member Ehmann denied that Petition by Order dated November 27, 1989, because of its non-compliance with 25 Pa.Code §21.122(a)(2). We reaffirm his Order by this Adjudication and in reaching the conclusions drawn herein accordingly have disregarded those portions of Spang's Post-Hearing Brief based on these attachments.

Before considering the evidence in this case the scene must be set as to the regulatory background. As a given in examining this matter, we must understand that DER's regulation of hazardous wastes under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* ("SWMA"), and 25 Pa.Code Chapter 75 is co-extensive with EPA's control over same under the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* ("RCRA"). In defining what wastes are hazardous wastes the regulations promulgated by the Environmental Quality Board provide at 25 Pa.Code §75.261(b) that a solid waste is a hazardous waste if it is listed as a hazardous waste by EPA at 40 CFR Part 261. Electroplating sludges are a listed hazardous waste in 40 CFR Part 261 with an EPA designation of F006.

Once any company's waste is a hazardous waste because it appears on EPA's list, all is not lost for the waste's generator, however. A waste may be removed from the list through "delisting," a procedure under §75.260 whereby a particular waste is removed from the list as a result of the submission of information to DER demonstrating that the waste is not hazardous. Obviously, an appeal to this Board would lie from a DER denial of such a petition. A waste remains a listed hazardous waste for the purposes of the SWMA and 25 Pa.Code Chapter 75, however, unless and until it is delisted.[5]

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[5] While Spang's appeal launches no attack on the regulatory scheme, Spang does, however, say once a substance is a listed hazardous waste, the next step is for there to be a hearing to see if the substance's constituents fit it within the umbrella of the listed class of wastes. Spang's Post-Hearing Brief argues that when this is done by this Board in this matter, the materials it discharged to the Lagoons from 1977 through 1985 to its lagoons are clearly not within hazardous waste class F006 and thus DER acted improperly in requiring Spang to treat the lagoon sludges as hazardous for closure purposes. The error in this line of reasoning is that in this case it makes this appeal to the Board a delisting proceeding in opposition to the procedure to delist a particular waste stream spelled out at 25 Pa.Code §75.260(b).

The record is clear that Spang began such a delisting proceeding footnote continued

As another preliminary it is also important to note that there is a "mixture" rule which is found at 25 Pa.Code §75.261 and which applies to hazardous wastes. In short, the rule says when a hazardous waste is mixed with other wastes, the resulting total mixture is a hazardous waste. This is important in terms of the contents of Spang's Lagoons because they contain wastes from various Spang operations other than just wastes from the electroplating line's treatment facility. Under this rule then if we find hazardous wastes from the electroplating line reached the Lagoons, their entire contents as mixed are hazardous wastes.

Finally, the transcript shows that the parties spent a great deal of time at this hearing fighting over the question of whether sludge had to contain quantities of cadmium, chromium, cyanide and nickel to be an F006 hazardous waste. The simple answer is that it does not. EPA's RCRA Background Document for F006 wastes deal with electroplating waste sludges from all types of electroplating operations. Everything from electroplating gold on cheap jewelry through plating of electronic circuit boards to common chrome plating is covered. The EPA document by which such sludge is found to be hazardous is Exhibit C-28. It does not specify any minimum concentration levels for these metals or for any forms of cyanide.

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continued footnote
with EPA using EPA's delisting procedure, but abandoned it without completing it. It was abandoned because EPA told Spang that because of the amount of nickel in the Lagoon's sludge, EPA would not delist Spang's wastes under RCRA. Spang never tried to use the DER procedure. Spang cannot now use this appeal to do that which it chose not to try to complete earlier. Spang cites no authority to us saying that it can. For us to serve in this role we would have to ignore the regulations cited above which say electroplating sludges are hazardous wastes unless delisted. We will not do this. Since it was not delisted, Spang's pre-1984 electroplating sludge, if any, is a hazardous waste, coded F006. Now that we know it is electroplating sludge, no inquiry is to be made by this Board to see if its characteristics fit within the unchallenged list of hazardous wastes in the unchallenged regulations governing hazardous waste disposal.

If the above is clear the next step is to determine whether or not there was any electroplating sludge at the Spang facility, and, if there was, determine whether any went into the lagoons. The evidence clearly establishes that if sludge was generated by Spang's treatment of the electroplating rinse waters, then in the period between 1977 and April of 1984 the sludge ended up in the lagoons. While for a portion of the period from 1977 to 1984 the treatment tank's contents went to an outdoor flow equalization tank and thence to the lagoons and for a shorter portion of the time, directly from treatment tanks to lagoons, there is no suggestion in the record that the treatment tanks' contents went anywhere except Lagoon A and thence to Lagoon B before being discharged to Bonnie Brook Creek. Spang does not argue the flow equalization tanks' content was hauled off site. There is also no dispute between DER and Spang over whether the sludges in Lagoons A and B were removed and placed in Lagoon C. They were.

Thus the real question is whether the treatment operation generated sludge from the treatment of the rinse water. We know from their briefs that DER and Spang agree that in 1984 the method of draining whichever of the two alternating treatment tanks had been used, was changed. Instead of the tank's contents being discharged from the pipes at the tank's bottom, new lines were installed by Spang which drew off all of the tank's contents except the bottom nine inches of the tank's contents. We also know that this was the only physical change to the treatment system which Spang made between 1977 and 1985 when it permanently discontinued operation of the line. In addition, we know this was done to address a "solids" problem in the treatment operation. Further, we know that once this change was made, Spang found it had sludge in the bottom nine inches of the treatment tank and Spang collected it in drums and properly disposed of it off-site. As to Lagoons A and B, the only

identified source of cyanide discharging to them according to the evidence was this rinse water treatment system. As to Lagoon C, the only source of cyanide in its contents could have been sludges conveyed to it from Lagoons A and B because no waste streams were discharged into it.

Finally, there can be no serious question that there were significant quantities of cyanides found in the sludge in the lagoons. Importantly, this is not documented solely by DER. On November 20, 1984, EPA, Spang, and DER split several samples of sludge from Lagoons A and C. While the record before us does not include the results of EPA's analysis, even though DER and Spang laboratories used different analyses techniques, they each showed significant cyanide concentrations in the sludge. DER's five samples of Lagoon C ranged from .3 mg/kg of total cyanide to 117.9 mg/kg. Its three samples of Lagoon A ranged from 75.4 mg/kg to 197.2 mg/kg, according to Exhibit C-38. According to Exhibit C-40, Free-Col Laboratories' analysis for Spang of the split samples showed Lagoon A cyanide values ranging from 140 mg/kg to 6.93 mg/kg and Lagoon C cyanide values ranging from 5.12 mg/kg to 68.4 mg/kg. Moreover, Spang's sample was split between its own "in house" lab and Free-Col Laboratories for analyses and Spang's lab ran an analysis of potassium cyanide using the same technique it used on the sludge to insure that the cyanide analysis results were accurate. Spang concluded in its own internal memo dated January 30, 1985 (C-48) that Free-Col's analysis "agree quite well [with Spang's results]" and that Spang's "...distillation and analytical procedure were accurate." Thus, even if no DER analyses results are considered, Spang's own sample results show the lagoon sludges contained substantial amounts of cyanide.

Analysis of subsequently collected samples showing no cyanides, are the basis for Spang's contention that there is no cyanide in the Lagoons.

These samples were not split with anyone. Spang can only conclude "no problem" if it can show both the samples it had Free-Col analyze and which were analyzed by DER and EPA are all wrong. Spang made no attempt to do this and we believe with good reason. Had it done so, then all of the evidence (its internal lab analysis of the "bleached" rinse water) which Spang says shows that its rinse water treatment operations destroyed all cyanide prior to discharge, thus preventing the discharge of cyanide to the Lagoons, would have been discredited too. This is because Spang relied on its in-house lab for both cyanide destruction analysis as to the rinse water and the analysis of this sludge. So if the split sample's analysis is wrong then Spang's cyanide destruction analysis could also be wrong (and this waste water could be the direct source of the cyanide in the Lagoons). Moreover, the cross-examination of Spang's chemist by DER's counsel suggested enough inconsistencies and credibility issues with his testimony that we cannot assign it more weight than the chemical testimony offered by DER.

The significance of this cyanide's existence in the Lagoons cannot be ignored. As EPA's Background Document (C-28) says, electroplating sludges contain a variety of metals and toxic complexed cyanides. The document recognizes each plating operation produces its own type of rinse water, which is treated to precipitate out toxic metals and to destroy cyanide and each such treatment process forms its own type of sludge. The document then goes on to recognize "...most of the sludges will contain significant concentrations of toxic metals and may also contain complexed cyanides in high concentrations if cyanides are not properly isolated in the treatment process." Here the levels of cyanide in the Lagoons speak volumes as to whether they were isolated in treatment or whether the electroplating treatment facility's (the only source of cyanide) discharge carried cyanides

into the Lagoons. It is cyanide's presence in electroplating sludge which is at least one of the reasons that electroplating sludges are listed as a hazardous waste by EPA and thus by DER at 25 Pa.Code §75.261. This cyanide's presence not only raises the level of concerns about the environmental hazard posed by the Lagoons, but also points toward the conclusion that EPA and DER are right to be concerned because the sludges in the Lagoons are hazardous wastes.

Spang's contention that DER has not proved that electroplating sludge reached the lagoon before 1984 can only be considered true insofar as DER did not produce an analysis of a pre-1984 sludge sample or a sample jar full of pre-1984 sludges. DER thus lacked a piece of physical evidence. DER's circumstantial evidence filled this gap. DER's environmental chemist testified that the very nature of the chemical reactions occurring with Spang's method of treatment of the electroplating rinse water created sludges throughout the time period (both post-1984 and pre-1984) in which the rinse water treatment process was used. This is confirmed generally by the EPA Background Document. It goes without saying that if the effluent clarification and decanting step was not added until 1984, but sludge was created before 1984, the pre-1984 sludge went somewhere. Settling or clarification is a process through which a liquid's suspended solid matter is separated from the liquid itself. Here, the clarification process is merely settlement, wherein as the liquid stills the suspended solids fall out of suspension forming sludge. This same result would have occurred before 1984 in the Lagoons themselves. Moreover, DER also showed us that Spang represented to DER, EPA and others that it felt these wastes were hazardous wastes. Finally, the Lagoon analysis shows cyanide laced sludges in the Lagoons.

With these facts and the Lagoon sludge analysis before us it became incumbent on Spang, if we were to find in its favor, to come forward with a rational explanation for how this much cyanide could exist in the lagoon sludge without there having been a cyanide sludge discharge from these treatment tanks. Spang also had to show us how adding a physical (as opposed to chemical) step (settlement), but no other steps to the treatment regime could have created this sludge.[6] Spang failed to do either. Accordingly, we must find DER had not abused its discretion in finding the Lagoons received F006 electroplating sludge, thus, since the sludge was a listed hazardous waste, the Lagoons became hazardous waste management units. In turn, this judtified DER's order as to closure and post-closure care for these hazardous waste impoundments in accordance with 25 Pa.Code Chapter 75.

Post-Closure Bond Calculation

The only attack raised in Spang's Post-Hearing Brief as to the posting of a post-closure bond for these Lagoons concerns whether DER should consider the time value of money in setting the amount of money Spang must post. DER ordered that within sixty days Spang was to post a "...30 year post closure bond [in the amount of] $326,000.00." DER did not calculate in the time value of money to arrive at this figure. DER calculated post-closure costs for one year (with which Spang's Post-Hearing Brief does not quarrel) and multiplied this amount by 30 years.

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[6] It is illogical to suggest as Spang does that solely by adding the settling step to the treatment process the sludge is created. If one settles a glass of distilled water, sludge is not formed. There had to be suspended solid material in the treated rinse water for settling to produce the sludge. We wonder how Spang could ask us to ignore this fact and the fact that the pre- and post-1984 treatment process is identical but for settling, so sludge had to exist pre-1984.

There are no reported decisions which address this issue or interpret these bonding regulations but, where DER gives a coherent, reasonable interpretation of these bonding regulations, we are constrained to give that interpretation weight absent fraud, mistake or some blatant abuse of discretion. Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa.Cmwlth. 78, 509 A.2d 877 at 880 (1986). Here, the factors for calculating a post-closure bond are spelled out at 25 Pa.Code§75.318(a)(7). The time value of money is not mentioned there and was not considered by DER, so obviously DER's interpretation of the regulations is that it is not authorized to consider this concept in setting the bond amount. A review of the regulations supports this view. The SWMA regulations on bonding are found at 25 Pa.Code Chapter 75, Subchapter E, Financial Responsibility Requirements for Hazardous Waste Storage, Treatment and Disposal Facilities, at Sections 75.311 through 75.330.

Pursuant to 25 Pa.Code§75.318(a), DER is required to calculate a bond amount based on "...the total estimated cost to the Commonwealth to complete final closure of the facility in accordance with the requirements of the applicable statutes, this chapter ... and to take measures that are necessary to prevent adverse effects upon the environment during the life of the facility and after closure until released as provided by this subchapter." Subsection (B) of §75.318 states that the bond amount shall be based on the factors therein, and the time value of money is not included amongst these factors. Thus, this section alone supports the position that the "time value" concept was not intended either by the Environmental Quality Board or the legislature to be considered in setting this amount.

This interpretation appears to be confirmed at 25 Pa.Code §75.327, which relates to bond forfeiture. Under this section the Department's

forfeiture of the bonds is addressed. 25 Pa.Code §75.328(b)(5) requires forfeiture of all bonds deposited for the facility. If these sections are read together when a forfeiture is begun, what must occur is a forfeiture of the entire amount of money needed for post-closure care of this site. If the time value of money concept were utilized, what would be forfeited is an amount less than the gross total dollar amount calculated as needed under 25 Pa.Code §75.318. While a forfeiture near the end of the post-closure period when the closed site is only being monitored and maintained might not impair the Commonwealth's ability to complete post-closure care if less than the total amount of the bond were present, a forfeiture near the beginning of the period could leave the Commonwealth with less than enough money to insure mandated subsequent post-closure site protection. That is clearly not what the SWMA and these regulations envision. Accordingly, we conclude that DER correctly decided not to include the "time value of money" concept in its bond calculation.

CONCLUSIONS OF LAW

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

2. DER has the burden of proof in this appeal from its Order to Spang concerning closure of the three lagoons at Spang's East Butler plant.

3. DER did not abuse its discretion in finding as part of its Order that Spang discharged hazardous waste sludges from its electroplating operation's treatment system into Lagoons A and B.

4. DER did not abuse its discretion in basing the portion of its Order dealing with closure of Lagoon C on a finding that Lagoons A and B sludges had been placed in Lagoon C.

5. DER's calculation of the amount of the post-closure bond under 25 Pa.Code §75.318 properly excluded consideration of the "time value of money" in arriving at the amount Spang is to post.

ORDER

AND NOW, this 27th day of March, 1990, it is ordered that Spang's appeal is dismissed and DER's Order of January 6, 1987, is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 27, 1990

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

GEORGE POTZ AND EDWARD R. LLOYD	:	
	:	
v.	:	**EHB Docket No. 87-250-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 28, 1990**

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

Where in 1987, appellants raise an appeal from a bond forfeiture based upon a possible future agreement with DER to complete reclamation of the mine site or the completion of site reclamation itself, and DER files a motion for summary judgment in 1989 alleging that reclamation remains incomplete, summary judgment may be entered, when appellants fail to respond in any fashion to DER's Motion.

BACKGROUND

On June 24, 1987, George Potz ("Potz") and Edward R. Lloyd ("Lloyd" but collectively with Potz "Potzs") filed a singular Notice of Appeal in connection with the forfeiture by the Department of Environmental Resources ("DER") of surface mining surety bond SU34500 in the amount of $10,000 posted by Utica Mutual Insurance Company. According to their Notice of Appeal, Potzs are indemnitors to Utica Mutual Insurance Company ("Utica") for the bond

posted for GLT Corporation's ("GLT") mine in Grant Township, Indiana County, which mine is covered by Surface Mining Permit No. 32813003.

According to DER's forfeiture letter as filed by Potzs with their Notice of Appeal, DER forfeited this bond and bonds K01805873 and K01805903 posted on GLT's behalf by the Insurance Company of North America ("INA"). No appeal was taken from the forfeiture of the two INA bonds by Potzs or GLT and neither Utica nor GLT took an appeal from DER's forfeiture of this Utica bond.

The reason for appeal recited in Potzs' joint appeal is that the forfeiture is unwarranted because either the bonded area is reclaimed or forfeiture violates an oral understanding with DER regarding continuing reclamation activities.

According to the Pre-Hearing Memorandum filed for George Potz, the appeal arises because reclamation of the site was either completed or was ongoing and because one of the principals of GLT had reached an understanding with the DER mine inspector whereby GLT and DER would execute a written agreement under which completion of the reclamation would occur. The separate pre-hearing memorandum filed for Edward R. Lloyd on January 20, 1989 sets forth the same reasons for appeal.

On August 15, 1988, DER filed a Motion to Dismiss this appeal as to bonds K01805873 and K01805903 because no appeal was filed as to their forfeiture. On December 2, 1988, former Board Member William A. Roth issued an order denying this motion because the appeal was only as to Utica's bond SU34500.

On August 16, 1989, this Board received DER's Motion for Summary Judgment as to forfeiture of bond SU34500. By letter dated August 24, 1989, we notified counsel for each appellant to file his client's objections to this motion with the Board by September 5, 1989. To date, neither appellant has

filed any such objections.

Thereafter, on October 26, 1989, this matter was assigned to Board Member Joseph N. Mack. On February 9, 1990, this appeal was reassigned to Board Member Richard S. Ehmann because counsel for George Potz and Board Member Joseph N. Mack had been partners in a law firm during the pendency of this appeal and up until the time Member Mack began serving on this Board.

OPINION

In an appeal from a forfeiture by DER of a bond posted under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), the burden is on DER to prove, through a preponderance of evidence, that the facts justify the act of forfeiture. James E. Martin et al. v. DER, 1988 EHB 1256.

The fact that DER has such a burden does not automatically mean there must be a full hearing on the merits of any appeal from such an action. Where there is no genuine issue of material fact and DER is entitled to forfeiture as a matter of law, the Board is empowered to grant a motion, such as that now before us, for summary judgment. Commonwealth v. Summerhill Borough, 34 Pa. Cmwlth 574, 383 A.2d 1320 (1978).

In deciding whether to grant such a motion, we must be guided by the standards set forth in Pa. R.C.P. 1035. This rule provides any party may move for summary judgment on the pleadings and any depositions, affidavits, admissions and answers to interrogatories. Pa. R.C.P. 1035(b) provides the adversary party the opportunity to file opposing affidavits setting forth the contested facts. Pa. R.C.P. 1035(d) then provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts

> showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added)

In the instant case when DER's Motion for Summary Judgment was filed with this Board, we invited counsel for Potz and counsel for Lloyd to make their responses. Our letter of August 24, 1989 in this regard to both attorneys has gone unanswered either by a pleading or the type of factual response envisioned in Pa. R.C.P. 1035(b) and (d). Under circumstances such as this where DER has filed a motion and a supporting affidavit, there is an actual shift of the burden to Appellants to offer rebuttal. Roland v. Kravco Inc., 355 Pa. Super. 493, 513 A.2d 1029 (1986). The lack of a response from either appellant does not meet this factual burden. Accordingly, it now remains for us to determine whether under DER's facts, the law allows for bond forfeiture.

DER is entitled to forfeiture. According to the affidavit of Mine Conservation Inspector Ronald R. McCracken submitted with DER's Motion, mining began at this mine site in 1984. In 1987, when DER forfeited this bond, the affidavit says:

1. water was impounded at the site;
2. all disturbed areas of the site were not reclaimed;
3. all areas were not backfilled and regraded;
4. the ground and surface water were not being monitored at the site;
5. acid mine drainage was discharging from the site with a pH of less than 6.0; and
6. GLT had mined this site in 1987 without the prerequisite mining license.

Finally, the affidavit says that as of its date (August 10, 1989) corrective work had not been done at the site and the violations recited above still existed.

According to DER's letter of forfeiture, Utica Bond No. SU34500 was posted for Bonding Increment 01 which is for 4.8 acres of land. The bond instrument (attached to DER's Motion) shows the bond conditioned on compliance with SMCRA, the regulations promulgated thereunder, and GLT's permit. The bond instrument provides that liability is for the full $10,000.

The requirements imposed on GLT under SMCRA and the regulations promulgated thereunder are found in part in 25 Pa. Code, Chapter 87. 25 Pa. Code §87.116 requires ground water monitoring by GLT in the manner approved by DER. 25 Pa. Code §87.117 requires surface water monitoring by GLT in the manner approved by DER. 25 Pa. Code §87.141 requires completion of rough backfilling and grading within 60 days of coal removal. According to DER's Motion and the affidavit, backfilling and grading are still incomplete and ground and surface water monitoring are not occurring. The lack of any response by Potz and Lloyd leaves this undisputed. These violations of the regulations also provide an adequate ground for forfeiture under the bond.[1]

Defenses thereto by Appellants do not exist. Their joint notice of appeal says the site is reclaimed, or, inconsistently, that the site is being reclaimed. This internal inconsistency inferentially supports DER's Motion and affidavits suggesting reclamation remains to be completed. The 1989 DER affidavit stating that the site is still unreclaimed is also not rebutted by statements in the 1987 notice of appeal (or the two 1988 pre-hearing memoranda which we have previously ruled are not pleadings) that there is an oral agreement regarding future reclamation. DER's Motion concedes past negotiations aimed at an agreement to reclaim, but advises that they were unsuccessful. This allegation is again unrebutted. Roland v. Kravco, supra.

[1] These violations are sufficient to warrant forfeiture, so we have not delved into the other allegations in the affidavit.

In light of Morcoal Company v. Commonwealth of Pennsylvania, DER, 74 Pa. Cmwlth 108, 459 A.2d 1303 (1983), there is no question that DER has met its burden as to forfeiture of the bond and our granting this Motion.

ORDER

AND NOW, this 28th day of March, 1990, it is ordered that DER's Motion for Summary Judgment is granted. The appeal of George Potz and Edward R. Lloyd from forfeiture by DER of Utica Mutual Insurance Company Surety Bond No. SU34500 is dismissed.

ENVIRONMENTAL HEARING BOARD*

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 28, 1990

cc: **Bureau of Litigation**
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Western Region
For Appellant George Potz:
Robert D. Douglas, Esq.
Bonya & Douglas
For Appellant Edward R. Lloyd:
James H. Stratton, Jr., Esq.
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*Joseph N. Mack did not participate in this decision, having recused himself.

nb

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M. DIANE SMITH
SECRETARY TO THE BO

AMERICAN STATES INSURANCE COMPANY	:	
	:	
v.	:	**EHB Docket No. 89-187-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 2, 1990**

OPINION AND ORDER SUR
MOTION TO DISMISS AND
PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss is granted, and a petition for leave to file appeal nunc pro tunc is denied, in a case where the petitioner requests leave to appeal, fourteen months after the expiration of the appeal period, from the Department's forfeiture of bonds. The allegation that the notice of forfeiture was "misdirected" by petitioner's mail room does not establish an adequate basis for granting leave to appeal nunc pro tunc. In addition, the allegation that the Department "may have" failed to properly address the notice of forfeiture does not establish a basis for allowing the appeal, or for granting petitioner the right to conduct additional discovery, where the petitioner admits that it received the notice in its mail room fourteen months prior to its request for leave to file its appeal nunc pro tunc.

OPINION

This proceeding was initiated by the filing of a Petition for Leave to File Appeal Nunc Pro Tunc by American States Insurance Company (American) on July 5, 1989. In this petition, American seeks leave to appeal the forfeiture of a $117,500 bond by the Department of Environmental Resources (DER) on March 31, 1988. American had issued this bond to DER on behalf of Soloman & Teslovich in connection with a surface mining operation in Bullskin Township, Fayette County, Pennsylvania.

In its petition, American acknowledges that the appeal period from DER's notice of forfeiture expired on May 1, 1988. However, American contends that it should be permitted to file its appeal nunc pro tunc because this notice of forfeiture, as well as others, was misdirected by American's mail room, and that the individuals responsible for claims under the bonds did not receive notice of the forfeiture until the appeal period had expired. American argues that the "error or omission" of its mail room employees constitutes "excusable neglect." American further argues that it has valid defenses to the forfeiture in that the forfeiture was barred by a Consent Order between DER and Soloman and Teslovich, and that failure to grant the petition will create an unjust result.

DER filed a Motion to Dismiss and Objection to Petition for Leave to File Appeal Nunc Pro Tunc on July 17, 1989. In its motion, DER notes that American admits that its appeal was not timely filed. DER argues that an appeal nunc pro tunc is permitted only when there is some fraud or breakdown in the Board's operations which causes the untimely filing. DER further argues that a breakdown in American's mail room does not constitute good cause for allowing an appeal to be filed nunc pro tunc.

American filed a response to DER's motion to dismiss. American

contends that leave to file an appeal nunc pro tunc should be granted where the untimely filing resulted from a "non-negligent happenstance," citing Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). American asserts that since its employees who were authorized to file appeals never received the forfeiture notice, because it was misdirected by the mail room, the failure to file a timely appeal was attributable to non-negligent happenstance. In addition, American asserts that it may have been misled because DER "may not have properly addressed the notice (of forfeiture)," and that this warrants granting it leave to file its appeal nunc pro tunc,[1] citing Roderick v. State Civil Service Commission, 76 Pa. Commonwealth Ct. 329, 463 A.2d 1261 (1983), Tarlo v. University of Pittsburgh, 66 Pa. Commonwealth Ct. 149, 443 A.2d 879 (1982).

Unless the requirements for an appeal nunc pro tunc are met, the Board lacks jurisdiction over untimely appeals. Rostosky v. Commonwealth, DER, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976). The general rule is that an appeal nunc pro tunc will only be permitted in extraordinary circumstances, namely, when there is fraud or a breakdown in the processes of the Court or agency receiving the appeal. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975). Neglect or a mistake by the appellant or his counsel will not excuse the failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Superior Ct. 212, 421 A.2d 1224, 1227 (n. 7) (1980).

In Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), the Supreme Court held that a non-negligent failure of counsel to file an appeal

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[1] In the alternative, American requests that the Board grant it ninety days to conduct discovery to gather facts on whether DER failed to properly address the notice.

would constitute grounds for an appeal nunc pro tunc when the error was quickly discovered and the party promptly requested leave to appeal nunc pro tunc. However, Pennsylvania's intermediate appellate courts have limited the holding in Bass to cases involving non-negligent happenstance where unique and compelling facts are presented. See In re Interest of C. K., 369 Pa. Superior Ct. 445, 535 A.2d 634 (1987), Guat Gnoh Ho v. Unemployment Compensation Board of Review, 106 Pa. Commonwealth Ct. 154, 525 A.2d 874 (1987). The Board has followed these latter precedents. See Lancaster Press, Inc. v. DER, EHB Docket No. 88-410-W (Opinion and Order issued March 24, 1989), Borough of Bellefonte, et al. v. DER, EHB Docket No. 88-458-F (Opinion and Order issued May 3, 1989), affirmed, No. 1050 C.D. 1989 (Pennsylvania Commonwealth Court, filed February 12, 1990).

We disagree with American that Bass requires that its petition be granted. In Bass, the appeal was filed four days late as a result of a secretary's illness. Here, American filed its petition for leave to appeal nunc pro tunc on July 5, 1989, while the appeal period expired fourteen months earlier on May 1, 1988. The fourteen-month hiatus in this case stands in stark contrast to the four-day lapse in Bass. In addition, American has not alleged facts which, if found to be true, would establish that the failure to timely file the appeal was non-negligent. The fact that the notice of forfeiture was "misdirected" by American's mail room employees certainly does not establish the absence of negligence by American. If anything, it establishes the opposite. American is responsible for the procedures by which its mail is distributed to individuals within the company, and it is responsible for the acts of its non-professional and clerical employees as well as its professional employees.

We also disagree with American's argument that its petition should be

granted, or that it should be allowed to conduct additional discovery, because DER "may have" failed to properly address the notice, thus misleading American. American has not provided any basis whatsoever for this vague allegation. Moreover, this contention cannot be squared with American's frank admission in its petition for leave to appeal nunc pro tunc that "notice of this forfeiture action as well as others were misdirected in the mail by Petitioner's mail room," and that "failure to file a timely response to the forfeiture resulted from the error or omission of employees responsible for the direction of the mail within Petitioner's company." (Petition, paragraphs 6A, B). American admits that the notice of forfeiture was received in its mail room,[2] and we cannot envision circumstances which would justify the company's failure to file a petition for leave to appeal nunc pro tunc until fourteen months later. To allow such an untimely appeal would be damaging to the concept of finality of administrative decisions.

In summary, it is clear that American has failed to allege a sufficient factual basis to support its petition for leave to file its appeal nunc pro tunc. Therefore, we will deny the petition and grant DER's motion to dismiss.

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[2] Significantly, by stating that the appeal period expired on May 1, 1988, American implicitly admits that receipt of the notice by its mail room constitutes receipt by the company. This is so because the appeal period begins to run when an affected person receives notice of DER's action. See 25 Pa. Code §21.52(a).

<u>ORDER</u>

AND NOW, this 2nd day of April, 1990, it is ordered that:

1) The Petition for Leave to File Appeal *Nunc Pro Tunc* filed by American States Insurance Company is denied.

2) The Motion to Dismiss filed by the Department of Environmental Resources is granted.

3) This appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
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ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 2, 1990

cc: **Bureau of Litigation**
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FRANKLIN TOWNSHIP :
:
v. : EHB Docket No. 85-380-MJ
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 4, 1990

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By: Joseph N. Mack, Member

Synopsis

The licensing and permitting provisions of the Non-Coal Surface Mining Conservation and Reclamation Act (52 P.S. 3301 et seq.) apply to a township operating a gravel pit where the township sells gravel to other parties.

OPINION

On September 11, 1985, Franklin Township (Township) filed this appeal from a compliance order issued by the Department of Environmental Resources (DER) for the failure of the Township to secure a license and permit for the operation of a gravel pit, in violation of the Non-Coal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. (Non-Coal Act). The parties have now filed cross-motions for summary judgment concerning whether the activities of the

Township are regulated under the permitting and licensing provisions of the Non-Coal Act. The motions establish that the Township operates a gravel pit for its own use and also sells gravel by the ton to the Pennsylvania Department of Transportation (PennDot).

The Township argues that the Non-Coal Act does not apply to it. To sustain that position it must either fall within one of the exceptions set out in the Non-Coal Act as part of the definition of "Surface Mining"[1] or fall outside the definition of "operator." DER argues that the Township's mining and sale of gravel does not come within one of the exemptions and that the Township must therefore be licensed as an operator under the Act.

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1 **"Surface mining."** The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. <u>The term does not include any of the following</u>:

(1) The extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him.

(2) The extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes of the Pennsylvania Department of Transportation or the extraction of minerals pursuant to construction contracts with the department if the work is performed under a bond, contract and specifications that substantially provide for and require reclamation of the area affected in the manner provided by this act.

It is clear that the use of the gravel pit by the Township for its own purposes falls within the first exception. If that were the only use, a permit would not be required under the Non-Coal Act, but the undisputed facts indicate that the Township, by contract and on a regular basis, supplies gravel to PennDot. The Non-Coal Act specifically exempts use by PennDot of "borrow pits" for highway construction purposes but that is not the situation here.[2] This is a sale of gravel on a tonnage basis as indicated by the contract provided by the Township.

As for the Township's argument that the legislative intent was not to include municipalities as entities regulated by the Non-Coal Act, the Township's argument is not sustained by the Non-Coal Act itself. The definition of "Operator" in Section 3 includes "person or municipality." In turn, the definition of "Municipality" specifically includes a "township."

Because there is no dispute as to material facts and DER is entitled to judgment as a matter of law, DER's motion for summary judgment is well taken and will be granted. C & K Coal Company v. DER, 1988 EHB 1080; Commonwealth, DER v. Summerhill Borough, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978).

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[2] A "borrow pit" is an area from which materials are borrowed during highway construction to provide for fills where necessary to build up the centerline contour of a road. Borrow pits are usually used where the "cuts" and "fills" on a construction job do not balance.

ORDER

AND NOW, this 4th day of April, 1990, it is ordered that DER's Motion for Summary Judgment is granted, and the appeal of Franklin Township is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 4, 1990

cc: **Bureau of Litigation**
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rm

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M. DIANE SMIT
SECRETARY TO THE B

R & H SURFACE MINING	:	
	:	
v.	:	**EHB Docket No. 87-478-E**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 4, 1990**

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT
FILED ON BEHALF OF THE DEPARTMENT OF
ENVIRONMENTAL RESOURCES

By Richard S. Ehmann, Member

Synopsis

Surface miner's failure to reply to DER's Motion for Summary Judgment, coupled with its response to DER's Requests for Admissions in which it failed to give any response to certain specific admissions, created a basis on which to grant DER's motion on the issues raised therein.

OPINION

This appeal arose on November 16, 1987, when Robert Helfer, a partner in R & H Surface Mining ("R & H"), appealed the issuance to it of surface mining Compliance Order No. 87G532. Robert Helfer, as a partner in R & H, has appeared pro se on its behalf in this appeal.

R & H operates a surface coal mine known as the R & H #1 Strip in Burrell Township, Armstrong County, pursuant to License No. 1-02281 and Surface Mining Permit No. 03823076.

On October 27, 1987, Mine Conservation Inspector Russell C. Dill issued Compliance Order No. 87G532 on behalf of the Department of Environmental Resources ("DER") to R & H in connection with this mine. Paragraph 1 of DER's order found R & H's mine drainage treatment facility inadequate and required R & H to submit to DER by November 13, 1987 a plan and implementation schedule to rectify these inadequacies. DER's order found the following inadequacies:

1. no automatic neutralization process was installed,
2. leaking treatment ponds,
3. unstable treatment pond embankments, and
4. improperly placed discharge pipes.

Paragraph 2 of DER's order found that R & H had failed to comply with paragraphs 2 and 3 of Compliance Order 87G390 and paragraphs 2 and 3 of Compliance Order 87G429 (collectively "prior orders"). R & H was directed to comply with paragraphs 2 and 3 of Compliance Order 87G390 by September 15, 1987. It was also to comply with paragraph 3 of Compliance Order 87G429 by that date and was ordered to comply with paragraph 2 by September 30, 1987. Paragraph 2 in each of these prior orders dealt with site revegetation. Paragraph 3 in Compliance Order 87G390 dealt with repairs to the barrel and riser pipe in R & H's sedimentation ponds, while paragraph 3 in Compliance Order 87G429 dealt with installation of an energy dissipator in R & H's sedimentation control ponds.

The basis for R & H's current appeal with regard to paragraph 2 of Compliance Order 87G532 is that R & H had separate appeals pending before us regarding the prior orders. R & H appealed paragraph No. 1 because it said it has installed adequate facilities except as to the discharge pipe and with regard thereto it is awaiting DER's comments on the two proposals which it has submitted. It also argued DER could approve manual neutralization if DER wanted to do so and therefore an automatic neutralization process is unnecessary.

After R & H filed its pre-hearing memorandum and on March 14, 1988, DER filed its pre-hearing memorandum and simultaneously sought leave from the Board to conduct additional discovery in the form of Requests for Admissions by R & H. We notified R & H of the Petition and its right to file objections thereto. By Order dated April 26, 1988, absent any response by R & H to DER's Petition, we granted DER the right to conduct further discovery. Subsequently R & H filed its Response to DER's Requests for Admissions. Thereafter on May 30, 1989, DER filed a Motion for Summary Judgment based on R & H's Response. By letter dated June 1, 1989 we notified Mr. Helfer of this filing and requested R & H's response to DER's motion by June 19, 1989. To date, no response to DER's motion has been filed on R & H's behalf.

It must first be pointed out that this appeal is one of a series of four appeals to this Board by R & H from four separate DER compliance orders issued to R & H in connection with this mine site. The appeal from DER Compliance Orders Nos. 87G390 and 87G398 was dismissed on DER's motion for summary judgment by our Opinion and order of May 1, 1989. Robert Helfer d/b/a R & H Surface Mining v. DER (Docket No. 87-365-R, Opinion issued May 1, 1989). R & H's appeal of Compliance Order 87G429 was also dismissed, when we granted

DER's Motion for Summary Judgment. See R & H Surface Mining v. DER (Docket No. 87-424-R, Opinion issued March 29, 1989). A third appeal, at Docket No. 88-004-E, and the instant matter are both still pending before us.

A second preliminary matter concerns R & H's responses to DER's fifty-two Requests for Admissions. In forty-two instances R & H admitted DER's proposed admission. In nine other instances R & H gave no response thereto. Pursuant to Pa.R.C.P. 4014(b), the admissions are deemed admitted unless the party on whom they are served files a verified answer or objection. Moreover, R & H has failed to file a verified answer as to the four Requests out of the fifty-two made by DER to which Answers were given by R & H. This could be argued to say all fifty-two Admissions are admitted, but we will not go that far. As to the nine unanswered Requests, however, failure to answer at all is deemed an admission. John H. Miller v. DER, 1988 EHB 538.

We next turn to the question of whether we can grant summary judgment and answer this question affirmatively. Where there is no genuine issue of material fact and DER is entitled to judgment as a matter of law, the Board is empowered to grant a motion, such as that now before us, for summary judgment. Commonwealth v. Summerhill Borough, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978).

In deciding whether to grant such a motion, we must be guided by the standards set forth in Pa.R.C.P. 1035. This rule provides any party may move for summary judgment on the pleadings and any depositions, affidavits, admissions and answers to interrogatories. Pa.R.C.P. 1035(b) provides the adversary party the opportunity to file opposing affidavits setting forth the contested facts. Pa.R.C.P. 1035(d) then provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise

> provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added)

In the instant case when DER's Motion for Summary Judgment was filed with this Board, we invited Mr. Helfer to make a response. Our letter has gone unanswered either by a pleading or the type of factual response envisioned in Pa.R.C.P. 1035(b) and (d). Under circumstances such as this where DER has filed a motion and supporting Requests for Admissions there is an actual shift of the burden to R & H to offer rebuttal. Roland v. Kravco Inc., 355 Pa.Super. 493, 513 A.2d 1029 (1986). The lack of a response from R & H does not meet this factual burden. Accordingly, it now remains for us to determine whether, under DER's facts, this order was justified.

Through its answers to DER's Requests for Admissions and its failures to answer same, R & H admitted that the treatment ponds receive a 1 to 2 gallons per minute flow, that the ponds were not discharging on October 21, 1989, and that on that date they were leaking. R & H also admitted that the pond's embankments are unstable and that the treatment pond discharge pipes are improperly placed so that water exiting the pipes had to flow over the pond's embankment. R & H also admitted there was no automatic neutralization process in place at the treatment ponds. (This is also admitted by negative inference in R & H's pre-hearing memorandum.)

DER's order says these admitted facts constitute a violation of 25 Pa.Code §87.107(a) and (b) which require treatment facilities to be based on good engineering design and (unless DER approves manual neutralization) to include an automatic neutralization process. Clearly ponds which leak, have improperly placed discharge pipes, and have unstable embankments are not ponds based on good engineering design, and are in violation of 25 Pa.Code

§87.107(b). The lack of automatic neutralization is also a violation of 25 Pa.Code §87.107(b) and R & H offered us no evidence that it sought or received DER approval of manual neutralization.

These regulations were promulgated under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. and R & H has violated the statutes by violating these regulations. Under these circumstances paragraph 1 of Order 87G532 reasonably requires a plan and schedule to install and maintain adequate treatment facilities.

We next turn to the issues presented by R & H's appeal from paragraph 2 of DER's Order. This paragraph directed R & H to comply with paragraphs 2 and 3 in the two prior orders. When the instant appeal was filed, there was then pending before us R & H's appeal of Compliance Order 87G390. The appeal was captioned Robert Helfer d/b/a R & H Surface Mining v. DER, Docket No. 87-365-R. Between R & H's filing of that appeal and our opinion on DER's Motion in the instant appeal, we dismissed R & H's appeal of Compliance Order 87G390 in Robert Helfer d/b/a R & H Surface Mining v. DER, supra, (Opinion issued May 1, 1989). What is true as to that compliance order is also true as to DER Compliance Order 87G429. That order was appealed here as R & H Surface Mining v. DER, Docket No. 87-424-R. Between the time of that appeal's commencement and the instant opinion, we dismissed that appeal too. R & H Surface Mining v. DER, supra, (Opinion issued March 29, 1989).

Because the appeals of those Orders were dismissed by us, R & H cannot challenge either those dismissals or the two prior orders at this time in this case. The doctrine of collateral estoppel bars such a challenge.

William Fiore t/d/b/a Municipal and Industrial Disposal Company v.Commonwealth, Department of Environmental Resources, 96 Pa.Cmwlth. 447, 508 A.2d 371 (1986).

The only question as to these orders thus remains, whether R & H complied therewith. In failing to respond to Admission 32, R & H admits its failure to seed, lime, fertilize and mulch the bare areas at R & H's mine by September 15, 1987, as required in paragraph 2 of Compliance Order No. 87G390. These areas are located west of the proposed rock channel on Phase I and on portions of Phase 2 where the treatment ponds had been removed. Paragraph 3 of Compliance Order 87G390 required R & H to repair the discharge pipe in R & H's sediment pond #1 by September 15, 1990. R & H's lack of response to Request for Admission No. 39 admits that as of October 21, 1987, the pipe was still not repaired. Thus as to this Order, there is no suggestion that R & H timely complied therewith.

Compliance Order No. 87G429 was not complied with by R & H in a timely fashion either. Paragraph 2 thereof required R & H to revegetate the backfilled areas by September 30, 1987. R & H admits in response to Admission No. 46 it did not do so by that date. Its lack of response to Admission No. 47 indicated it failed to do this by October 21, 1987 either. Paragraph 3 of Compliance Order No. 87G429 required R & H to install dumped rock energy dissipators at the outfalls of sedimentation ponds 1 and 2 by September 15, 1987. In response to DER's Admission No. 52, R & H admits it failed to do this by September 15, 1987. Its response to Admission No. 53 indicates this was not done by October 21, 1987 either. Thus there is no question of timely compliance with Compliance Order 87G429.

The prior orders were not complied with by R & H. R & H has raised no response to DER's Motion and it has either admitted the facts underlying DER's action or is barred from challenging them. Clearly under Section 3 of SMCRA, as amended, 52 P.S. §1396.4c, and Sections 610 and 611 of the Clean Streams Law, 35 P.S. §691.610 and §691.611, DER has statutory authority to issue this Order. Accordingly, DER is entitled to judgment as a matter of law and summary judgment must be granted.

O R D E R

AND NOW, this 4th day of April, 1990, it is ordered that the Motion for Summary Judgment filed on behalf of the Department of Environmental Resources is granted. The appeal of R & H Surface Mining is dismissed.

ENVIRONMENTAL HEARING BOARD

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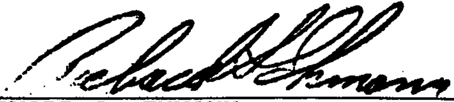

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 4, 1990

cc: **Bureau of Litigation**
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Western Region
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Robert Helfer
R & H Surface Mining
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R & H SURFACE MINING : EHB Docket No. 88-004-E

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 5, 1990

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

Summary Judgment will be granted where through answers to DER's Request for Admissions, Appellant concedes all factual disputes and through its Notice of Appeal, Pre-hearing Memorandum and failure to respond to DER's Motion for Summary Judgment, eliminates all legal arguments against same.

BACKGROUND

On December 7, 1987 the Department of Environmental Resources (DER) issued Compliance Order No. 87G601 to R & H Surface Mining (R & H) with regard to the R & H #1 Strip in Burrell Township, Armstrong County. That coal stripping operation was conducted pursuant to Mine Drainage Permit No. 03823076.

DER's order states it is issued pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as

amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (Clean Streams Law). It says R & H has violated Section 18.6 of SMCRA, Section 611 of the Clean Streams Law and 25 Pa.Code §87.146, which is promulgated pursuant to these two statutes. Specifically this Order says R & H has failed to comply with a prior DER Compliance Order (87G532) as it pertains to construction and maintenance of adequate treatment facilities (in order to address the inadequacies in R & H's then existing facilities). DER's Order also says R & H must grade out, fill in and stabilize a gully downslope of R & H's sedimentation pond No. 2.

In response to this Order, on January 4, 1988 R & H filed the instant appeal with this Board. As to the gully, R & H's Notice of Appeal contends it is not a gully but a deliberately dug discharge channel, which R & H has built to handle runoff until the sedimentation pond is removed. As to the issue of noncompliance with the prior DER order, R & H's Notice of Appeal says simply: "Previously appealed."

Thereafter on January 1, 1988, we issued our Pre-Hearing Order No. 1 advising the parties this case was assigned to Board Member William A. Roth and directing the parties to file their respective pre-hearing memoranda. On March 30, 1988 R & H filed its pre-hearing memorandum. On the noncompliance issue, R & H's pre-hearing memorandum says only that we are to see numbers 8 to 16 in its pre-hearing memorandum in the appeal at Docket Number 87-478-R. As to the DER's directive to remove the gully, R & H's pre-hearing memorandum says it dug the ditch (not a gully) to drain water from this point to the natural drainage channel and it will remove the ditch when it removes the pond. In its pre-hearing memorandum R & H also argues that DER violated its

written internal procedures in issuing this Order to R & H without giving R & H notice of this "gully" violation in an inspection report and thus affording R & H an opportunity to correct it prior to issuance of this Order.

On the same day on which R & H filed its pre-hearing memorandum, we also received DER's Petition for Leave to conduct additional discovery and proposed Request for Admissions pursuant to Pa.R.C.P. 4014. By letter dated March 31, 1988 we notified R & H that it had until April 20, 1988 to file any objections to DER's Petition. On April 26, 1988, when no response to that Petition was received from R & H, we granted DER's Petition.

Thereafter on June 17, 1988 DER filed its pre-hearing memorandum.

On May 22, 1989 DER filed a Motion for Summary Judgment in this matter. By letter of May 26, 1989 we notified R & H that it must file its response thereto, if any, with this Board by June 12, 1989. R & H has never filed any response to DER's Motion with this Board.

On February 9, 1990, Board Member Roth having resigned from this Board, the case was reassigned to Board Member Richard S. Ehmann for primary handling.

OPINION

In an appeal from a DER Order, it is DER which bears the burden of proof under 25 Pa.Code §21.101(b). The fact that DER has such a burden does not automatically mean there must be a full hearing on the merits of any appeal from such an action. Where there is no genuine issue of material fact and DER is entitled to a judgment in its favor as a matter of law, the Board is empowered to grant a motion, such as that now before us, for summary judgment. Commonwealth v. Summerhill Borough, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). We must, however, consider this Motion in the light most

favorable to R & H as the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

In deciding whether to grant such a motion, we must be guided by the standards set forth in Pa.R.C.P. 1035. This rule provides any party may move for summary judgment on the pleadings and any depositions, affidavits, admissions and answer to interrogatories. Pa.R.C.P. 1035(b) provides the adversary party the opportunity to file opposing affidavits setting forth the contested facts. Pa.R.C.P. 1035(d) then provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added)

In the instant case when DER's Motion for Summary Judgment was filed with this Board, we invited R & H to make a response. Our letter of May 26, 1989 in this regard to R & H has gone unanswered either by a pleading or the type of factual response envisioned in Pa.R.C.P. 1035(b) and (d). Under circumstances such as this where DER has filed a motion, a supporting affidavit and R & H's response to DER's Request for Admissions, there is an actual shift of the burden to R & H to offer rebuttal. Roland v. Kravco Inc., 355 Pa.Super. 493, 513 A.2d 1029 (1986). The lack of a response from R & H does not meet this burden. Accordingly, it now remains for us to determine whether under DER's facts, the law allows for issuance of its order to R & H.

In reviewing the factual support for DER's Motion we have two sources of information. The primary source is the responses by R & H to DER's Request for Admissions which are Exhibit A to DER's Motion. DER sought 35 admissions

and received 32 responses agreeing to DER's specific requests. In addition, Requests for Admission Nos. 32, 33 and 34 were not responded to at all. Pursuant to Pa.R.C.P. 4014(b) these three requests are also deemed admitted by R & H because it failed to file a verified answer or objection with regard thereto. Thus all of the requests are admitted by R & H. John H. Miller v. DER, 1988 EHB 538.

The second source of information is the affidavit of DER's Mine Conservation Inspector Russell C. Dill, which is attached to DER's Motion. This affidavit is unrebutted by R & H. It states that R & H failed to submit to DER for DER's approval any plans and a schedule to construct and maintain adequate treatment facilities, which plans were to be submitted by November 13, 1987. It also states that as of December 7, 1987 there was a gully at least nine inches deep at the downslope of Sedimentation Pond No. 2 at the R & H No. 1 Strip. Finally, Dill states DER has never authorized or approved this gully as a deliberate discharge area for runoff.

From the admissions it is also clear R & H was ordered to fill, grade and stabilize all rills and gullies which are deeper than nine inches (Admission No. 31). It is also clear a gully over nine inches deep exists in the location set forth in Dill's affidavit (unresponded to Admission No. 32) and, as of January 7, 1988, R & H had not filled it in (unresponded to Admission No. 33). In failing to respond to Admission No. 34, R & H admitted DER did not authorize or approve this gully.

Since 25 Pa.Code §87.146 mandates the filling, grading or other stabilization of all gullies over nine inches deep, it follows that this gully had to be filled and graded or stabilized by R & H unless DER approved otherwise. It is obvious from these admissions and the affidavit that DER did

not approve a variance from this regulation in this situation and that R & H did not timely comply with Paragraph 2 of DER's Order. It is also obvious it has thus violated 25 Pa.Code §87.146. Finally, it is clear that DER is empowered to issue this portion of this order to R & H by Section 4c of SMCRA, 52 P.S. §1396.4c.

According to the admissions made by R & H, while it made two proposals to DER concerning treatment facilities at R & H Strip No. 1, it never provided DER a schedule to implement them. In addition, neither proposal addressed the existing facility's unstable embankments, that facility's improperly placed discharge pipes, or installation of an automatic neutralization process at that facility.

Paragraph No. 1 of the Order required R & H to comply by November 13, 1987 with Paragraph 1 of the prior DER Order 87G532 to R & H. In Order 87G532 DER said R & H had not constructed adequate treatment facilities because the existing treatment facilities leaked, had unstable embankments and improperly placed discharge pipes, and failed to have an automatic neutralization process. To remedy this, that Order directed R & H by November 13, 1987 to submit to DER plans and a schedule for construction and maintenance of adequate treatment facilities.

Admission No. 28 shows that R & H has failed to submit plans to DER for new treatment facilities. Admission No. 29 shows that R & H has not been given any DER approval for construction of new treatment facilities at the mine site. Accordingly R & H has not complied with Paragraph 1 of Order 87G532 and in turn thus not complied with Paragraph 1 of Order 87G601.

The above evaluation satisfies us that as to the issues raised in DER's motion, it is factually entitled to summary judgment. Nothing in

R & H's pre-hearing memorandum changes that evaluation. One point still remains to be addressed, however. As to Paragraph No. 2 of the Order, R & H's pre-hearing memorandum says issuance of DER's Order 87G601 violated DER's internal operating procedure. This procedure is reflected in The Memorandum of Understanding of the Department of Environmental Resources - Inspection and Enforcement Policy for Mining Operations I:110:10:3 IIB. According to R & H this document requires DER to record these violations in inspection reports which serve as the first official notice of the violation and give the operator an opportunity to correct same. R & H then says the "gully" violation was never mentioned in DER inspection reports prior to the Order's issuance.

DER's Motion (prepared by the predecessor to present counsel) does not address this point either factually or as a matter of law, although it is addressed in DER's pre-hearing memorandum (see Contentions of Law Nos. 10, 11, and 12). In light of Robert C. Penoyer v. DER, supra, and this omission, we must consider this Motion in the light most favorable to R & H and therefore assume that indeed DER's issuance of this Order was not preceded by a notice of violation reciting this gully's existence to be a violation. We also assume DER's policy generally calls for issuance of a notice of violation in cases like this, followed by an Order (where the condition remains uncorrected). Despite these assumptions in R & H's favor, we must find in favor of DER on this point, too.

25 Pa.Code §86.214 specifically states that after a violation is disclosed by a DER inspection, the alleged violator will be notified thereof "...by copy of the inspection report, notice of violation, or through Department order or other enforcement document." Thus the regulations spell

out that DER is authorized to give notice of the gully to R & H through either a notice of violation or an order. If DER's choice was an order in this case, it thus complied with its own regulations in selecting this option. It is clear that DER policy, whether written or unwritten, could not overrule a statute or a regulation which is contrary thereto. William J. McIntire Coal Company, Inc. et al. v. DER, 1986 EHB 969, affirmed 108 Pa.Cmwlth. 443, 530 A.2d 140 (1987).

Further, R & H fails to mention this point in its Notice of Appeal but first raises it as a defense to DER's action in its pre-hearing memorandum. In so doing, it is raising a new ground for appeal in an untimely fashion. This it may not do. Robbi v. DER et al., 500 EHB 1988. Thus we cannot consider this point. Accordingly, even when we consider this motion in a light favorable to R & H on this point, we must sustain DER's motion and grant it a summary judgment.

O R D E R

AND NOW, this 5th day of April, 1990, upon consideration of DER's Motion for Summary Judgment and R & H's lack of any response thereto, the motion is granted and the appeal of R & H is dismissed.

ENVIRONMENTAL HEARING BOARD

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TERRANCE J. FITZPATRICK
Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 5, 1990

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M. DIANE SMIT
SECRETARY TO THE B(

CPM ENERGY SYSTEMS, INC.	:	
	:	
V.	:	**EHB Docket No. 88-162-M**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 5, 1990**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A Petition for Supersedeas, filed by a permittee after its permit had been suspended and, subsequently, revoked, is denied because the permittee has not shown a likelihood of prevailing on the merits. DER was justified in suspending the permit for admitted violations at a processing facility for municipal waste. The storage of the end product of the processing operation was not exempt from regulation when it differed significantly from the end product authorized by the permit. DER, therefore, had the authority to order the removal and proper disposal of this stored material that was creating environmental problems. The permittee's failure to comply with this order after a one year period justified DER's revocation of the permit. Financial inability is not an excuse.

OPINION

On June 24, 1987 the Department of Environmental Resources (DER) issued to CPM Energy Systems Corporation (CPM) Permit No. 101263 for a solid waste disposal and/or processing facility in Williams Township, Northampton

County, under the provisions of the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. On March 25, 1988 DER issued an Order (1988 Order) suspending CPM's Permit for specified violations and directing CPM to take corrective actions. CPM's appeal from the 1988 Order was filed on April 25, 1988 and docketed at 88-162.

On March 24, 1989 DER issued another Order (1989 Order) revoking CPM's Permit and directing CPM to take essentially the same corrective action mandated by the 1988 Order. CPM's appeal from the 1989 Order was filed on April 24, 1989 and docketed at 89-109. The two appeals were consolidated on May 23, 1989, at the request of CPM, at docket number 88-162. In the meantime, CPM had filed a voluntary petition under Chapter 11 of the Bankruptcy Code on February 22, 1989 in the United States Bankruptcy Court for the District of Delaware (Bk. No. 89-103).

Both parties had filed pre-hearing memoranda and the consolidated appeals were about to be listed for hearing when, on February 27, 1990, CPM filed a Petition for Supersedeas. DER filed a Motion to Deny the Petition on March 14, 1990. A hearing on the Petition was held in Harrisburg on March 15, 1990 by Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented evidence in the form of testimony and exhibits. CPM filed a Memorandum of Law on March 26, 1990 responding to DER's Motion to Deny the Petition.

To be entitled to a supersedeas CPM must show, by a preponderance of the evidence, that it will suffer irreparable harm, that it is likely to prevail on the merits of the appeal, and that there is no likelihood of injury to the public or other parties. If pollution or injury to the public health, safety or welfare exists or in threatened, a supersedeas cannot be granted. Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988,

P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78. CPM's Petition is unusual because it was filed nearly two years after DER suspended its Permit and nearly one year after DER revoked its Permit. While petitions for supersedeas can be filed at any point in a proceeding, they are most commonly filed at the outset. This is especially true when the underlying DER order shuts down a business operation and revokes a permit. A litigant, such as CPM, that delays in seeking the suspension of such an order inevitably creates doubt about the irreparable harm a shutdown order normally would engender.

CPM's late filing of its Petition may stem from a misconception of the nature of a supersedeas within the framework of the regulatory process and a Board of limited jurisdiction. CPM's Notices of Appeal invoked the Board's jurisdiction for the purpose of determining whether DER violated the law or abused its discretion in issuing the 1988 Order and the 1989 Order. A supersedeas, if issued under appropriate circumstances, would suspend the effectiveness of DER's Orders only until the Board could fulfill its purpose - determining the legality and appropriateness of the Orders. That determination necessarily focuses on conditions existing at or before the issuance of the Orders, not on whether those conditions still exist one or two years later.[1]

The thrust of CPM's evidence appears to be that, while violations had occurred at and before the issuance of the 1988 Order and 1989 Order,

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[1] This is not to suggest that evidence of conditions or events occurring after the issuance of an order is necessarily irrelevant. Quite the contrary, such evidence often is helpful in measuring the reasonableness of DER's action. Hearings being de novo, the Board has wide discretion in determining the admissibility of such evidence: Warren Sand & Gravel Co., Inc. v. Commonwealth, Dept. of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); The Chesterbrook Conservancy v. The Fox Company, 1974 EHB 406; Township of Salford v. DER, 1978 EHB 62; Township of Middle Paxton v. DER, 1981 EHB 315.

conditions have since improved and DER should reinstate the Permit. To show a likelihood of prevailing on the merits, however, CPM must prove that conditions existing at the time of issuance of the 1988 Order and the 1989 Order were not serious enough to warrant the suspension and revocation of the Permit. Evidence that those conditions may have been improved by subsequent actions of CPM is not adequate to carry this burden.[2]

Relevant evidence presented by DER establishes that during 1987 CPM's processing facility on Line Street had odor and vector problems and that CPM's warehouse facility on Industrial Road had discharges of leachate and several fires. More serious environmental problems arose in February 1988 when equipment breakdowns and a lack of funding forced a cessation of the processing operation. Solid waste was allowed to fill the processing facility to overflowing, generating not only odor and vector problems but an intensified risk of fire. These conditions remained unchanged for 6 weeks or more after being initially discovered by DER. CPM admitted to the violations at the processing facility, for the purposes of the supersedeas, but not the violations at the warehouse facility. On the basis of the evidence[3] available to us at this stage of the proceedings with respect to the processing facility, we believe that DER was amply justified in issuing the 1988 Order shutting down CPM's operation, suspending its Permit and directing the removal and proper disposal of solid waste.

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[2] CPM clarified its position in the Memorandum of Law filed on March 26, 1990. It now seeks a supersedeas only with respect to those portions of the 1988 Order and the 1989 Order that (1) suspended the Permit, (2) revoked the Permit, and (3) directed CPM to remove and properly dispose of the material stored in the warehouse facility.

[3] The conditions are documented in DER Exhibits 3 to 15, 21 to 44 and 56 to 58.

It took CPM until August 1988 to clean up the processing facility. Little or nothing was done at the warehouse facility, however, and fires occurred frequently in the material stored there. In late January 1989, DER inspectors found that part of one wall of the warehouse had collapsed and that the material had spilled out onto the ground. These conditions[4] prompted the issuance of the 1989 Order, revoking the Permit and requiring CPM to remove and properly dispose of the material stored in the warehouse facility.

CPM maintains (1) that the material stored in the warehouse facility was not a solid waste regulated by the SWMA; (2) that, to the extent the 1988 Order and 1989 Order required the removal and disposal of this material, they were beyond DER's statutory authority; and (3) since the only violations alleged in the 1989 Order related to the material stored in the warehouse facility, DER had no basis for revoking the Permit.

The Operational Plan dated March 24, 1987 (DER Exhibit 2) that CPM submitted to DER as part of its application for the Permit referred to a facility "which produces fuel pellets from municipal waste" (page 1). The Processing section of the Plan stated that "Pelletizing is the final step in the process." "The high temperatures created in [extruding the municipal waste into pellets] kill bacteria, therefore preventing decomposition of the pellets during storage". Since these "fuel pellets" are a "product," their storage in the warehouse facility "does not require a permit"[5] (page 4). The Permit dated June 24, 1987 (DER Exhibit 1) was issued to CPM "for the processing of municipal solid waste into fuel pellets" (page 2).

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[4] The conditions are documented in DER Exhibits 16 to 20, 54 and 55.

[5] This statement apparently was based on a representation made by DER in 1984 that "the pelletized waste material is considered to be a fuel and not a waste" (Exhibit 1 to Exhibit A of CPM's Petition).

There is no mention in either of these documents of an end product in some form other than pellets or of an end product used for some purpose other than fuel. Despite this fact, CPM argues that its operation was not limited by the Permit to the production of fuel pellets. DER's witness, Lawrence Lunsk, who reviewed CPM's application, disagreed with this argument (N.T. 184-191).

The only documentary evidence mentioning an end product other than pellets is the version of the Operational Plan contained in CPM's Request for Beneficial Use Approval dated March 13, 1990 (Petitioner's Exhibit 3). This Plan referred to a facility which produces "refuse-derived fuel (RDF) from municipal waste" (page 1). The RDF Processing section of the Plan stated that "Pelletizing is the final step in the process if the fuel is to take the pelletized form" (page 4). Significantly, this version of the Operational Plan carried a revision date of October 21, 1987, some 4 months after issuance of the Permit. On the basis of the record before us, we are satisfied that, in issuing the Permit and characterizing the final product, DER was considering only fuel pellets and not the so-called "fluff" material produced basically by shredding the municipal waste.

The difference may carry significant importance, especially as concerns storage. The pelletizing process, by killing bacteria that cause decomposition, also reduces the likelihood of combustion. The fluff material, not having been subjected to bacteria-killing high temperatures, is not similarly protected. When this material is simply piled up in a warehouse facility, it becomes little more than a compost heap; and, under the right conditions, may produce enough internal heat to bring about combustion.

Obviously, this is what occurred frequently in CPM's warehouse facility. The smouldering material not only threatened the warehouse and

other nearby structures, it produced deep pockets of ash hidden within the piles that became a safety hazard for firemen trying to extinguish the fires.

It is apparent from photographs, physical samples (DER Exhibits 52 and 53, Petitioner's Exhibit 4) and testimony that most of the material stored in the warehouse facility was fluff. Robert D. Osborne, who testified on behalf of CPM, stated that 65% of the 13,000 tons of end product made by CPM was in pellet form, the other 35% being fluff (N.T. 77-78). This converts to about 8,500 tons of pellets and 4,500 tons of fluff. The maximum inventory of finished material in the warehouse facility at any one time, according to Osborne, was 4,000 to 5,000 tons. While some of this inventory was in the form of pellets, there is no doubt that the bulk of it was fluff.

The material in the warehouse facility being, for the most part, beyond the scope of CPM's Permit and presenting a threat of fire and contamination of ground and surface water, DER was fully justified in ordering its removal in the 1988 Order. Such action could be taken under the SWMA (§§104, 601, and 602, 35 P.S. §§6018.104, 6018.601 and 6018.602), treating the material either as municipal waste or residual waste; and also could be taken under section 1917-A of the Administrative Code, Act of April 19, 1929, P.L. 177, as amended, 71 P.S. §510-17, without regard to the nature of the material.

While Osborne was under the impression initially that DER would allow CPM to reopen as soon as the processing facility had been cleaned up, he knew by June 1988 that DER also was insisting on the removal of the material from the warehouse facility (N.T. 31, 35, 94). He acknowledged that such removal was mandated by the 1988 Order (N.T. 37-38). Despite this knowledge, CPM did

little to comply with DER's Order.[6] Of the 2,500 to 3,000 tons stored in the warehouse facility when the 1988 Order was issued, 1,500 tons still remain today (N.T. 80-81).

The number of tons in storage when the 1989 Order was issued was not established, but it had to be somewhere between the figures mentioned above. That material had been in storage at least for a year by that time and was causing fires at a frequency of nearly one per week (N.T. 176). On the basis of this evidence, DER clearly was justified in again directing its removal in the 1989 Order.

If, as we have found, DER had the legal authority and factual justification for ordering CPM to remove the material from the warehouse facility, it follows that DER had the legal authority to revoke CPM's Permit for failure to comply with that order: section 503(c) of the SWMA, 35 P.S. §6018.503(c). Our view of the evidence at this stage of the proceedings satisfies us that revocation was justified when it was accomplished in March 1989. Conditions at the warehouse facility had existed since 1987 and had become increasingly intolerable. DER's order to remove the material had been in existence for a year but CPM had done little to comply with it. These circumstances were sufficient for DER to conclude that CPM lacked the ability or intention to comply with the 1988 Order and the 1989 Order.

We appreciate the fact that CPM's difficulty was primarily financial, resulting in a Chapter 11 bankruptcy just before the 1989 Order was issued. However, financial inability to comply with a DER order is not and, indeed, cannot be used as justification: O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 659 (1981). We also realize that processing operations such as those

[6] Nor did CPM request a supersedeas from the Board at that time.

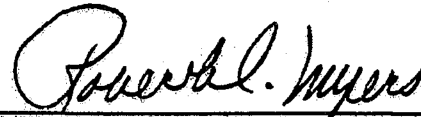
described by CPM's witnesses may be desirable alternatives to the traditional methods of disposing of municipal waste. Nonetheless, if such operations are conducted (whether by design, incompetence or financial inability)in such a manner that they cause as many or more environmental problems as they solve, the operators have no reason to expect lenient treatment from the regulatory authorities.

Since CPM has not shown a likelihood of prevailing on the issues raised in its limited request for a supersedeas, we need not discuss any of the other relevant factors.

ORDER

AND NOW, this 5th day of April, 1990, it is ordered that the Petition for Supersedeas filed by CPM on February 27, 1990 is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 5, 1990

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NGK METALS CORPORATION :
:
V. : **EHB Docket No. 90-056-MR**
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: April 5, 1990**

OPINION AND ORDER
SUR
PETITION TO AMEND NOTICE OF APPEAL

Synopsis

An appellant will not be permitted to amend its Notice of Appeal, after expiration of the 30-day appeal period, to raise legal objections which could have been raised initially and which were not dependent on discovery.

OPINION

On February 2, 1990, NGK Metals Corporation (NGK) filed a Notice of Appeal from the December 21, 1989 issuance by the Department of Environmental Resources (DER) of National Pollutant Discharge Elimination System (NPDES) Permit No. PA0011363, Amendment No. 3 (Amended Permit), pertaining to NGK's industrial facility in Muhlenberg Township, Berks County. On February 9, 1990, NGK filed a Petition for Supersedeas with respect to certain requirements of the Amended Permit. On March 13, 1990, DER filed its Answer to the Petition for Supersedeas, accompanied by a Memorandum of Law. On March 12, 1990, NGK filed a Reply Memorandum of Law.

A hearing on the Petition for Supersedeas had been scheduled to convene in Harrisburg on March 13, 1990 before Administrative Law Judge Robert D. Myers, a Member of the Board. Immediately prior to the hearing, DER filed

a Motion for Continuance alleging that NGK's Reply Memorandum of Law contained new legal objections not previously raised. When the hearing was convened, the parties informed the presiding Judge that they had agreed to a continuance, subject to the Judge's approval. Because NGK's Reply Memorandum of Law appeared to set forth legal objections not contained in the Notice of Appeal, the Judge directed NGK (if it desired to pursue these objections) to file a Petition to Amend its Notice of Appeal pursuant to 25 Pa. Code §21.51(e). NGK agreed to do so without waiving its position that the so-called new legal objections were adequately raised in the Notice of Appeal.

NGK filed a Petition to Amend Notice of Appeal and a supporting Memorandum of Law on March 21, 1990. DER filed a Memorandum of Law in opposition to the Petition to Amend on March 30, 1990.

In its Petition to Amend NGK sets forth its desire to raise the following legal objections to the Amended Permit:

1. Chapter 16 and section 8a(b) of Chapter 93 of DER's regulations were not promulgated in accordance with the Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §1102 et seq. (Documents Law), and are invalid;

2. Chapter 16 and section 8a(b) of Chapter 93 of DER's regulations were not promulgated in accordance with the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §51 et seq., the Regulatory Review Act, Act of June 25, 1982, P.L. 633, as amended, 71 P.S. §745.1 et seq., and the Sunset Act, Act of December 22, 1981, P.L. 508, as amended, 71 P.S. §1795.1 et seq., and are invalid;

3. DER's reliance upon the IRIS[1] database to set beryllium effluent limits is invalid because the IRIS data have not been subjected to rulemaking procedures and because the data used by DER was not in the database at the time the permit was issued.

We will dismiss summarily NGK's argument that these legal objections were raised in the Notice of Appeal. Even construing the language of that document with as much elasticity as possible, we can find nothing remotely similar to the legal objections NGK now desires to raise. The objections contained in the Notice of Appeal challenge the Amended Permit strictly on a scientific and technical basis, not on legal and procedural grounds set forth in the Petition to Amend. Not having raised the objections initially, NGK can litigate them only if it can bring itself within the scope of 25 Pa. Code §21.51(e), which reads as follows:

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department [DER]. Such objections may be factual or legal. Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

In its construction of this provision in Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd. on other grounds, ____ Pa. _____, 555 A.2d 812 (1989), Commonwealth Court held that "a decision to allow a party to amend an appeal to include new grounds, after the thirty-day period has run, is analogous to a decision to allow any agency appeal nunc pro tunc" (509 A.2d

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[1] IRIS is an acronym for the Integrated Risk Information System, a computerized information system maintained by the U.S. Environmental Protection Agency (EPA) which provides risk assessment data on several hundred chemicals.

877 at 885). Therefore, the Board "need not grant the petition absent a showing of good cause" (509 A.2d 877 at 886). The Court went on to observe that an appeal to the Board is not like a civil suit where leave to amend should be liberally granted. Specifying the grounds for an appeal to the Board is jurisdictional and amendments beyond the 30-day appeal period can be allowed only in limited circumstances. One of those circumstances is the necessity for engaging in discovery in order to elucidate the grounds for appeal, provided that a statement to that effect is included in the Notice of Appeal.

NGK's petition to Amend was filed after the 30-day appeal period had expired. Included in the Notice of Appeal was paragraph 13, which reads as follows:

> The DER has not provided a comprehensive statement of the reasons for including the challenged limitations and conditions in the permit. NGK reserves the right to amend this Notice of Appeal or to introduce additional objections in this proceeding based upon subsequent discovery of the basis for the DER's actions in issuing [the Amended Permit].

This language was adequate to notify the Board of NGK's intention to amend its Notice of Appeal in order to raise new objections - provided those new objections related to the basis for DER's action learned through subsequent discovery. It is obvious that the legal objections which NGK desires to raise do not fall within the terms of the proviso.

Chapter 16 and section 8a(b) of Chapter 93 of DER's regulations became effective on March 11, 1989, nearly 11 months prior to the filing of NGK's Notice of Appeal. The manner in which these regulations were adopted is a matter of public record, not something within the control of DER and obtainable only through discovery. The legal status of the Environmental Quality Board (EQB) also is a matter of public record and not determinable

only through discovery. The decision of the Supreme Court in Blackwell v. State Ethics Commission, ____ Pa. _____, 567 A.2d 630 (1989), which calls into question (solely by implication) the legal status of the EQB, was handed down on December 13, 1989, some 7 weeks prior to the filing of NGK's Notice of Appeal. The Board is aware that this decision was highly publicized and was the subject of much discussion in the news media. It is reasonable to expect that NGK's legal counsel (a large and prestigious law firm dealing regularly with state agencies) was aware of the decision prior to finalizing the Notice of Appeal and filing it on February 2, 1990.

DER's use of the IRIS database was known to NGK long before the Notice of Appeal was filed. Chapter 16 of the regulations discloses this use in several places and, as already noted, Chapter 16 became effective on March 11, 1989. Besides, the beryllium effluent limit was the subject of ongoing discussions between NGK and DER for months prior to the issuance of the Amended Permit. NGK was attempting to convince DER that beryllium is not a carcinogen by route of ingestion (NGK's letter of July 7, 1989 to DER - Exhibit B to Petition for Supersedeas). In its letter of December 21, 1989, transmitting the Amended Permit to NGK (Exhibit A to Petition for Supersedeas), DER notified NGK that it was not convinced by NGK's data on beryllium. The letter went on to state:

> We agree with EPA, which has recently re-evaluated the data and calculated an oral potency (or slope) factor for beryllium. That potency factor, which has not yet been added to the IRIS data base, is 4.8/mg/kg/d. It is nearly the same as that calculated in 1980 and used to develop the current water quality criterion for beryllium. The new potency factor was obtained via three different calculations, all of which agree within an order of magnitude.
> (underlining in original)

It is clear that, upon receipt of this letter and the Amended Permit,

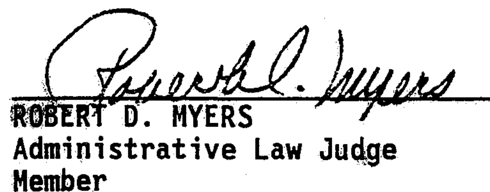
NGK knew that DER was using the IRIS database and that DER was using a potency factor which had not yet been added to the database. Being possessed of this knowledge, NGK could have raised its legal objection in the Notice of Appeal. It needed no discovery to do so.

NGK has failed to show good cause (within the limits set forth in the Pennsylvania Game Commission case, supra,) why it should be allowed to raise the legal objections set forth in its Petition to Amend. Accordingly, its Petition must be denied.

ORDER

AND NOW, this 5th day of April 1990, it is ordered that the Petition to Amend Notice of Appeal, filed by NGK Metal Corporation on March 21, 1990, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 5, 1990

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ARTHUR RICHARDS, JR., V.M.D. and CAROLYN B. RICHARDS	:	
v.	:	**EHB Docket No. 89-362-E**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and WILLOWBROOK MINING COMPANY, Permittee	:	**Issued: April 10, 1990**

OPINION AND ORDER
SUR PERMITTEE'S MOTION FOR SUMMARY JUDGMENT
OR IN THE ALTERNATIVE TO LIMIT ISSUES

By Richard S. Ehmann, Member

Synopsis

Appellant's failure to appeal from the initial issuance by DER of a surface mining permit to this permittee does not foreclose appeal as to the renewal of the permit by DER, but that failure to appeal does limit the issues which Appellant may raise in this appeal and does restrict the evidence which may be received at a hearing thereon. Issues which should have been raised in an appeal from the initial permit issuance decision could be foreclosed to Appellant. In other situations the issue could still be raised by Appellant, but Appellant may not be allowed to prove its case with evidence which was or should have been available when the initial permit was issued.

OPINION

Willowbrook Mining Company ("Willowbrook") has filed a Motion For Summary Judgment Or In The Alternative To Limit Issues. It seeks summary judgment or to limit the issues which Arthur Richards, Jr., V.M.D. and Carolyn Richards (collectively "Richards") can raise in their challenge of the renewal of Willowbrook's surface coal mining permit by the Department of Environmental Resources ("DER"). DER and Richards have both filed responses to the motion, opposing same, and all parties have submitted Memorandums of Law on their positions. Willowbrook has also filed a Reply to the responses by DER and Richards.

Willowbrook's verified motion with attached exhibits states that in 1985 DER issued Lucas Coal Company, Inc. surface mining permit No. 43840105 and Richards did not appeal same. Willowbrook next states that in 1986 DER issued a transfer of this same permit from Lucas Coal Company, Inc. to Willowbrook, and again Richards did not appeal therefrom. Willowbrook's motion then states that in 1989 DER issued Willowbrook a renewal of this permit, and it is from this renewal that Richards appeal. Willowbrook concludes that it should be given summary judgment because Richards cannot challenge renewal where they failed to challenge the same permit on either of the two prior occasions.

In response, DER admits the prior permit's issuance and transfer to Willowbrook. It then states it made a review of the application to renew the permit under 25 Pa.Code §86.55, determined the application met the requirements and issued Willowbrook a renewal of its permit. DER then concluded that because of this, Richards can challenge matters addressed in

the original permit. DER's response to the Motion alleging this review is unverified.

Richards' response is also unverified. It also admits issuance of the permit to Lucas Coal Company, Inc. and its transfer to Willowbrook. Richards' response then states that Willowbrook's motion fails to show facts essential to the granting of its motion and therefore Willowbrook cannot be granted summary judgment.[1]

Pa.R.C.P. 1035 deals with motions for summary judgment. It requires that the moving party show, through interrogatory answers, deposition transcripts, pleadings, affidavits, and responses to requests for admissions, that the facts support the motion and, where material, are not in dispute. All we have in this regard from movant is an affidavit that the allegations in its motion are true. This is not satisfactory from our perspective. Even more unsatisfactory is the lack of <u>any</u> affidavit supporting the allegations in either DER's response or in the response filed on behalf of Richards. Clearly if the rule envisions more than the affidavit filed by Willowbrook, it envisions much more than the omissions by the respondents. The preferred approach where affidavits are to be used is separate, detailed affidavits

* * * * * * * * * * * * *

1 As to Richards' argument concerning this permit's expiration, it appears from Willowbrook's Reply and supporting affidavit that surface mining activities may have occurred at the site so as to have activated the permit. This contention was only offered by Richards to bar summary judgment for Willowbrook and that is occurring for other reasons. Richards may not offer this as a new grounds to challenge this permit absent amendment of their Notice of Appeal after showing good cause. See <u>NGK Metals Corporation v. DER</u>, Docket No. 90-056-MR (Opinion issued April 5, 1990) and <u>ROBBI v. DER</u>, 1988 EHB 500. As Richards did not include this issue in their Notice of Appeal and as yet have not sought leave to amend it to include this issue, we will not pass on the merits of this contention further at this time.

supporting the motion. Of course responses making factual assertions without even an affidavit supporting same (such as those in paragraphs 6 and 7 of DER's response) are disregarded in ruling on such motions. Thus it is at a party's peril that it fail to include same. We are denying Willowbrook summary judgment for another reason, however.

Merely because the Richards failed to challenge the prior DER decisions does not preclude them from challenging this renewal decision. DER decisions on permit renewals are governed by 25 Pa.Code §86.55, which addresses the issues DER is to evaluate in considering a request for renewal.[2] If issues of the type spelled out in Section 86.55(f) have arisen since transfer of the permit to Willowbrook, which state grounds to successfully challenge this renewal, Richards must be given an opportunity to present them. Richards could not have raised a challenge based on such a development earlier because at that time it would not have existed. To hold otherwise would mean there could never be a challenge to this permit, regardless of any new developments regarding same.

Having stated the obvious above, we must nevertheless dispatch DER's Response legally. DER's Response lacks credibility. At least as far back as the late 1970's, DER routinely sought to bar appeals based on the same theory now advanced by Willowbrook. See Sharon Steel Company v. DER, 1976 EHB 100. Moreover, we can see no question in light of Sharon Steel Company v. DER, supra, and our subsequent rulings that, all other things being equal and absent new developments, we would have to sustain a challenge to a DER denial

* * * * * * * * * * * *

2 Transfers of permits are authorized when the application to transfer complies with 25 Pa.Code §86.56.

in 1989 of a renewal request, where DER's denial was based on evidence predating the 1986 transfer of this permit to Willowbrook. 25 Pa.Code §86.55 is a limitation on DER also. This being true, contrary to DER's contention, it does not follow that merely because DER says it conducted a review of Willowbrook's application to renew Richards may now raise any and all issues they wish. Richards are as bound by their own prior actions or failures to act as are DER and Willowbrook.

While we deny the motion for summary judgment, under Blevins v. DER and Southeastern Chester County Refuse Authority et al., 1986 EHB 1003, we will grant Willowbrook's motion to limit the evidence which the Richards may offer in the hearing on the merits. Neither DER's response nor that on Richards' behalf offers reason to deny the motion in this regard. Richards could have challenged the initial permit's issuance to Lucas Coal Company, Inc. or the permit transfer from Lucas Coal to Willowbrook. Richards did not do so. To the extent they would now like to challenge renewal using evidence available prior to the transfer of this permit to Willowbrook, they may not do so. Of course pre-transfer evidence is not barred insofar as it is used for legitimate purposes in the current appeal such as showing a baseline of data against which to measure current conditions. However, evidence arising solely from pre-1986 materials or relating to why the permit should never have been issued to Lucas or transferred to Willowbrook, will not be allowed. It is too late to offer such evidence.

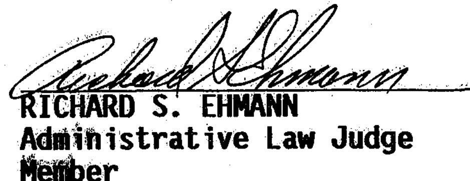
At present it appears possible that Richards could offer evidence of proper kind on each issue raised in their Notice of Appeal, although it appears to be more possible on some issues than on others. Accordingly, we

will not deny them the opportunity to try to do so, thus eliminating their chance to be heard at all on a specific issue. Willowbrook will either have to file a more specific motion as to some objectionable piece of evidence or object to evidence as it is offered at the hearing on this appeal. If such objections are made and have merit, they will be sustained.

ORDER

AND NOW, this 10th day of April, 1990, Willowbrook's Motion For Summary Judgment Or In The Alternative To Limit Issues is denied as to summary judgment. It is granted as to limiting the evidence which Richards may offer in support of each of the grounds for appeal set forth in their Notice of Appeal.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATE: April 10, 1990

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EDWARD J. AND PATRICIA B. LYNCH	:	
	:	
v.	:	**EHB Docket No. 88-158-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 11, 1990**

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment filed by the Department of Environmental Resources (DER) is granted, and appellants' cross-motion for summary judgment is denied, where appellants failed to allege a sufficient factual basis to establish that DER acted arbitrarily or abused its discretion when it denied appellants' private request for revision of a municipality's official sewage disposal plan.

OPINION

This proceeding involves an appeal by Edward J. and Patricia B. Lynch (Lynches) challenging the Department of Environmental Resources' (DER) refusal to grant a private request to revise the official sewage disposal plan of Aldan Borough, Delaware County. The Lynches submitted the private request pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966 P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. (SFA).

(SFA). DER was, at the time of the request, empowered to grant such requests under 25 Pa. Code §71.17.[1] Both parties have filed motions for summary judgment, which the Board addresses in this Opinion and Order.

The parties have stipulated to the following facts: The Lynches own an undeveloped lot located on the northwest corner of Belgrade Avenue and Walnut Street in Aldan Borough (Borough). In order to sell the undeveloped lot, the Lynches wished to obtain a sewage hookup for the property. A six-inch (diameter) sewage line was installed on Walnut Street by a private party some 70 years ago, and it currently services the Lynches' house on the north and three other houses on the south side of Walnut Street. The private line runs about 312 feet to Glenwood Avenue, where it connects into the nearest municipal line--a 10-inch (diameter) line maintained and operated by the Borough. For reasons which have not been set out before the Board, the private owner has refused to allow the Lynches or their prospective buyer access to the private line. Thus, the Lynches wrote the Borough, asking it to either condemn the private line or lay a new public line on Walnut Street. Apparently, the Borough did not respond, so the Lynches wrote to DER, requesting a revision be made to the Borough's Official Sewage Disposal Plan "to provide for the sewage disposal needs of the residents of Walnut Street" on the grounds that (1) the private line was possibly polluting the waters of the Commonwealth and (2) the Sewage Facilities Act created a "right" to publicly-owned sewers on Walnut Street. DER wrote to the Borough, saying it considered the Lynches' letter a private request for revision of a municipal official sewage plan pursuant to 25 Pa. Code §71.17. The Borough responded,

[1] That particular section was repealed in June, 1989, and a revised version of it now exists under 25 Pa. Code §71.14. See 19 Pa. Bulletin 2429 (June 10, 1989).

indicating that it had no objection to accepting waste from the lot, provided that the property-owners pay the cost of installing a new sewer line the distance of 312 feet. By letter to the Lynches, DER denied the private request. The stipulated facts add that the Lynches "seek through this appeal to reverse that denial and obtain an order from the Department to require the Borough to revise its official plan so that [the Lynches] can obtain sewage for the same price as paid by other property owners in the Borough..." [Pre-hearing Stipulation, pp. 2-5]

DER argues that the Lynches cannot, as a matter of law, meet their burden of showing that DER acted arbitrarily and capriciously in denying the Lynches' request to order the Borough to revise its official plan. DER contends that the Lynches cannot show that the Borough's sewage facilities plan is inadequate to meet their needs, because that plan calls for a community sewage system and the Borough is willing to allow the Lynches to connect to the system. DER further argues that the SFA does not grant the owner of an undeveloped lot the right to require the municipality to either condemn a private line or build an extension line to the owner's lot at the public's expense.

The Lynches argue that DER failed to properly consider the reasons they gave for their request. The Lynches interpret the SFA as giving DER "full, absolute, and unrestricted authority" in the area of "pollution, adequacy of official plans, planning for new development, and 'sewage rights.'" (Lynches' response, p. 5). Specifically, the Lynches view Section 3 of the SFA, 35 P.S. §750.3, as granting DER authority to enforce an "equitableness in relation to sewage." (Lynches' response, p. 2), and they contend that it is inequitable that other lot owners can gain access to the Borough's system ten feet in front of their lots, while the Lynches must

construct a line three hundred and twelve feet to gain similar access. Furthermore, the Lynches argue that the Borough's plan is flawed because it allows a privately-owned line which denies access to others, thus forcing the construction of a parallel line.

The Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summerdale Borough v. Commonwealth, DER, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320, 1322 (1978), Carl Snyder v. DER, EHB Docket No. 88-277-F (Opinion and Order issued June 22, 1989).

Our review of the stipulation and of the cross-motions for summary judgment concludes that there are no genuine issues of material fact and that DER is entitled to judgment as a matter of law; therefore, we will grant DER's motion for summary judgment and deny the Lynches' cross-motion.

When a party appeals from DER's refusal to order a municipality to revise its sewage facilities plan, that party must show that DER's decision was arbitrary or an abuse of discretion. Warren Sand & Gravel Co. v. DER, 20 Pa. Commw. 186, 341 A.2d 556 (1975); Lathrop Twp. Board of Supervisors v. DER, 1979 EHB 259; Haycock Twp. v. DER, 1985 EHB 321, 327; Lower Providence Twp. v. DER, 1986 EHB 802, 810. In the present case, it is clear that DER did not abuse its discretion by refusing to order the Borough to revise its sewage facilities plan. The Lynches' problems of not being able to connect with the private line, and not being able to connect directly to the public system unless they construct a line three hundred and twelve feet, are not matters which ought to be addressed in the Borough's sewage facilities plan. The Lynches' argument that DER should have ordered a revision of the plan

misconstrues DER's role under the SFA.

Where a municipality operates a community sewage system, a distinction must be drawn between its roles as a "planner" and as a "provider" of sewage services. DER's role under the SFA is to assure that municipalities execute their planning responsibilities. DER may also, to a limited extent, regulate the municipality as a "provider" in that it may order a municipality to construct or extend a sewer system where such action is necessary to prevent pollution or to prevent a public health nuisance. See, Section 203 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.203, Ramey Borough v. Commonwealth, DER, 466 Pa. 45, 351 A.2d 613 (1975). However, neither DER's authority to review a municipality's sewage facilities plan, nor its authority to compel a municipality to construct or extend a community sewage system where necessary to prevent pollution, gives it comprehensive responsibility to regulate all aspects of how the municipality manages its system from an operational and a business standpoint.[2] Although DER's decisions may often have an impact upon how a municipality manages its system, DER's decisions are based upon its responsibilities to protect the environment. Specifically, we can find nothing in Section 3 of the SFA, 35 P.S. §750.3 (entitled "Declaration of Policy") which gives DER responsibility to consider whether a municipality is operating its sewage system in an

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[2] DER does not have power to regulate municipal sewage systems in the same way as, for example, the Public Utility Commission (PUC) regulates privately-owned providers of sewage service. As part of its responsibility to regulate whether a utility is providing "reasonable and adequate service" under section 1501 of the Public Utility Code, 66 Pa. C.S. §1501, the PUC may order a utility to extend its mains at the utility's expense. See McCormick v. Pennsylvania Public Utility Commission, 48 Pa. Commonwealth Ct. 384, 409 A.2d 962 (1980). We find nothing in the SFA which grants DER authority to assure that municipalities provide "reasonable and adequate" sewage service.

equitable manner.[3] Since it is obvious from the Stipulation (paragraph 17) of the parties that the Lynches' reasons for requesting revision of the Borough's official plan were economic and had nothing to do with the environment, DER was justified in summarily denying the Lynches' request.

In summary, there are no material facts in dispute and DER is entitled to judgment as a matter of law; therefore we will grant DER's motion for summary judgment.

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[3] Contrary to the Lynches' arguments, Borough of Sayre v. DER, 1979 EHB 29 does not support their position here. In Sayre, the Board upheld DER's order that a municipality must revise its plan to permit on-lot sewage disposal where the soil conditions were suitable for this type of disposal. The instant case does not involve the propriety of different types of sewage disposal; it involves the question whether DER may, based upon notions of "equity", order a municipality to extend the main lines of its community sewage system at the community's expense.

ORDER

AND NOW, this 11th day of April, 1990, it is ordered that:

1) The motion for summary judgment filed by the Department of Environmental Resources is granted, and the cross-motion for summary judgment filed by Edward J. and Patricia B. Lynch is denied.

2) The appeal at EHB Docket No. 88-158-F is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: April 11, 1990

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Louise Thompson, Esq.
Eastern Region
For Appellants:
Edward J. and Patricia B. Lynch
Glen Mills, PA

nb

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M. DIANE SMITH
SECRETARY TO THE BO

INGRAM COAL COMPANY, et al.	:	
	:	
v.	:	**EHB Docket No. 88-291-F**
	:	**(Consolidated Cases)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 17, 1990**

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT,
CROSS-MOTIONS FOR SUMMARY JUDGMENT,
AND MOTION TO DISMISS

By: Terrance J. Fitzpatrick, Member

Synopsis

This is a consolidated proceeding involving three appeals from an order of the Department of Environmental Resources (DER) directing the Appellants to remedy acid mine discharges emanating from a mine site. We will grant DER's motion and enter summary judgment against two of the Appellants because they engaged in "operation of a mine," and, thus, they are responsible for the discharges on the site regardless of whether they caused the discharges. We will also deny the motion to dismiss filed by one of these Appellants, and grant DER's motion to substitute the personal representatives of the Appellant's estate. With regard to the third Appellant, there are unresolved factual questions regarding whether it engaged in "operation of a mine"; therefore, we will deny this Appellant's motion for summary judgment.

OPINION

This proceeding involves three appeals which have been consolidated for hearing. The Appellants are the "Ingram Partnership" (consisting of Clark R. Ingram, George M. Ingram, Gary C. Ingram, and Gregory B. Ingram), Herman J. Israel[1] (a sole proprietorship), and Rockwood Energy and Mineral Corporation.[2] At issue is a compliance order issued to the Appellants by DER on August 30, 1988, directing them to abate discharges from a surface mining site near the town of Frenchville in Girard Township, Clearfield County, Pennsylvania.

All three Appellants filed petitions for supersedeas. On February 6, 1989, the Board issued an Order granting the petition of Rockwood, but denying the petitions of the Ingram Partnership and Israel. Subsequently, DER filed a motion for partial summary judgment (or, in the alternative, to limit issues) seeking summary judgment against Ingram Partnership and Israel. Both of these parties filed responses opposing this motion. The Ingram Partnership filed a cross-motion for summary judgment, which was opposed by DER and Rockwood. Rockwood filed a motion for summary judgment, which was opposed by the Ingram Partnership and DER. Finally, Israel filed a motion to dismiss, which was opposed by DER and the Ingram Partnership. This Opinion and Order addresses all four of these motions.

Some of the facts in this case are undisputed. The Ingram Partnership secured two permits from DER in 1976 to mine the Frenchville site.

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[1] Mr. Israel died after this appeal was filed. As we will explain later in this Opinion, the representatives of the estate of Mr. Israel will be substituted for Mr. Israel.

[2] DER contends that all three of these Appellants have, at different times, conducted business as "Ingram Coal Company" (DER Pre-hearing Memorandum, p. 2).

Mining Permit No. 1476-3 was issued on August 26, 1976; Mine Drainage Permit No. 4576SM4 was issued on May 6, 1976. The Ingram Partnership mined on the site from 1976 to 1980. From 1980 to 1982, the Ingram Partnership conducted reclamation and other post-mining activities at the site. In May, 1982, Ingram Partnership signed a purchase agreement with Israel, and Israel received the business known as "Ingram Coal Co." and certain assets of that company. At the same time, Ingram Partnership signed a purchase agreement with Rockwood by which it transferred certain assets to Rockwood.[3]

Despite the sale of Ingram Coal Co., neither Israel nor the Ingram Partnership ever transferred the Permits under which mining was conducted at the Frenchville site.[4] After the sale, employees of Israel[5] completed work at DER's direction to remedy erosion and sedimentation problems at the site. Israel also continued a water monitoring program which was put in place when the Ingram Partnership had control of the site.

Rockwood took control of Ingram Coal Company at some point in 1984, when it exercised an option to buy the company pursuant to an agreement with Israel signed in 1982.

The controversy here surrounds who should be held responsible for three acid mine discharges emanating from the Frenchville site. Two of these discharges are located at the southern toe of the affected area of the site. The other discharge is from a pipe in the sediment pond near the southeast

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[3] We are deleting many details regarding Israel and Rockwood which are not crucial to this Opinion. Suffice it to say that Israel was a stockholder in a parent company of Rockwood, and that there were agreements between Israel and Rockwood regarding the Frenchville site.

[4] Those permits were issued to the Ingram Partnership, doing business as Ingram Coal Co.

[5] Gary, George, and Gregory Ingram were employed by Israel following the transfer of the business to Israel.

corner of the affected area. These three discharges flow into an unnamed tributary of Deer Creek.

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

The motions which have been filed address the potential liability of each of the Appellants. We will address the legal arguments raised regarding each Appellant in a separate section.

1. Liability of Clark R. Ingram, Gary C. Ingram, George M. Ingram, and Gregory B. Ingram (the Ingram Partnership) for the Discharges.

DER and the Ingram Partnership have both filed motions seeking summary judgment on the question of whether the Ingram Partnership is responsible for the discharges. Each party, in turn, has responded to the other's motion.

DER argues that the Ingram Partnership was, and still is, the permittee for the Frenchville site, and that the discharges are emanating from the permitted area. DER contends that the Ingram Partnership is "strictly liable" for the discharges under Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), regardless of whether the discharges preexisted the Partnership's mining or whether the Partnership's mining caused or affected the discharges, citing Bologna Mining Co. v. DER, 1989 EHB 270, Benjamin Coal Co. v. DER, 1987 EHB 402, William J. McIntire Coal Co. v. DER, 1986 EHB 712,

affirmed, 108 Pa. Commonwealth Ct. 443, 530 A.2d 140 (1987), Hepburnia Coal Co. v. DER, 1986 EHB 563, 602.[6]

The Ingram Partnership raises a number of arguments why it is not legally responsible for the discharges and, thus, why its motion for summary judgment should be granted. First, it argues that there are no appellate court decisions in Pennsylvania which have held a mine operator liable for a discharge it did not cause, citing William J. McIntire Coal Co. v. Commonwealth, DER, 108 Pa. Commonwealth Ct. 443, 530 A.2d 140 (1987). Relying upon this lack of judicial precedent, Ingram Partnership contends that the Board precedents cited by DER, which held an operator liable regardless of causation, were incorrectly decided. Second, Ingram Partnership argues that DER is estopped from holding it responsible for any pre-existing discharge which it did not cause or contribute to, because DER's regulations which were in effect at the time Ingram conducted its mining (specifically, 25 Pa Code §77.92(26), now repealed) only held an operator responsible for "any additional pollution load" which an operator added to a pre-existing discharge. Holding an operator responsible under these circumstances would allegedly violate the operator's right to due process of law. Third, Ingram Partnership argues that Herman Israel assumed the liability of Ingram Coal Co. upon the transfer of that business in 1982, and that Ingram Partnership was, accordingly, absolved of any liability. Finally, Ingram Partnership argues that the recent worsening of the discharges is attributable to unidentified parties who drilled test-holes on the site within the past few years (after the Partnership concluded its operation on the site), and that the Partnership cannot be held responsible for the actions of these third parties.

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[6] DER also argues, in the alternative, that Ingram Partnership's mining did cause or contribute to the discharges in question.

The first issue is whether Ingram Partnership can be held liable under Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), for a discharge from its permitted area which it did not cause. This section provides, in relevant part:

> (a) No person or municipality shall operate a mine or allow a discharge from a mine into waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department....The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department, is hereby declared to be a nuisance.

DER is correct that the Board has construed this language to hold an operator responsible for a discharge on its site regardless of whether the operator caused or contributed to the discharge. See e.g. Bologna Mining Co., Benjamin Coal Co.; McIntire Coal Col, Hepburnia Coal Co., supra. On the other hand, Ingram Partnership is correct that Pennsylvania's appellate courts have never held an operator liable under Section 315(a) where the operator did not cause the discharge. See William J. McIntire Coal Co. v. Commonwealth, DER, 108 Pa Commonwealth Ct. 443, 530 A.2d 140 (1987). Furthermore, in McIntire, Commonwealth Court noted that causation was present in two judicial precedents which the Board had cited in support of finding liability without causation.[7] McIntire, 530 A.2d at 142-143.

For the reasons which follow, we reaffirm our previous holdings that an operator is responsible under Section 315 for any discharge emanating from its mine site, regardless of whether the operator "caused" the discharge.

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[7] These precedents are Commonwealth v. Barnes & Tucker Co. (Barnes & Tucker I), 455 Pa. 392, 319 A.2d 871 (1974), and Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973).

See, Bologna, Benjamin, Hepburnia, McIntire, supra., see also, Yenzi v. DER, 1988 EHB 643, Adam Greece d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135, Robert C. Penoyer v. DER, 1987 EHB 131, Hawk Contracting, Inc. & Adam Eidemiller, Inc. v. DER, 1981 EHB 150, 173.

At the outset, we recognize that the liability imposed by Section 315 is a departure from traditional concepts of liability under tort law. In tort law, a finding of causation is required to establish a connection between the defendant's actions or omissions and the injury suffered. William Prosser, The Law of Torts, p. 236 (4th ed. 1971). Causation is required even in those areas of tort law where "strict liability"--liability without fault[8]--is

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[8] There appears to be some confusion that "strict liability"--liability without "fault"--eliminates the requirement of causation. This confusion can be traced to the multiple meanings of the word "fault." Fault is best understood as a synonym for "negligence." This was the sense in which Superior Court used the term when it stated that: "The progress of the law in extending liability without fault....[has not been] in disregard of fundamentals pertaining to the tort law of causation." Bascelli v. Randy, Inc., 339 Pa. Superior Ct. 254, 488 A.2d 1110 (1985), quoting from, Oehler v. Davis, 223 Pa. Superior Ct. 333, 334, 298 A.2d 895 (1972). This statement recognizes that under tort law, consideration of the defendant's mental state (whether he acted intentionally or negligently) is a separate consideration from whether he caused the injury; thus, liability depends upon showing that both the requisite mental state and causation are present. However, fault is sometimes used (perhaps less precisely) as a synonym for the broader concept of "responsibility"--a term which is used interchangeably with "liability." For example, when a person did not cause the damage, he might argue that the damage was not his "fault." When understood in this way, dispensing with "fault" (i.e. strict liability) means dispensing with consideration of both the defendant's mental state and causation. Commonwealth Court has used the term "fault" in the latter sense. See Western Pennsylvania Water Co. v. Commonwealth, DER, ___ Pa. Commonwealth Ct. ___, 560 A.2d 905, 909 (1989). Since the terminology of fault and strict liability comes from tort law, we will use those terms with the same precision as in tort law. Thus, using the term "fault" as a synonym for "negligence," our holding that an operator is responsible for discharges he may not have caused cannot technically be justified by saying that we are imposing "strict liability" or "liability without fault" upon an operator. Liability without causation goes beyond these concepts. It is difficult to find a term in tort law to describe liability without causation-although this concept has been described as imposing an insurer's responsibility upon the operator. Adam Greece d/b/a footnote continued

applied. See, Berkebile v. Brantly Helicopter Corp. 462 Pa 83, 337 A.2d 893 (1975), Bascelli v. Randy, Inc., 339 Pa. Superior Ct. 254, 488 A.2d 1110 (1985), Oehler v. Davis, 223 Pa. Superior Ct. 333, 298 A.2d 895 (1972). Federal Courts have also interpreted federal statutes to require causation where a defendant may be held strictly liable for different types of pollution. See United States v. West of England Ship Owner's Mutual Protection and Indemnity Assoc., 872 F.2d 1192 (5th Cir. 1989), United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978), State of Idaho v. Bunker Hill Co., 635 F.Supp. 665 (D. Idaho 1986).

The connection between the defendant and the injury suffered which is normally supplied by causation is not required in cases arising under Section 315, however, because that connection is supplied by the operator's relationship with the site which he mines. Section 315 imposes the duty upon an operator not to "allow" any discharge from his site. This is a higher duty than if the General Assembly had written that the operator may not "cause" any discharge.[9] The imposition of this higher duty is consistent with the objective of the Clean Streams Law:

> It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted.

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continued footnote
Cherry Run Fuel Co. v. DER, 1980 EHB 135, 145 (Concurring Opinion). Whatever term is used to describe the concept, however, it is not entirely novel--it has been applied by the Courts under Section 316 of the Clean Streams Law. See, footnote 9, infra.

[9] This duty is similar to that imposed upon a landowner or occupier under Section 316 of the Clean Streams Law, 35 P.S. §691.316. A landowner or occupier may be ordered to correct conditions on his land which are causing pollution regardless of whether he caused or created the conditions. National Wood Preserver's Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed, 449 U.S. 803, 101 S. Ct. 47, 66 L. Ed.2d 7 (1980), Western Pennsylvania Water Co. v. Commonwealth, DER, ___ Pa. Commonwealth Ct. ___, 560 A.2d 905 (1989).

35 P.S. §691.4(3). The Supreme Court of Pennsylvania has relied upon this objective in deciding other cases where mine operators argued that it was unfair to hold them responsible for acid mine discharges. See Commonwealth v. Harmar Coal Co., 452 Pa 77, 306 A.2d 308, 321 (1973), appeal dismissed, 415 U.S. 903 (1974), Commonwealth v. Barnes & Tucker Co. (Barnes & Tucker II), 472 Pa 115, 371 A.2d 461, 465 (1977).

Moreover, while we do not casually dismiss the operator's argument of unfairness, it is evident that in the eyes of the General Assembly, the public policy consideration of the public's right to clean water overrode considerations of individual unfairness. If operator were permitted to contest causation of a discharge, the public's right to unpolluted water would be severely impaired because acid mine pollution would continue while litigation ran its languorous course. This result would be contrary to both the remedial objective of the Clean Streams Law as well as Article I, Section 27 of the Pennsylvania Constitution.

We disagree with Ingram Partnership's argument that a finding of causation is required by Commonwealth Court's decision in William J. McIntire Coal Co. v. Commonwealth, DER, 108 Pa Commonwealth Ct. 443, 530 A.2d 140 (1987). Commonwealth Court avoided the question of whether causation was required, because it found that the evidence supported a finding of causation. In addition, although Commonwealth Court pointed out that causation was present in Harmar and Barnes & Tucker I; the Court did not hold that an operator could not be held liable without causation.[10]

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[10] We agree that Harmar and Barnes & Tucker I did not resolve the precise issue presented here. In Harmar, the Court decided that an operator was required to treat all the water discharging from its mine, even though some (not all) of that water originated in an adjacent, abandoned mine. In Barnes footnote continued

We also disagree with Ingram Partnership's argument that DER is estopped from holding it liable for a pre-existing discharge because a DER regulation (25 Pa Code §77.92(26), now repealed) which was in force at the time the Partnership began mining provided that an operator was only responsible for any additional pollution load which he added to a pre-existing discharge. This issue was raised and decided against the operator in Bologna, supra, and we will reject the argument here. Ingram Partnership did not obtain an indefeasible right to allow a discharge from its site merely because such a discharge may have been tolerated when it conducted its mining. See Commonwealth v. Barnes & Tucker Co., 455 Pa 392, 319 A.2d 871 (1974). Similarly, we reject Ingram Partnership's argument, based upon the repealed regulation, that holding it liable without causation would violate fundamental fairness and due process of law. The Partnership did not develop this argument in any significant detail. (See, Partnership's Brief filed November 22, 1989, p. 27). As we stated above, we do not take the Partnership's unfairness argument lightly; however, we must also consider the public's right to unpolluted water. Moreover, we believe that our conclusion is required by the language of Section 315, and we lack the authority to find this statutory provision unconstitutional. St. Joe Minerals Corp. v. Goddard, 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974).

In addition, we disagree with Ingram Partnership's argument that it was absolved of future liability because its agreement with Herman Israel provided that Israel assumed the liabilities of Ingram Coal Co. upon the

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continued footnote
& Tucker I, the Court held that an operator was liable for a post-mining discharge caused by its prior mining, even though the law in existence at the time the mining was conducted did not provide for liability for post-mining discharges. However, while these decisions are not "on all fours" with the present case, we do believe that the rationale employed by the Supreme Court supports our holding here.

transfer of the company to Israel. The permit was issued to Ingram Partnership. A permittee cannot, by private agreement, delegate duties imposed upon it by statute. Morcoal Co. v. Commonwealth, DER, 74 Pa Commonwealth Ct. 108, 459 A.2d 1303 (1983). As the permittee, Ingram Partnership had responsibility for the site and it could not shift this burden to Israel via a private agreement.

Ingram Partnership's final argument is that it cannot be held liable for the discharges because the recent worsening of the discharges is attributable to the actions of third parties who drilled testholes on the site after the Partnership ceased its mining activities.[11] DER counters this "drill-hole theory" by arguing that water sample test results show that at least one of the discharges was degraded as early as 1980--long before the alleged drilling occurred.

DER's argument raises a factual issue, which would require a hearing to resolve. However, we find that Ingram Partnership's argument must be rejected as a matter of law. As we concluded above, Section 315(a) barred Ingram Partnership from allowing any discharge from its mining site. Ingram Partnership remains responsible for the Frenchville site because it never obtained a release of its responsibility from DER. Even if we concede that third parties entered the site and drilled testholes which caused the discharges--Ingram Partnership is still responsible for those discharges under Section 315(a). See, Adam Greece d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135, John E. Kaites, et al. v. DER, 1985 EHB 625. This result is inescapable because, as we stated above, the liability of an operator under Section 315(a) is predicated not upon causation, but upon the operator's relationship with

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[11] This argument seems to be supplemental to the Partnership's argument that the discharges pre-existed the Partnership's mining on the site.

the land it mines. As the Board noted in Adam Greece and Kaites, the operator may have a private cause of action against third parties, but that does not affect the operator's liability under Section 315(a).

For the reasons stated above, it is obvious that DER's motion for summary judgment as to Ingram Partnership must be granted, and Ingram Partnership's motion for summary judgment must be denied.

2. Liability of Herman J. Israel for the Discharges.

(a) Israel's Motion to Dismiss

First, we must address Israel's motion to dismiss. The sole basis for this motion was that Herman J. Israel died after the Compliance Order was issued. DER filed a response to this motion, contending that Mr. Israel's liability survives him and is transferred by operation of law to his estate. See 20 Pa C.S. §3371, 42 Pa C.S. §8302. DER asserted that the personal representatives of Mr. Israel's estate--Herman L. Israel and Betty Ann Taylor--should be substituted for Mr. Israel.

DER is correct that Israel's liability survives him. See 20 Pa C.S. §3371, 42 Pa C.S. §8302. In addition, we may substitute the personal representatives of Israel's estate for Israel. See 20 Pa C.S. §3372. Therefore, we will deny Israel's motion to dismiss, and grant DER's request to substitute Herman L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel, for Israel.

(b) DER's Motion for Summary Judgment against Israel.

DER's motion seeks summary judgment against Herman J. Israel because he was an "operator" on the site. Although, as stated in the previous section, Israel never became the permit holder on the site, DER asserts that Israel conducted remedial work and carried on a water monitoring program while he was the owner of Ingram Coal Co. Thus, DER contends that Israel became an

"operator" under Section 3 of the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. §1396.3, and that his activities constituted "operation of a mine" under Section 315(a) of the CSL, 35 P.S. §691.315(a). As a result, DER argues that Israel can be held liable under Section 315(a) for the discharges from the site, whether he caused them or not.

Israel argues that he cannot be held responsible under Section 315(a) because he never became the permittee for the site, citing Morcoal v. Commonwealth, DER, 74 Pa Commonwealth Ct. 108, 459 A.2d 1303 (1983). Israel also argues that his reclamation and water monitoring activities do not constitute "operation of a mine" because if they do, then a multitude of parties who were always viewed as independent contractors would be engaged in "operation of a mine." Indeed, Israel contends that, under DER's construction of the term, DER itself engages in "operation of a mine" since DER conducts water sampling on mining sites. Finally, Israel contends that his actions did not contribute to or affect the discharges.

We agree with DER that Israel is responsible under Section 315(a) due to his activities which constitute "operation of a mine."[12] We recognize that this case presents an unusual situation in that Israel did not have a permit to mine the site, but responsibility under Section 315(a) is not based upon a permit, it is based upon operation of a mine. Israel cannot escape liability simply because he failed to secure a permit and, thus, operated illegally. With regard to Israel's argument that DER's interpretation of "operation of a mine" will subject independent contractors, and possibly DER itself, to liability under Section 315(a), this is not the case because DER

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[12] Section 315(a) defines operation of a mine to include, among other things, "any....work done on land or water in connection with the mine." Certainly, Israel's reclamation and water sampling come within this definition.

has restricted its definition to those who are "operators"--principals rather than agents--under SMCRA. See 52 P.S. §1396.3.

In addition, we disagree with Israel that liability is restricted to the permittee under Morcoal v. Commonwealth, DER, 74 Pa Commonwealth Ct. 108, 459 A.2d 1303 (1983). In Morcoal, the Court rejected a permittee's attempt to deflect responsibility to a third party who the permittee claimed was the actual operator of the site. This does not mean, however, that DER is precluded from assigning responsibility to an operator simply because he acted illegally and operated without a permit. In such a case, both the permittee and the de facto operator are subject to liability.

In summary, we will deny Israel's motion to dismiss, and grant DER's request to substitute the personal representatives of Israel's estate. In addition, Israel is responsible for the discharges under Section 315(a) regardless of whether he caused them or not. Therefore, we will also grant DER's motion for summary judgment against Israel.

3. Liability of Rockwood Energy and Mineral Corporation for the Discharges.

The final issue involves Rockwood's motion for summary judgment. DER did not file a motion for summary judgment against Rockwood because it believes that Rockwood's liability depends on unresolved questions of fact.

Rockwood argues that it is not responsible for the discharges because it did not conduct mining, reclamation, or any other surface mining activities at the site, and because it is not the permittee for the site. Rockwood further contends that it cannot be held responsible merely because of its contractual relationship with Israel. Finally, Rockwood argues it cannot be held liable as a successor to the Ingram Partnership.

In its response to Rockwood's motion, DER contends that it believes Rockwood conducted the final round of water sampling and made the decision to

discontinue the water monitoring program. If so, Rockwood engaged in "operation of a mine," and is subject to Section 315. However, the Department recognizes that these facts were not conclusively established at the supersedeas hearing; therefore, a hearing is necessary to address Rockwood's liability. Furthermore, DER asserts that whether Rockwood can be held responsible as a successor to Ingram Coal Co. hinges upon factual questions regarding what assets and liabilities of Ingram Coal Co. have been assumed by Rockwood.

It follows from what we stated above with regard to Israel that Rockwood engaged in "operation of a mine" if it authorized the water sampling on the site. We agree with DER that a hearing is necessary to address whether Rockwood did authorize the water sampling; therefore, we will deny Rockwood's motion for summary judgment.[13]

---

[13] We take no position on the arguments of the parties regarding successor liability.

ORDER

AND NOW, this 17th day of April, 1990, it is ordered that:

1) Herman J. Israel's motion to dismiss is denied, and DER's request to substitute Herman L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel, is granted.

2) DER's motion for partial summary judgment is granted, and summary judgment is entered against Appellants Clark R. Ingram, George M. Ingram, Gary C. Ingram, and Gregory B. Ingram (the Ingram Partnership), and also against Herman L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel.

3) The cross-motions for summary judgment filed by the Ingram Partnership and Rockwood Energy and Mineral Corporation are denied.

4) The appeals filed by the Ingram Partnership at EHB Docket No. 88-394-R and by Israel at EHB Docket No. 88-395-R are dismissed.

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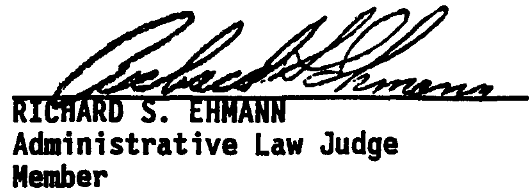

RICHARD S. EHMANN
Administrative Law Judge
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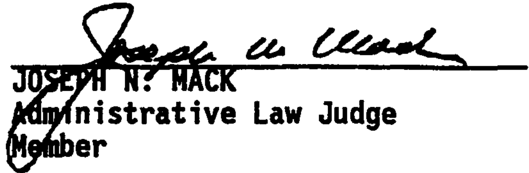

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 17, 1990

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M. DIANE SMIT
SECRETARY TO THE B

PALISADES RESIDENTS IN DEFENSE OF THE ENVIRONMENT (P.R.I.D.E.), Appellants

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee

and

BUCKS COUNTY CRUSHED STONE, INC., Permittee

EHB Docket No. 86-265-E

Issued: April 18, 1990

OPINION AND ORDER
SUR APPELLEE'S MOTION IN LIMINE TO LIMIT ISSUES

Synopsis

Because of the simultaneous issuance of the mine drainage permit and the mining permit by the Department of Environmental Resources ("DER") to Bucks County Crushed Stone, Inc. ("Bucks"), the doctrine of collateral estoppel does not bar a challenge in an appeal of the issuance of the mining permit by Palisades Residents in Defense of the Environment ("P.R.I.D.E.") of all matters mentioned in the untimely appealed mine drainage permit. Nevertheless, our prior dismissal of the untimely P.R.I.D.E. appeal of the mine drainage permit and P.R.I.D.E.'s failure to appeal Plan Approval 09-310-006B, do bar the P.R.I.D.E.'s raising of issues in this appeal which would be properly addressed in a timely appeal of the permit and Plan Approval.

OPINION

On May 26, 1986, P.R.I.D.E. filed a notice of appeal seeking review of DER's issuance of Mine Drainage Permit No. 7479SM2A2 and Mining Permit No. 300956-7974SM2-01-01 to Bucks authorizing a quarry operation in Nockamixon Township, Bucks County. These permits were issued in part under the Non-Coal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. ("Non-Coal Act").

P.R.I.D.E.'s Notice of Appeal alleges Buck's operation generates excessive noise creating a public nuisance and DER failed to condition the permits to control excessive noise; the quarry generates too much dust contrary to DER's rules, creates a public nuisance and the permit fails to control fugitive dust; the permit was issued without adequate coordination with the Bureau of Air Quality; the permits fail to include a blast plan or to provide adequate control of blasting; DER improperly waived the permit requirements under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. and 25 Pa.Code Chapter 105 and the design of the diversion structures was inadequate; DER failed to collect water samples of the receiving streams and the effluent limitations in the permits are thus invalid; the reclamation costs estimate is inadequate and the bond amount is thus too low; Bucks failed to demonstrate the post mining land use meets the criteria of the Non-Coal Act; and DER's review of the permits violated Article I, Section 27 of the Pennsylvania Constitution.

On June 11, 1986, Bucks filed a motion to dismiss P.R.I.D.E.'s appeal as untimely. We granted the motion to dismiss the appeal as to Mine Drainage Permit No. 7974SM2A2 because publication of that permit's issuance occurred

more than thirty days before the filing of P.R.I.D.E.'s appeal. See P.R.I.D.E. v. DER et al., 1986 EHB 905. We denied the motion with respect to Mining Permit No. 300956-7974SM2-01-01 since notice of this permit's issuance was never published and publication of the issuance of the mine drainage permit is not adequate notice of issuance of the mining permit.

DER filed its Motion in Limine with us on September 22, 1988. The Motion requests that the Board limit the issues in the appeal of the mining permit to the sufficiency of the bond posted by Bucks to assure site reclamation. DER argues that the mining permit was a "bonding increment" and only addressed that issue, whereas the remaining issues were all addressed in the mine drainage permit. From this fact DER argues these issues cannot be attacked in this appeal because such an attack is barred by the doctrine of collateral estoppel. Bucks joined in DER's Motion on October 7, 1988.

With the pre-hearing memoranda of Bucks and P.R.I.D.E. filed, we scheduled this matter for trial on September 26 and 27, 1988. Because of the failure of all parties to comply with Pre-Hearing Order No. 2 and the filing of DER's Motion in Limine, the hearing was cancelled.

On October 24, 1988, in response to DER's Motion, P.R.I.D.E. filed its reply, arguing that noise and dust issues can be considered in relationship to the mining permit and that the mining permit contains a waiver of 25 Pa.Code Chapter 105, thus claims as to the diversion of Anderson Creek are properly before the Board.

On April 2, 1990 this matter was assigned to Board Member Richard S. Ehmann.

In its regulation of non-coal surface mines, DER requires prospective miners to secure both a mine drainage permit and a mining permit. In the

instant case, the two permits issued to Bucks for its quarry were issued simultaneously on March 28, 1986. This fact is of critical importance because DER advances the doctrine of collateral estoppel as a bar to a hearing on most of the issues raised by P.R.I.D.E. As discussed in George and Barbara Capwell v. DER, 1987 EHB 174:

> It is a well-established precedent that one who fails to appeal a Department action directed to it cannot collaterally attack that action in a subsequent proceeding. (citing Middlecreek Coal Company v. DER, 1987 EHB 30)

Accordingly, Capwells were barred from relitigating in that appeal from DER's Order to remove fill from a lake, the prior DER denial of their permit for this fill (which Capwells had previously appealed to this Board and had dismissed because their appeal was untimely filed). The cases cited by DER are in accord. In Pittsburgh Coal and Coke, Inc. v. DER et al., 1986 EHB 704, Appellant did not challenge a mine drainage permit's issuance in 1981 but sought to challenge a 1985 correction of the mining permit as to issues in the initial mine drainage permit. In Antrim Mining, Inc. v. DER, 1988 EHB 105, Antrim attacked a 1984 DER compliance order to treat its sedimentation pond effluent to meet the effluent limitations in its 1982 mine drainage permit. Antrim's appeal said in part that the permit's effluent limitations were arbitrary, capricious, not duly promulgated and otherwise in error. DER's Motion For Partial Summary Judgment as to this challenge to the effluent limitations was sustained under the collateral estoppel doctrine. Finally, in Toro Development Company v. Commonwealth, 56 Pa.Cmwlth. 471, 425 A.2d 1163 (1981), Toro contended Sabocks' June 7, 1978 appeal from DER's issuance of a permit to build a sewage trunk line was an untimely collateral challenge to DER's 1977 approval of the township's sewage plan revision and the Court

sustained this argument.

The problem with these cases and the legions of others citing this doctrine is that they do not address the factual circumstance of the simultaneously issued permits we have before us now; rather they address successive or serial actions of DER. The doctrine properly prevents challenges of one DER action months or years after it has occurred when some subsequent other DER action taken in reliance on the finality of the former action is appealed. Here, that scenario does not play out, as there is no original action with a second action taken in reliance thereon. Accordingly, our dismissal of P.R.I.D.E.'s appeal of Bucks' simultaneously issued mine drainage permit does not raise a collateral attack bar.

Our dismissal of the appeal as to Bucks' mine drainage permit does not mean every issue raised in the notice of appeal is now fully litigable in the instant appeal. To suggest such an argument would be to go as overboard in that direction as DER's Motion would have had us go on its behalf in limiting P.R.I.D.E. It would make our dismissal of the appeal as to the mine drainage permit a meaningless act. We are not convinced we should go that far because a review of the mining permit and the mine drainage permit reveal that each permit was focused on specific environmental issues. Accordingly, we must review the issues raised in the appeal and address them on an issue-by-issue, permit-by-permit basis.

The clearest issue raised by P.R.I.D.E. but covered by the mine drainage permit's review, and thus barred by the dismissal of the appeal as to the mine drainage permit issues, is that dealing with effluent standards and water samples. Nothing in the mining permit addresses this issue, whereas the Mine Drainage Permit contains Special Conditions Nos. 1, 3, 11, and 12, all of

which deal with water encountered or generated by mining. Condition No. 11 as the best example provides:

> Discharges of water from areas disturbed by surface mining and reclamation operations must meet all applicable Federal and State Laws and Regulations, and at a minimum, the following numerical effluent limitations:
>
> Effluent Limitations, in Milligrams per liter, mg/l, except for pH

Effluent Characteristics	Maximum Allowable	Average of Daily Values For 30 Day Consecutive Discharge Days
Iron, Total		
Manganese, Total		
Total Suspended Solids	70.0	35.0
pH	between 6 and 9	

> Any overflow from facilities designed, constructed, and operated to treat to the applicable limitations, the precipitation and runoff resulting from a 10 year, 24 hour precipitation event shall not be subject to the limitations of this section.
>
> Where the application of neutralization and sedimentation treatment technology results in an inability to comply with the manganese limitation, the Department may allow the pH level in the final effluent to be exceeded to a small extent in order that the manganese limitation be achieved.

Bucks' Mine Drainage Permit Application Supplement B-1 (incorporated into the mine drainage permit when issued by part F of the permit) also addresses these water issues.

P.R.I.D.E.'s appeal also challenged the lack of a blast plan. Blasting is also addressed in the mine drainage permit and not in the mining permit. Special Condition 2 of the mine drainage permit says:

> If in the course of mining, the District Surface Mine Conservation Inspector deems the established blasting practices are insufficient to insure adequate protection regarding health and safety procedures, existing adjacent land use, or adjacent stream use, blasting shall cease until a corrected blasting plan is approved by the Pottsville District Office.

Accordingly, the blasting issues will not be considered in P.R.I.D.E.'s challenge to the mining permit's issuance.

Supplement D-1 of the mine drainage permit and the drawings attached to the application for permit (which are also incorporated into the permit by part F of the permit) deal with P.R.I.D.E.'s issues as to the diversion of Anderson Creek and compliance with both the Dam Safety and Encroachments Act, supra, and 25 Pa.Code Chapter 105. Supplement D-1 states:

> STREAM
> (a) Will this operation involve the relocation of any watercourse or stream? yes (Anderson Creek)
>
> (b) What is the area of the watershed above the relocation of the stream? 107.5 acres
>
> (c) Have you obtained a permit from the Water and Power Resources Board to do this? Waiver
>
> (d) Will any mining and/or the placing of spoil be within 100' of the stream? No (Rapp Creek)
>
> (e) Have any provisions been made to prevent the possible break thru of any stream into the operation? yes
>
> If so, what are they?
>
> Anderson Creek will be diverted around the area of extraction for the active life of the mine. See Sheets 1 and 2 for location and details of the diversion and attached design criteria. Also, a continuous berm will run along the bank of Rapp Creek adjacent to the quarry site. See Sheet 1.

P.R.I.D.E. states this issue is also covered by the mining permit but our review of the mining permit does not disclose such coverage. Accordingly, it may not be raised further by P.R.I.D.E. in this appeal.

P.R.I.D.E. raises air pollution from the quarry operation in challenging this mining permit. In response, DER states it issued Bucks an air pollution Plan Approval No. 01-310-006B as to the stone crusher and screen to be operated at this site and that P.R.I.D.E. did not appeal that permit's

issuance. Nothing in P.R.I.D.E.'s response challenges the truth of DER's assertion. Accordingly, under Pittsburgh Coal and Coke, Inc. v. DER, supra, we hold that P.R.I.D.E. is barred from raising air pollution issues in this appeal as to the stone crusher and screen. However, the mining permit clearly directs Bucks to comply with the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001. Nothing in the mine drainage permit appears to address this issue. Moreover, air pollution is a proper issue to consider in issuing permits for a mining operation. Kwalwasser v. DER, 1986 EHB 24, Snyder Township Residents for Adequate Water Supplies v. DER et al., 1988 EHB 1202. Accordingly, air pollution matters not involving the stone crusher and screen are properly before us.

Noise issues are also before us. Historically, when DER regulated noise, it did so through its Bureau of Air Pollution Control (at one time known as the Bureau of Air Pollution and Noise Control). Further, neither permit clearly states it addresses this issue, but DER is required to address noise during the permit issuance process. Snyder Township Residents for Adequate Water Supplies v. DER, supra. While DER's Motion states that if DER were to address noise at this mine, DER would do so through the mine drainage permit, P.R.I.D.E.'s Response says noise must be addressed in issuance of a mining permit. The cases cited by P.R.I.D.E. for its contention are not of great help on this point. Setliff v. DER, 1986 EHB 296, deals with an appeal of a mine drainage permit for a coal mine. Glasgow Quarry, Inc. v. DER, 1974 EHB 308, deals with a non-coal surface mine, but addresses blasting and blasting noise. Nevertheless, where it is not currently clear where and when noise issues are evaluated in the permit issuance process and the parties dispute this fact, it is inappropriate for us to grant a general motion

barring consideration of noise issues in any fashion. This issue will thus be before us at the hearing.

The question of reclamation cost is also still before us in the appeal of this mining permit. Reclamation cost was considered in part in the issuance of the mine drainage permit, as is evident from Supplement F-1. The supplement contains a Reclamation Narrative and an estimate of cost of the major reclamation steps. As to costs, the narrative states:

> Estimated costs of major reclamation steps are as follows.
>
> | | | |
> |---|---|---|
> | Earthwork: 30,000 c.y. @ $1.00 | = | $30,000 |
> | Demolition and Removal of Buildings and Plant Facilities | = | 10,000 |
> | Removal of Temporary Stream Channel Diversion | = | 1,000 |
> | Removal of Sedimentation Ponds | = | 1,000 |
> | Revegetation: 40 acres @ $450/acre | = | 18,000 |
> | TOTAL | | $60,000 |

At the same time, reclamation costs were also considered by DER in issuing the mining permit. The mining permit contains an entire page where DER calculates the surety bond to be $97,470.00, not the $60,000.00 in Supplement F-1 of the mine drainage permit. This bond is to insure compliance with the applicable statutes and regulations during mining and reclamation. Why the reclamation costs were considered in both permits has not been explained to us by the parties, but this is irrelevant at this point in time in this case.

P.R.I.D.E.'s notice of appeal specifically challenges the reclamation cost estimates in Bucks' mine drainage permit. Clearly this issue is not before us because of our dismissal of the appeal as to the mine drainage permit. Any issues as to the bonds not foreclosed by this limitation are still before us, however. These could include bond amount calculation (as

suggested by DER's Motion); questions about the bond's adequacy if it must assure Bucks control of air and noise problems; or issues related to bonds and P.R.I.D.E.'s "Article I, Section 27" contentions.

P.R.I.D.E. also raises post mining land use and contends in its Notice of Appeal that Bucks fails to show compliance with the Non-Coal Act's criteria for post mining land use in its application. While DER's Motion does not address this contention specifically, it does seek to bar P.R.I.D.E. from raising issues not properly in an appeal of a mine drainage permit. Clearly, in review of reclamation plans in the mine drainage permit, DER addresses the post mining land use. This issue is specifically addressed in Supplement F-1 of the mine drainage permit, which states in part:

> (b) State the proposed use following reclamation.
> The proposed use is a water impoundment with vegitated slopes"

Accordingly, this issue is also foreclosed to P.R.I.D.E. in this appeal.

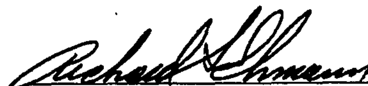
Finally, P.R.I.D.E.'s Notice of Appeal raises DER's failure to comply with Article I, Section 27 of the Pennsylvania Constitution in reviewing these permits. Clearly, DER must comply therewith in issuance of the mining permit. Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86 (1973), affirmed 468 Pa. 226, 361 A.2d 263 (1976). This issue is thus unavoidably before us as to the mining permit.

Thus we enter the following Order.

O R D E R

AND NOW, this 18th day of April, 1990, upon consideration of DER's Motion In Limine, it is ordered that the motion is granted in part and denied in part. Based upon P.R.I.D.E.'s Notice of Appeal and our Opinion and Order found at 1986 EHB 905, P.R.I.D.E.'s appeal of DER's issuance of the mining permit to Bucks is limited to the issues set forth in our foregoing opinion, i.e., noise, air pollution, bonding, and Article I, Section 27 of the Pennsylvania Constitution. Further, having disposed of this Motion, the Board shall schedule this matter for trial at the Board's earliest available date.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 18, 1990

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M. DIANE SMI
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MR. & MRS. PETER A. KRISS,
Appellants

and CATHERINE McKNIGHT, CORIENA GARLETTS, CONNELLSVILLE AREA SCHOOL DISTRICT, and PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION,
Intervenors

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

and CHRISTOPHER RESOURCES, INC.,
Permittee

EHB Docket No. 88-036-MJ
(Consolidated)

Issued: April 19, 1990

OPINION AND ORDER SUR
MOTION TO REOPEN DISCOVERY
MOTION TO COMPEL DISCOVERY
MOTION TO BAR A WITNESS

Synopsis

Discovery will not be reopened where it has already been available for six months, nor will it be permitted to broaden the issues before the Board. A witness will not be barred because of a potential or hypothetical conflict of interest.

OPINION

This matter was initiated February 11, 1988 by Mr. and Mrs. Peter Kriss (Kriss) filing a notice of appeal from the issuance of Surface Mining Permits Nos. 26850112 and 26850112(C) to Christopher Resources, Inc.

(Christopher) for a surface mine in Dunbar Township, Fayette County, Pennsylvania. The appeal was docketed at 88-036 and alleges that the Isaac Meason house, an historic structure owned by Krisses, would be damaged by the blasting authorized by the permits. The permits specifically provided that no blasting was to take place prior to the issue of a blasting plan approval. This approval was issued by the DER to Christopher Resources, Inc. (Christopher) on March 22, 1989. This plan approval was appealed by Kriss on April 21, 1989 at EHB Docket No. 89-106. This same plan approval was appealed by Christopher on April 21, 1989 at EHB Docket No. 89-107. In addition, Christopher filed an appeal at 89-108 on the basis that the blast plan spproval of DER was for a small part (the 01 increment) of the permit and rejected blasting on the balance of the permits as proposed by the appellant Christopher. Thereafter, on June 6, 1989, the Pennsylvania Historical and Museuum Commission (PHMC) sought to intervene at this Docket No. 88-036 and at Docket Nos. 89-106, 89-107 and 89-108. Intervention was granted at each of the dockets listed on June 27, 1989. On July 7, 1989 all of the dockets, i.e. 88-036, 89-106, 89-107 and 89-108 were consolidated at 88-036 by Board order. Two other parties, i.e. Connellsville Area School District and Catherine McKnight, together with Corina Garletts, were granted intervention in the Docket No. 88-036 by Board order dated August 10, 1988, and were therefore included in the consolidation in July of 1989.

Discovery in EHB cases is usually delineated in the Pre-Hearing Order No. 1 as limited to 75 days from the date of the order. In this case,

however, discovery has continued by motion of one or more of the parties[1] on numerous occasions until January 15, 1990. The docket indicates that discovery was available to PHMC beginning in May of 1989 and running continuously until January 15, 1990.

We are now asked to rule upon a three-pronged motion by PHMC which seeks to reopen discovery, compel specific discovery and bar the use of a witness listed in the pre-hearing memorandum of DER. We will address each motion separately.

Motion to Reopen Discovery

This reopening of discovery sought by PHMC is directed principally at the testimony of an employee of DER known to be an expert. This knowledge was available to PHMC during all of the discovery period. The counsel for PHMC indicates that had she known of a letter or report, she would have deposed him, and now wants to do so. There is a proper procedure to discover and depose an expert witness, found in Pa.R.C.P. 4003.5. This Board recently dealt with a similar situation in Gordon and Janet Bock v. DER, 1990 EHB ____, issued February 9, 1990. We do not propose to extend discovery for this purpose for an additional period.

Motion to Compel Discovery

The matter which is sought by PHMC in its motion to compel discovery is the remote and, in the opinion of this Board Member, irrelevant relationship of James Filiaggi to some of the background of the permittee. Counsel for PHMC set forth the limits of its inquiry when it requested intervention. It represented then to the Board "that counsel would attend the

---

[1]The docket indicates that four of the extensions were at the specific request of PHMC separately or with one or more other parties.

hearings, put forth and examine witnesses regarding the effect of the proposed project on the Meason House and adjacent archaeological resources and cross-examine any other witnesses who would be testifying regarding those issues." The motion to compel discovery goes substantially beyond this statement and will unnecessarily broaden the issues, and will therefore be denied. Franklin Township Board of Supervisors, 1987 EHB 853.

Motion to Bar a Witness

PHMC asks the Board to bar a witness on the basis that an expert witness has rendered an opinion for DER and is now listed by the permittee as a witness for the Permittee. PHMC also raises the question of the same expert's participation in settlement negotiations. These may be all legitimate questions at time of hearing and may have some bearing on the weight to be accorded the testimony of the witness, but are not a basis for barring his testimony.

O R D E R

AND NOW, this 19th day of April, 1990, the Board enters the following orders.

1) Discovery in the within-captioned case is closed and will not be reopened.

2) The Board will not compel discovery with respect to James Filiaggi.

3) The Board will not bar D. T. Froedge as a witness.

4) Any amendments to pre-hearing memoranda shall be filed within twenty (20) days of this order. Such amendments shall not raise new issues or broaden any issues previously raised.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 19, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

ROBERT L. SNYDER AND JESSIE M. SNYDER, et al.	:	**EHB Docket No. 79-201-R**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 27, 1990

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

Motion for summary judgment on the forfeiture of various bonds posted for mining permits is granted where it is established through Appellants' responses to requests for admissions and Appellants' failure to specifically dispute the material facts alleged by the Department that the forfeiture action was justified. Because the Board's review is *de novo*, evidence gathered subsequent to the forfeiture may be used to support the propriety of the Department's action.

OPINION

The procedural history of this matter is recounted in the Board's May 2, 1989, opinion dismissing as moot those portions of the consolidated appeals relating to Mining Permit (MP) Nos. 847-4(A) and 847-5. Presently before the Board for disposition is the Department of Environmental Resources' (Department) January 21, 1988, motion for partial summary judgment relating to its forfeiture of the bonds posted in connection with MP Nos. 847-1(A), 847-6, and 847-6(A), which are encompassed by Mine Drainage Permit (MDP) No. 3672SM1,

and MP Nos. 847-8 and 847-8(A), which are encompassed by MDP No. 3075SM5. The Department generally alleges that Appellants[1] violated the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (SMCRA), the rules and regulations promulgated thereunder, and the terms and conditions of its permits and that, as a result, the Department had a mandatory duty under §4(h) of SMCRA to forfeit the bonds related to these permits. The Department further contends that Appellants affected all of the acreage on the permits and, therefore, the Department was entitled to the entire amount of the bonds. Alternatively, the Department requests that it be granted partial summary judgment on the issue of the propriety of the forfeitures.

Appellants responded to the Department's motion on March 15, 1988, challenging the Board's authority to dispose of this matter by summary judgment in light of 1 Pa.Code §35.180(a). Appellants also argue that even if the Board had the power to grant summary judgment, the Nanty Glo rule, explained below, would preclude it from doing so in this case. They assert that questions of material fact remain which prohibit the grant of summary judgment, that, in the case of MP Nos. 847-6 and 847-6A, the Department cannot rely upon evidence gathered long after the bond forfeiture as a basis for the grant of summary judgment, and that the Department was estopped from forfeiting the bonds. We will first address Appellants' general arguments.

Appellants dispute the Board's authority to grant a motion for summary judgment. Contrary to Appellants' assertion, the Commonwealth Court ruled in Summerhill Borough v. Department of Environmental Resources, 34

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[1] We will use the term Appellants to refer to Robert and Jessie Snyder and AH and RS Coal Company. AH and RS joined in the Snyders' response to the motion for summary judgment on March 15, 1988.

Pa.Cmwlth 574, 383 A.2d 1320 (1978), that the Board had the power to grant summary judgment. As for 1 Pa.Code §35.180, it is true that this section of the General Rules of Administrative Practice and Procedure does not permit the Board Member to whom a matter is assigned for primary handling to rule on any motion which disposes of a matter. However, the Board's own rule at 25 Pa.Code §21.86 is completely consistent with this rule, since any final decision, such as the grant of a motion for summary judgment, must be by a majority of the Board's Members.

The Nanty Glo rule, which was enunciated in Nanty Glo v. American Surety, 309 Pa. 236, 163 A 523 (1932), stands for the proposition that affidavits of the moving party are an insufficient basis for the grant of summary judgment because the trier of fact cannot assess the credibility of the affiants. However, the grant of summary judgment (assuming the other elements are established) in this matter is not barred by the Nanty Glo rule, since the affidavits are supplemented by Appellants' admissions and other documentary evidence.

We turn now to the parties' arguments relating to the individual mining permits.

MP No. 847-1(A)

With respect to MP No. 847-1(A), the Department alleges that Appellants, by their own admission, failed to adequately backfill and regrade the permit area concurrent with mining, conducted mining within a gas line barrier without first taking the necessary precautions to prevent rupturing of the gas line, and mined outside the bonded area. The Department then argues that liability under the bond accrues in proportion to the amount of acreage affected and that since Appellants also admitted that they affected all of the acreage encompassed by the $13,000 surety bond posted for the permit, the

Department's forfeiture of the entire bond amount was appropriate. Appellants argue that there are questions of material fact regarding the exposed gas pipeline on MP No. 847-1(A) and provided the affidavit of Robert L. Snyder, president of AH and RS, to support this contention.

Whether there are disputes between the parties regarding the gas pipeline is immaterial, for other violations which would trigger mandatory forfeiture have been established. Appellants have admitted that there are open pits on MP No. 847-1(A) (Response to Request for Admissions No. 3); that abandoned gas lines of Buckeye Pipeline Company were hanging in the highwall adjacent to MP No. 847-1(A) (Response to Request for Admissions No. 5), and that no reclamation was performed on the site of MP No. 847-1(A) since 1978 (Response to Request for Admissions No. 9). These conditions constitute violations of 25 Pa.Code §§87.141 to 87.148 (open pits, failure to conduct reclamation) and 25 Pa.Code §209.34 and, therefore, the Department's forfeiture of the bonds was mandated by SMCRA, James E. Martin v. DER, 1988 EHB 1256, aff'd, No. 101 C.D. 1989 (Pa.Cmwlth. Feb. 8, 1990). Appellants' arguments that reclamation could not be completed because of the Department's refusal to renew AH and RS's mining license are no defense to the forfeiture, for the obligation of AH and RS to reclaim the site of MP 847-1(A) existed independently of the issue of AH and RS's future ability to conduct surface mining operations.[2] Since violations sufficient to trigger bond forfeiture have been established and since Appellants have admitted to affecting all of the acreage on MP No. 847-1(A) (Response to Request for Admissions No. 4), the Department is entitled to summary judgment and its forfeiture of the $13,000 bond associated with MP No. 847-1(A) will be sustained.

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[2] Appellants raised this argument with regard to all the permits.

MP No. 847-6

With respect to MP No. 847-6, a 22 acre site in Perry Township, Clarion County, the Department contends that Appellants caused or allowed the discharge of mine drainage from the site in violation of 25 Pa.Code §87.102 and that Appellants' failure to contest 1986 compliance orders citing these violations and Appellants' failure to satisfy their obligation to treat mine drainage pursuant to the terms of a 1980 amended Consent Decree (Amended Consent Decree) in Commonwealth Court establish these violations. The Department also offers the affidavit of Richard Stempeck to establish these violations. Asserting that these violations compel bond forfeiture, the Department contends that the entire acreage was affected and that it, therefore, is entitled to summary judgment on the propriety of its forfeiture of the $12,650 surety bond posted for this permit. Appellants do not dispute the Department's contentions regarding violations of the Amended Consent Decree. With regard to the unappealed compliance orders and the bond release denial, Appellants assert that their counsel did not receive copies of the orders. And, finally, Appellants argue that the unappealed compliance orders and bond release denial cannot be used as the basis for the entry of summary judgment in the Department's favor because these events occurred long after the forfeiture.

We will initially address Appellants' argument that the entry of summary judgment in the Department's favor on MP No. 847-6 is inappropriate because it is based upon evidence gathered long after the forfeiture. In particular, Appellants object to the Department's contentions regarding the

1986 compliance orders and the 1985 completion report denial.[3] The Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, and its predecessor statute, §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, empower the Board to conduct a *de novo* review of the Department's actions. The Commonwealth Court interpreted the nature of that *de novo* review in Warren Sand and Gravel Co., Inc. v. Commonwealth, Department of Environmental Resources, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975), as imposing a duty upon the Board to determine whether the Department's action can be sustained or supported by the evidence taken by the Board.[4] The Board's decisions have been consistent with the concept of review set forth in Warren Sand and Gravel. In Township of Salford et al. v. DER and Mignatti Construction Company, 1978 EHB 62, 77, we held that in reviewing a Department action we were not restricted to a review of the Department's determination and allowed expert testimony not developed prior to the Department's action. Similarly, in Pennsylvania Game Commission v. DER et al., 1985 EHB 1, 19, we sustained the issuance of a solid waste permit where the Department sought to support it with a re-evaluation of the data on which its decision was based. And, in Melvin D. Reiner v. DER, 1982 EHB 183, we sustained the Department's forfeiture of surface mining bonds on the basis of reasons set forth in the Department's pre-hearing memorandum and evidence concerning the condition of

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[3] The 1985 completion report denial also pertained to MP No. 847-6(A), but it is unnecessary to address this contention for the reasons stated, *infra*.

[4] "In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's fact-finding hearing." 341 A.2d at 565.

the site at the time of the hearing. We see little difference between the Reiner appeal and the matter now before us.

Here, we believe that the Consent Decree at No. 1015 C.D. 1978 approved by the Commonwealth Court on June 21, 1978 (Exhibit L to the Department's motion for summary judgment); the contempt proceedings initiated by the Department against Appellants for their failure to abide by the Consent Decree which resulted in the Commonwealth Court's order of November 29, 1978 (Exhibit K to the Department's motion for summary judgment); and the contempt proceedings initiated by the Department on April 3, 1980, as a result of Appellants' alleged failure to comply with the Commonwealth Court's order of November 29, 1978, which culminated in the Amended Consent Decree of October 21, 1980, all provide adequate bases for the Department's bond forfeiture. The Consent Decree, the Commonwealth Court's November 29, 1978, order, and the Amended Consent Decree all recognize Appellants' failure to perform the required reclamation on MP No. 847-6.[5] Indeed, it appears that Appellants did not contest the fact that they had failed to perform their reclamation obligations, but rather, offered their lack of assets and related bankruptcy proceedings as justification for their failure to comply with the Commonwealth Court's November 29, 1978, order. Thus, we need not even address the allegations of the Department regarding Appellants' failure to perform reclamation by May 15, 1981, as required by the Amended Consent Decree, because Appellants' other actions/inactions were, in and of themselves, sufficient to warrant forfeiture of the bond.

Furthermore, Appellants' response to the Department's motion for summary judgment leads to the conclusion that summary judgment in the

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[5] Also MP Nos. 847-6A, 847-8, and 847-8A.

Department's favor is warranted. When a summary judgment motion is filed, it is unnecessary for the non-moving party to formally respond or file opposing affidavits if the non-moving party is satisfied it can defeat the motion on its merits. Wright v. North American Life Assur. Co., 372 Pa.Super. 272, 539 A.2d 434 (1988). But, Pa.R.C.P. No. 1035(d) provides that:

> ...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

With regard to MP No. 847-6, Appellants did not dispute the Department's contentions in Paragraph 23 of Section II-T of the motion for summary judgment that Appellants had failed to complete the reclamation for MP No. 847-6 required by the Amended Consent Decree; this contention is supported by Inspector Stempeck's affidavit (Exhibit 5 to the Department's motion for summary judgment). The Amended Consent Decree, as we have previously stated, came about as a result of contempt proceedings initiated by the Department in response to Appellants' failure to abide by the Commonwealth Court's order of November 29, 1978. The failure to reclaim is a violation of Appellants' permits, SMCRA, and the rules and regulations adopted thereunder and, therefore, forfeiture of the bond was mandated by §4(h) of SMCRA.

Liability under the bond posted with MP No. 847-6 accrues in proportion to the acreage affected (Exhibit N to the motion for summary judgment). Appellants have not disputed the allegation in Paragraph 12 of Section II-T of the Department's motion which is supported by Inspector Stempeck's affidavit

(Exhibit S to the Department's motion for summary judgment) that the entire acreage of MP No. 847-6 was affected. Therefore, the Department is entitled to forfeiture of the entire bond amount.

MP No. 847-6(A)

With regard to its forfeiture of the $5000 surety bond posted with MP No. 847-6(A), the Department argues that it is entitled to summary judgment because of Appellants' admission that topsoil was not spread on the area encompassed by MP No. 847-6(A) (Appellants' Response to Request for Admissions No. 31), Appellants' failure to appeal the Department's 1985 denial of Appellants' 1977 request for bond release, and Appellants' failure to comply with the Amended Consent Decree. The Department also offers the 1988 affidavit of an inspector to establish the existence of these violations. Appellants contend that the Department failed to establish that its forfeiture was justified at the time the Department took the action. We do not agree.

Although Appellants' failure to comply with the Amended Consent Decree justified bond forfeiture, Appellants had committed violations long before the May 15, 1981, deadline in the Amended Consent Decree. The Department's Request for Admissions was filed with the Board on March 31, 1980, as an attachment to a petition for discovery. The Board granted the Department's petition in an April 25, 1980, order and Appellants responded to the request on or about June 2, 1980, the date of Robert L. Snyder's affidavit verifying the Appellants' responses. In responding to Request No. 31, Appellants admitted that no topsoil was spread on MP No. 847-6(A) (Exhibit T to the Department's motion for summary judgment) and, therefore, since this is a violation of 25 Pa.Code §§87.140-87.145, the Department was mandated to forfeit the bond posted with MP No. 847-6(A). Morcoal v. Commonwealth of Pennsylvania, Department of Environmental Resources, 74 Pa.Cmwlth 108, 459

A.2d 1303 (1983). Although liability under the bond posted with MP No. 847-6(A) accrues per acre affected, there is a minimum liability of $5000 under the bond (Exhibit U to the Department's motion for summary judgment) and, consequently, it was not necessary for the Department to establish the acreage affected on MP No. 847-6(A). Therefore, since there is no genuine issue of material fact regarding Appellants' failure to reclaim and the Department is entitled to judgment as a matter of law both as to the propriety and amount of the bond forfeiture, we will grant the Department's motion for summary judgment with respect to MP No. 847-6(A).

MP Nos. 847-8 and 847-8A

With respect to MP Nos. 847-8 and 847-8A, the Department argues that it is entitled to summary judgment because Appellants failed to adequately backfill and regrade the permit areas concurrent with mining, failed to complete reclamation in accordance with the approved reclamation plans incorporated in the permits, allowed water to accumulate in open pits, did not properly dispose of acid-forming materials, and did not limit the length of open cuts to a maximum of 1500 linear feet. The Department further contends that Appellants affected 28 of the 30 acres encompassed by MP No. 847-8 and 15 of the 59 acres encompassed by MP No. 847-8A, and that because liability under the bonds accrues in proportion to the acreage affected, the Department is entitled to forfeit $28,000 of the $30,000 surety bond posted for MP 847-8 and $15,000 of the $59,000 surety bond posted with MP No. 847-8A. In responding to the Department's motion, Appellants did not dispute these contentions (which were set forth in Paragraphs 17 and 26 of Section III-N of the Department's motion for summary judgment and supported by Inspector Odenthal's

affidavit (Exhibit AA to the Department's motion for summary judgment)), but rather objected on the basis that these events occurred after the forfeiture of the bonds.

For the reasons explained, *supra*, we reject the Appellants' arguments concerning the use of post-forfeiture evidence. In addition, Appellants' responses to the Request for Admissions were dated June 2, 1980, and therein Appellants admitted that three acid impoundments existed on MP No. 847-8 (Request for Admission No. 35) and that there was no backfilling equipment on the site of MP No. 847-8 (Request for Admission No. 36). And, finally, Appellants failed to specifically dispute the contentions regarding MP Nos. 847-8 and 847-8A in Paragraphs 17 and 26 of Section III-N of the Department's motion for summary judgment and in Inspector Odenthal's affidavit, which the Department offered in support of the contentions in Paragraph 17 of Section III-N of its motion. Indeed, because Pa.R.C.P. No. 1035(d) requires the non-moving party to respond and set forth facts showing that there is a genuine issue of fact for trial, Paparelli v. GAF Corp. 379 Pa.Super.62, 549 A.2d 597 (1988), and Appellants have failed to do so, we must conclude that there are no genuine issues of material fact regarding the conditions on the site. These conditions constituted violations of the terms and conditions of MP Nos. 847-8 and 847-8A and MDP No. 3075SM5, the Clean Streams Law, SMCRA, and the rules and regulations adopted thereunder. Consequently, the Department was mandated to forfeit the bonds.

Appellants also have not disputed the Department's allegations regarding the acreage affected on MP Nos. 847-8 and 847-8A; these allegations were set forth in Paragraph 26 of Section III-N of the motion and supported by Inspector Odenthal's affidavit (Exhibit AA to the Department's motion for summary judgment). As a result, Pa.R.C.P. No. 1035(d) compels us to conclude

that there is no genuine issue of material fact regarding the acreage affected on MP Nos. 847-8 and 847-8A. Because liability under the bonds accrues based on the acreage affected (Appellants' Response to Paragraphs 60 and 66 of the Department's Request for Admissions Directed to AH and RS Coal Corporation - First Set)[6] the Department is entitled to forfeit $28,000 of the $30,000 surety bond for MP No. 847-8 and $15,000 of the $59,000 surety bond for MP No. 847-8A.

Since we have already dismissed the appeal as it relates to MP Nos. 847-4(A) and 847-5 as moot and are now granting summary judgment in the Department's favor on MP Nos. 847-1(A), 847-6, 847-6(A), 847-8 and 847-8A, the only remaining portions of the appeal relate to MP Nos. 847-2 and 847-2(A).[7]

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[6] The responses were verified by Robert L. Snyder.

[7] The Department advised us on January 19, 1988, in its letter transmitting this motion for filing that it would be filing a document evidencing the amicable resolution of the appeal as it related to these two mining permits. No such document has been filed.

O R D E R

AND NOW, this 27th day of April, 1990, it is ordered that:

1) The Department of Environmental Resources' motion for summary judgment is granted with respect to MP Nos. 847-1(A), 847-6, 847-6(A), 847-8, and 847-8(A); and

2) On or before May 29, 1990, the parties shall advise the Board whether they have amicably resolved the appeal as it relates to MP Nos. 847-2 and 847-2(A).

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

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

DATED: April 27, 1990

cc: See next page

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

CITY OF HARRISBURG :
:
v. : **EHB Docket No. 88-120-F**
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued:** April 30, 1990
and PENNSYLVANIA FISH COMMISSION, Intervenor

OPINION AND ORDER SUR
NINE MOTIONS REGARDING DISCOVERY

By Terrance J. Fitzpatrick, Member

Synopsis

The Board issues an Opinion and Order resolving nine motions which the parties have filed during the course of the discovery process. DER is compelled to provide information which relates to its actions upon other requests for Certification pursuant to Section 401 of the Federal Clean Water Act, 33 USC §1341. DER need not, however, provide to the City copies of its files regarding these other actions--DER is only required to allow the City to inspect the files. DER is also compelled to provide information, both documents and deposition testimony, regarding its policies and procedures for deciding Certification requests generally, and the City's request in particular. Information regarding these policies and procedures is relevant, and discovery of this information is not barred by the Attorney-Client privilege, the Attorney Work Product privilege, or the Deliberative Process privilege.

The City will be compelled to provide copies of documents which it allowed DER's counsel to inspect. However, DER must comply with the Rules of Civil Procedure relating to non-parties to obtain discovery of other documents in the possession of Acres International Corp. Acres is entitled to be represented by its own counsel in this proceeding. The City will not be compelled to bring to the deposition of the project's manager all files and documents which "touch or concern" the project since this request is overbroad and unduly burdensome.

Finally, the discovery period will be extended to July 20, 1990.

OPINION

This proceeding involves an appeal by the City of Harrisburg (City) from the denial by the Department of Environmental Resources (DER) of the City's request for water quality certification pursuant to Section 401 of the Federal Clean Water Act, 33 USC §1341. The project for which the City sought certification is the Dock Street Dam and Lake Project, a proposed hydro-electric dam to be constructed across the Susquehanna River.

The procedural status of this case can be summarized as follows.[1] On October 6, 1988, we issued an opinion and order granting in part, and denying in part, the City's motion to limit issues. The practical effect of this ruling was to bar DER from introducing evidence in support of three grounds which DER had relied upon in its denial letter--the inundation of wetlands, the effect of the project on fish migration, and the effect on aquatic resources resulting from physical changes in the river. On March 29, 1989, we issued an opinion and order which denied DER's request that we reconsider our earlier decision. These rulings on the scope of the issues are

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[1] For a more complete recitation of the procedural history, see City of Harrisburg v. DER, 1989 EHB 365, 1989 EHB 373.

pending before Commonwealth Court. Commonwealth, DER v. City of Harrisburg, 966 C.D. 1989. In the meantime, the parties have engaged in the process of discovery to prepare for the hearing before the Board.

This Opinion and Order addresses nine motions filed by the parties during the discovery process. We will discuss these motions individually.

1. **DER's Motion for Protective Order (filed on November 30, 1989)**

In this motion, DER requests that the Board protect it from all discovery by the City directed at five areas: 1) documents prepared by counsel for DER regarding the City's request for water quality certification (certification); 2) any communications at meetings attended by DER's counsel to discuss legal issues, strategies, and tactics regarding the City's request for certification; 3) documents regarding DER's policy on certification decisions; 4) any communication at meetings concerning DER's policy on certification decisions; and 5) any requests for information regarding DER's decisions on other requests for certification. DER asserts that it should be protected from discovery in these areas based upon the Attorney-Client privilege, the Attorney Work Product privilege, that supplying copies of the documents would be unduly burdensome, that the information sought is neither relevant nor likely to lead to discovery of relevant information, and that the information sought is protected by the Governmental Deliberative Process privilege.

The City filed a response. The City argues that neither the Attorney-Client privilege nor the Attorney Work Product privilege protects communications (oral or written) regarding DER's handling of certification requests in general, or the City's request in particular. The City contends that it is entitled to discover information regarding the Department's decision-making process. The City also argues that information regarding

other certification decisions by DER is relevant because the City is alleging that DER engaged in discriminatory enforcement, citing Tenth Street Building Corp. v. DER, 1987 EHB 151, 154. Furthermore, the City points out that supplying this information would not be unduly burdensome because the City would be willing to go to DER's regional offices to inspect the files and copy documents. Finally, the City contends that the Board does not recognize the validity of the Deliberative Process privilege.

Discovery in Board proceedings is governed by the Pennsylvania Rules of Civil Procedure. See 25 Pa. Code §21.111. In general terms, discovery is available regarding any information, not privileged, which is relevant to the subject matter of the proceeding. Pa. R.C.P. 4003.1. Relevance is construed broadly for purposes of discovery. Texas Eastern Gas Pipeline Co. v. DER, 1989 EHB 186, 187. Regardless of relevance, Rule 4011(b) bars discovery which would cause "unreasonable . . . . burden or expense."

With regard to information concerning DER's decisions on other requests for certification, we find that this information may be discovered by the City. Board precedent indicates that information concerning other decisions by DER may be relevant where a party raises the argument that DER's action was discriminatory or arbitrary and capricious. Tenth Street Building Corp. v. DER, 1987 EHB 151, 154, DER v. Texas Eastern Gas Pipeline Co., 1989 EHB 186, 188, 191. However, we do agree with DER that it would be unduly burdensome to require it to produce copies of all of this material to the City. Instead, DER should make its files on other certification decisions available to the City for inspection. If those files are in DER's regional offices, DER need only make them available at those regional offices. To the extent the City wishes to depose DER employees on other certification decisions, it may do so, but DER need not bring the files to the depositions

and the employees need not review these files prior to the depositions.

The other categories of information DER seeks to protect are similar, and we will discuss them together. DER seeks to protect from discovery any communication within DER regarding the policy for reviewing certification requests. DER also seeks to protect any communication, oral or written, to or from its counsel regarding DER's decision on the City's request for certification.

The Deliberative Process privilege does not apply here because this privilege is not recognized in Pennsylvania. Commonwealth, DER v. Texas Eastern Transmission Corp., ___ Pa. Commonwealth Ct. ___, 569 A.2d 382 (1990).

The Attorney-Client privilege does not apply to the information described in DER's motion. This privilege applies only to confidential communications made to an attorney by his client. See, 42 Pa. C.S. §5928. The purpose of the privilege is to aid the administration of justice by encouraging clients to divulge information to attorneys. Cohen v. Jenkintown Cab Co., 238 Pa. Superior Ct. 456, 357 A.2d 689 (1976). Communications from DER personnel to DER lawyers regarding the City's request are not privileged because they are not confidential communications from a client to an attorney. When DER's lawyer's contribute to a DER adjudicatory decision, their function cannot be separated from that of DER itself. In such a case, the lawyers are but one of the different types of specialists who may contribute to the decision, and communications to lawyers which are part of this process could no more be assumed to be privileged than other communications between agency personnel. The same can be said with regard to communications to DER lawyers concerning the policy for reviewing certification requests generally. When DER's lawyers contribute to formation of DER's policies, their function cannot be separated from that of the Department itself. Moreover, if the purpose of

the privilege is to aid the administration of justice, it is doubtful whether that purpose is advanced by shielding from public view communications concerning the standards which DER applies to certification requests in general, and which DER applied to the City's request in particular.[2]

We also reject DER's assertion of the Attorney Work Product privilege to the extent DER attempts to use this privilege to shield its adjudicatory decision-making process. This privilege applies to "disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories . . . ." Pa. R.C.P. 4003.3. To the extent an attorney employed by a government agency contributes to an adjudicatory decision, the attorney's function cannot be separated from the client's function of rendering a decision. In this situation, rather than acting as the client's legal representative, the attorney is acting in a role which cannot be separated from the role of the client.[3]

In summary, we will deny DER's motion for protective order, except that DER need only provide access to its files concerning other certification requests.

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[2] In determining whether protecting these communications aids the administration of justice, we note the General Assembly's statement that the public's ability to "witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government. . . ." Section 2 of the Sunshine Act, Act of July 3, 1986, P.L. 388, No. 84, 65 P.S. §272(a).

[3] Our ruling here should not be construed as saying that DER may never assert the Attorney-Client and Attorney Work Product privileges. We are only saying that DER may not use these privileges to prevent disclosure of its adjudicatory decision-making processes.

2. **The City's Motion to Compel Answers to Interrogatories (filed December 19, 1989).**

The City's motion and DER's response raise many of the same issues which were involved in DER's motion for protective order. The City has moved to compel DER to answer interrogatories to which DER had filed objections. Those objections fall into five categories:

> 1) A general objection to all the interrogatories to the extent they seek information received or obtained after DER issued its decision denying certification.
>
> 2) That the information sought is subject to the Attorney-Client and Attorney Work Product privileges. (Interrogatories 7(a) & (b), 8(a) & (b), 9, 10, 11(e)(2) & (5), 11(h), 12(a)-(c), 14(c) & (d), 15, 18(a)-(g), and 27(a)-(e)).
>
> 3) That the information sought is subject to the Deliberative Process privilege (Interrogatories 7(a) & (b), 8(a) & (b), 9, 10, 11(e)(2) & (5), 11(h), 12(a)-(c), 14(c) & (d), 15, 18(a)-(g), and 27(a)-(e)).
>
> 4) That the information sought is neither relevant nor likely to lead to discovery of relevant information. (Interrogatories 16(a)-(c), 17(a) & (b), 18(a)-(g), 19(a) & (b), 20(a)-(c), 21, 24(a)-(c), 32(a)-(d), 33(a)-(c), 37(f), 42(f), 46(b) & (c), 53, 54, and 56(a)-(f)).
>
> 5) That supplying the information sought would be unduly burdensome. (Interrogatories 15, 16(a)-(c), 17(a) & (d), 18(a)-(g), 21, 23(a)-(c), 24(a)-(c), 33(a)-(c), 40(a)-(f), and 46(b) & (c)).

DER's first objection is that it should not be compelled to divulge information which it received or obtained after it issued its decision to deny the City's request for certification. DER argues that under Section 401 of the Federal Clean Water Act, 33 USC §1341, and under the rules of the Federal Energy Regulatory Commission (FERC) at 18 CFR §4.38(e)(2), its decision on the City's request for certification was required to be issued within one year of

its receipt of that request. Thus, the argument goes, information received after that date is irrelevant because it could not have been reviewed by DER in reaching its decision. The City argues that information received or obtained by DER after DER's decision is relevant because the Board conducts its hearings _de novo_, citing _Warren Sand & Gravel Co., Inc. v. DER_, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975).

We agree with the City that information acquired after DER's decision is relevant due to the Board's _de novo_ review powers. _See Pennsylvania Game Commission v. DER_, 1985 EHB 1. It is the Board's duty to determine whether DER's action can be sustained based upon the evidence put before the Board, not based upon whatever evidence DER might have had before it. _Warren Sand & Gravel_, 341 A.2d at 565. DER has not established an exception to this rule. DER is arguing, in essence, that the time limit in Section 401 affects not only the timing of DER's decision, but also the substantive review powers of the Board. There is nothing in Section 401 which indicates a Federal intent to alter the appeal procedures established by state law for reviewing DER's decision on certification. Nor does the fact that DER must issue a decision within one year limit, by implication, the Board's authority to consider evidence arising after DER's decision.

With regard to DER's objections based upon the Attorney-Client and Attorney Work Product privileges, our discussion in the previous section regarding DER's motion for protective order also applies here. DER's objections based upon these privileges lack merit.

DER's objections based upon the Deliberative Process privilege lack merit because that privilege is not recognized in Pennsylvania. _Commonwealth, DER v. Texas Eastern Transmission Corp._, ___ Pa. Commonwealth Ct. ___, 569 A.2d 382 (1990).

DER's objection that certain interrogatories seek irrelevant information also lacks merit. As we stated above, DER's actions on other requests for certification are relevant, or they may lead to relevant evidence, in light of the City's argument that it has been treated in an arbitrary and capricious manner.[4]

Finally, with regard to DER's objection that answering certain interrogatories would be unduly burdensome, we agree that DER need not compile information on other certification requests. As we stated above, the City can inspect DER's files on these other requests. Similarly, we will not require DER to compile information regarding other river systems which may have "dissolved oxygen fluctuations." (Interrogatory 46) If the City wishes to question DER employees about this during depositions, it may do so. However, we will not require DER to review its files for this information.

3. **The City's Motion to Compel Deposition Testimony (filed January 19, 1990).**

In this motion, the City seeks to compel the deposition testimony of DER employees Edward Brezina, James D. Miller, and Peter Slack. At the direction of counsel, these witnesses refused to answer questions during their respective depositions regarding meetings to discuss DER's standards and policies regarding certification requests in general, and regarding the City's request in particular. The grounds asserted for the refusal to answer were the Attorney-Client privilege, the Attorney Work Product privilege, and the Deliberative Process privilege.

Our ruling here is controlled by our discussion above. DER's assertion of these privileges lacks merit. Therefore, we will grant the

[4] Our conclusion that information regarding other certification requests and DER's action, or inaction, with regard to other projects is discoverable should not be construed as a conclusion that all of this information will be admissible as evidence at the hearing.

motion to compel.[5]

4. **The City's Motion to Compel Deposition Testimony (filed February 20, 1990).**

In this motion, the City moves to compel the deposition testimony of Michael Packard, Chief of the Hydroelectric Power Section, Bureau of Water Resources Management. At the direction of counsel, Mr. Packard refused to answer questions regarding DER's review of and action upon other certification requests. In addition, the City points out that Mr. Packard did not bring to the deposition, as requested by the City, documents and files relating to other certification requests and other FERC-licensed projects which he had reviewed. DER defended its actions at the deposition by asserting that information regarding DER's review of other certification requests was irrelevant.

As discussed above, DER's actions upon other certification requests are relevant, or at least may lead to discovery of relevant information. Therefore, the City was entitled to ask questions regarding these other actions. We will not, however, require Mr. Packard to bring with him to the deposition DER's files regarding other certification requests he has reviewed. If Mr. Packard has any personal files in his possession which relate to his work on these other actions, he should bring those files. If he does not have any such work files, he need not bring any files to the deposition.

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[5] We take special note of the questioning of Mr. Miller described in paragraph 10 of the City's Motion. The question asked--"Do you recall which interrogatories you answered for the Department?--is not objectionable because it does not ask Mr. Miller to relate any communication involving DER's counsel. However, if this questioning had gone into the substance of a conversation between Mr. Miller and counsel, it might have been subject to a privilege claim. Communications relating to answering interrogatories, unlike the communications discussed earlier in this opinion, are not part of DER's decision-making process. They are part of DER's defense of its decision.

6. **DER's Motions (two) to Compel Production of Documents (filed, respectively, on March 8 and March 20, 1990).**

In the first motion, filed on March 8, 1990, DER seeks an order compelling the City to produce all records held by Acres International Corp. (Acres), a consultant employed by the City, regarding the project. DER alleges that it made arrangements with the City for DER's counsel to travel to Acres' offices in Amherst, New York to inspect records which DER had originally sought when it served its first set of interrogatories and requests for production of documents on the City. DER alleges that the City had agreed to produce for inspection all records held by Acres concerning the project. But DER contends that when it inspected the files, it realized that certain documents had not been produced. When it questioned the City about this, the City produced a letter which listed categories of documents which had been withheld. In addition to these documents, DER also alleges that other documents not described in the City's letter were withheld. DER contends that the City's letter listing the documents withheld and the reasons therefore fails to either identify any specific documents or to clearly articulate the reasons why the documents are not being produced. Furthermore, DER argues that many of the withheld documents are back-up material to the City's FERC application, and that any privilege claim as to these documents has been waived since the entire FERC application, and significant supporting documents, have already been supplied to DER.

DER's second motion to compel, filed on March 20, 1990, also involves documents in the possession of Acres. DER asserts that, as part of its agreement with the City, DER's counsel would inspect the documents in

Acres' office, and DER's counsel would mark documents for copying by Acres.[6] DER asserts that the City has reneged on this agreement by refusing to provide copies of certain documents which DER's counsel marked for copying.

The City filed a single response to both of these motions to compel. The City asserts that the motions are flawed because, under Pa. R.C.P. 4009, DER must state specifically what documents it is requesting in a "request for production of documents" before it files a motion to compel. The City also argues that many of the documents withheld are neither relevant nor likely to lead to discovery of relevant evidence. Finally, with regard to DER's March 20 motion, the City argues that its agreement with DER regarding copying of documents in Acres' office was based upon an "assumption of good faith" on the part of DER, and that DER has breached that good faith by asking for copies of irrelevant documents.

We will address DER's March 20 motion to compel first. The motion will be granted. The City has waived whatever rights it had with regard to specific identification of documents or relevancy when it allowed DER's counsel to inspect the documents.[7] If anyone committed a breach of good faith here, it was the City, not DER.

With regard to DER's March 8 motion to compel, we will deny that motion. We are uncertain exactly what the agreement was between DER and the

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[6] DER contends that this agreement was an "agreement of counsel" pursuant to Pa. R.C.P. 4002, which permits parties to litigation to depart from formal discovery procedures where counsel agree to do so.

[7] As we will explain in the next section, the City and Acres are different entities, and Acres is entitled to retain its own counsel regarding discovery. However, it is clear that Acres' interests were being represented by the City at the time DER inspected the documents in question, and by allowing the inspection of its documents, Acres, as well as the City, has waived any objections to producing copies of the documents.

City regarding production of documents in the possession of Acres.[8] Moreover, as we will address in the next section, Acres has decided that in the future it will represent its own interests in discovery matters. In addition, there is nothing to indicate that Acres has waived its objections to release of these documents, unlike the documents involved in the March 20 motion. Therefore, if DER wishes to pursue these documents, it should follow the rules of civil procedure applicable to discovery of a non-party.

7. **DER's Motion to Quash the Entry of Appearance of Counsel for Acres (filed March 28, 1990).**

DER filed this motion after the law firm of Malatesta, Hawke, and McKeon filed an entry of appearance to represent Acres in the discovery process. In support of its motion, DER asserts that the Board's rules--specifically, 25 Pa. Code §§21.21-21.23--contemplate that only a "party" may appear before the Board. DER argues that since Acres is not a party, counsel for Acres may not file an entry of appearance.

Acres filed a response opposing DER's motion. Acres argues that the Board's rules provide that a "person" may be represented by an attorney in a proceeding. See 25 Pa. Code §21.22(a). Acres asserts that if the Board had intended that no one except a party could be heard before the Board, that the regulation governing appearances by attorneys would have been limited to appearances on behalf of "parties" rather than "persons." Moreover, Acres contends that the Rules of Civil Procedure provide for different methods of

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[8] Rule 4002, Pa. R.C.P., allows agreements among counsel regarding discovery. To eliminate uncertainty over such agreements, the Explanatory Note to Rule 4002 advises counsel to confirm such agreements in writing. There is no indication that the agreement referred to here was reduced to writing.

discovery for parties and for non-parties. See e.g. Rule 4007.1(d). Therefore, Acres argues that non-parties have a right to be represented by their own counsel since their own interests are at stake.

We agree that Acres may be represented by its own counsel in discovery matters, and that the Rules of Civil Procedure regarding discovery of non-parties should be applied to it. Therefore, we will deny DER's motion to quash the entry of appearance of counsel for Acres.

We feel compelled to add certain comments due to the novelty of this situation. Both the City and DER seemed to assume until very recently that for purposes of this proceeding, the City and Acres were one and the same. This is consistent with the statement in the City's Brief to Commonwealth Court (filed October 16, 1989, p.2) that Acres was retained by the City to "provide overall management for the licensing and construction of the Harrisburg Hydroelectric Project. . . ." However, in their responses to DER's motion, the City and Acres describe Acres' status simply as that of a consultant to the City. These statements raise the question of exactly what role Acres is playing here.

We hope that we are not forced to examine this issue in more detail, and we expect that Acres will comply with the Board's orders even though it may not be subject to the Board's "in personam jurisdiction" (Acres' Response, note 4). While we will require DER to comply with the procedures for discovery of non-parties with regard to Acres, we do not believe that DER should be disadvantaged as to the substance of discovery simply because the majority of the documents relating to the City's case are in the possession of an out-of-state entity. If difficulties arise as to discovery of Acres' documents, we may be forced to consider limiting the City's use of Acres' employees as witnesses at the hearing.

8. **<u>The City's Motion for Protective Order (filed March 20, 1990).</u>**

In this motion, the City takes exception to the Notice of Deposition which DER issued for Daniel Lispi, manager of the project for the City. This Notice stated that Mr. Lispi should bring with him "any and all files and documents in his possession, or in the possession of the City of Harrisburg, which in any way touch or concern the proposed Dock Street Dam and Lake Project." The City contends that this request is overly broad, burdensome, and is not calculated to lead to discovery of relevant evidence. The City contends that Mr. Lispi's and the City's files contain much material that has nothing to do with the nine reasons DER cited in its letter denying the City's request for certification. The City also contends that the Notice would require Mr. Lispi to bring files from Acres' offices in New York.[9]

DER did not file a response to the City's motion.

We will grant the City's motion for a protective order. DER's notice of deposition for Mr. Lispi is unnecessarily and unreasonably broad. Just as we would not require DER's employees to bring to their depositions all of DER's files concerning other requests for certification, we will not require Mr. Lispi to bring with him all of the City's files which concern the project. DER should draft a more specific, reasonable request.

9. **<u>DER's Motion to Amend Discovery Order (filed February 7, 1990).</u>**

Finally, we must address DER's motion to extend the discovery period, which was filed before many of the other discovery motions addressed in this opinion. To summarize DER's motion, it requests that the Board extend the discovery period from February 1, 1990 to roughly the end of the year, and

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[9] This statement is yet another example of the City giving the impression that the City and Acres are one entity for purposes of this proceeding.

that the Board plan for a hearing beginning in May, 1991. DER asserts that it plans to conduct roughly 30 additional depositions, and that it believes the City intends to conduct 35 additional depositions. These figures do not include any depositions the City might take of Fish Commission employees, nor do they include any depositions the Fish Commission itself may decide to conduct. DER estimates that all of these depositions will take one hundred and twenty days to complete, and that at a rate of three days per week, the depositions will consume roughly forty weeks.

The City opposes DER's motion, and recommends that the period for depositions should be closed as of April 1, 1990. The City contends that DER's estimates are exaggerated, and that DER is not pursuing discovery in good faith.

We will extend the discovery period, though not to the extent DER seeks. We recognize that discovery in this case is complicated by the fact that there is uncertainty over the scope of the issues. But even assuming that Commonwealth Court defines the issues as broadly as DER has advocated, it is our impression that the total number of depositions which DER estimates it and the City will conduct--sixty-five--is excessive. If the parties could complete all of these within a reasonable time, we would not interfere. However, we are not compelled to extend the discovery period to the end of 1990 to accommodate this number of depositions.

We will extend the discovery period to July 20, 1990. This extension is, in itself, longer than the period of seventy-five days which the Board usually allows for discovery. We urge the parties to demonstrate more reasonableness in completing discovery than has been evident thus far. In particular, we urge the parties to prioritize which depositions are most important, and to conduct those first.

The Board will hold a conference at the end of the discovery period to discuss the scheduling of hearings.

ORDER

AND NOW, this 30th day of April, 1990, it is ordered that:

1) DER's motion for protective order, filed on November 30, 1989, is denied, except that DER need only make its files regarding other certification requests available for inspection by the City.

2) The City's motion to compel answers to interrogatories, filed December 19, 1989, is granted, except that DER need not compile information on other certification requests, or on other river systems which may have dissolved oxygen fluctuations.

3) The City's motion to compel deposition testimony, filed January 19, 1990, is granted.

4) The City's motion to compel deposition testimony, filed February 20, 1990, is granted, except that Mr. Packard need only bring to his deposition any personal work files regarding other requests for certification.

5) DER's motion to compel production of documents, filed March 8, 1990, is denied.

6) DER's motion to compel, filed March 20, 1990, is granted.

7) DER's motion to quash the entry of appearance of counsel for Acres International Corp., filed March 28, 1990, is denied.

8) The City's motion for protective order, filed March 20, 1990, is granted.

9) DER's motion to amend discovery order, filed February 7, 1990, is granted in part and denied in part. The discovery period is extended to July 20, 1990.

10) The Board's order of April 3, 1990, staying discovery, is rescinded.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: April 30, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

DECOM MEDICAL WASTE SYSTEMS (N.Y.), INC.	:	
	:	
v.	:	**EHB Docket No. 89-358-F**
	:	**(Consolidated appeals)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 3, 1990**

OPINION AND ORDER SUR
RULE TO SHOW CAUSE
RAISING ISSUE OF MOOTNESS

By Terrance J. Fitzpatrick, Member

Synopsis:

An appeal from a DER compliance order does not become moot when the Appellant moves its operation to a different site, because the compliance order can have an effect upon later decisions by DER regarding civil penalties and issuance and renewal of permits.

OPINION

This proceeding involves an appeal by Decom Medical Waste Systems (N.Y.), Inc. (Decom) from a compliance order of the Department of Environmental Resources (DER) dated September 7, 1989.[1] In the compliance order, DER ordered Decom to cease accepting or storing "special handling

[1] Actually, there are two compliance orders and two appeals involved here. The compliance order at issue in the appeal at Docket No. 89-358-F was issued to American Environmental Services, Inc. (AES), but the assets of AES were transferred to Decom pursuant to an order of the Court of Common Pleas of Montgomery County. Based upon the evidence of this transfer introduced at the Supersedeas hearing, we issued an order on September 19, 1989 granting a motion to substitute Decom for AES. DER had also issued an order to Decom on September 7, 1989 because it was uncertain whether Decom or AES had control of the facility. Decom appealed this order at Docket No. 89-422-F. On September 25, 1989, the Board consolidated the two appeals.

waste" (medical waste) at the Decom facility on Delaware Avenue, Philadelphia, until it secured a permit. DER also ordered Decom not to remove waste from the site until notified by the Department.

Decom filed a petition for supersedeas with its appeal, and a hearing was held on September 15, 1989. On September 19, 1989, the undersigned issued an order granting a supersedeas; an opinion in support of the order was issued October 5, 1989. The primary basis for the supersedeas was that the Delaware Avenue site did not qualify as a "transfer facility" under DER's regulations at 25 Pa. Code §271.1 because, as DER had conceded, there was no "bulk transfer" of waste occurring at the site.

After the supersedeas was issued, Decom filed a motion for summary judgment. DER filed a Brief opposing Decom's motion. Thereafter, on February 26, 1990, DER filed a letter with the Board requesting that the Board refrain from ruling on the motion for summary judgment because Decom was allegedly planning to close the Delaware Avenue site and commence operations at some other site in Philadelphia. Decom responded to this letter on March 5, 1990, stating that operations had been moved from Delaware Avenue to 2500 Wheatsheaf Lane, Philadelphia. On March 12, 1990, Decom filed a second response, this time objecting to DER's request and requesting that the Board rule on the motion for summary judgment.

On March 14, 1990, the Board issued a Rule to Show Cause, directing the parties to show cause why the appeals at 89-358-F AND 89-422-F should not be dismissed as moot in light of the closing of the Delaware Avenue facility. The Rule stated:

> Although the Appellants state that the operation at the Wheatsheaf Lane facility will be the same as at the Delaware Avenue facility, it does not appear that the Department's September 7, 1989 order could reasonably be construed as applying to the new facility.

Decom filed a response to the Rule, contending that the appeal at 89-358-F (which involved the order to AES) could be dismissed as moot, but not the appeal at 89-422-F (which involved the order issued to Decom). Decom argued that if the appeal at 89-422-F is dismissed as moot, it will lose the chance to clear its "compliance record" with DER. Decom further argued that this result would be unfair because it did not own or operate the facility until after DER issued the orders at issue here. Finally, Decom stated that DER should withdraw its orders, and that the Board should then dismiss the appeals as moot.

DER filed a response. DER stated that it would not withdraw the Decom orders, but that if the appeals were dismissed as moot, and the Board's Supersedeas order and DER's orders also were dismissed as moot, the findings in DER's orders would not be res judicata as to Decom. Thus, DER would retain the right to cite Decom for unpermitted activity, and Decom would retain the right to appeal such a determination. DER stated that, given this understanding, it would not oppose an order "vacating the Supersedeas and the two Commonwealth Orders, and dismissing the pending appeals, as moot."[2] (response, p. 4).

The Board will dismiss a case as moot when a party no longer has a necessary stake in the outcome of the proceeding or when the Board is no longer able to grant effective relief. Kerry Coal Co. v. DER, 1988 EHB 755, In Re Gross, 476 Pa. 203, 382 A.2d 116 (1978), Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Commonwealth Ct. 353, 415 A.2d 1000 (1980). With

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[2] We do not understand DER's response. If we were to find that this controversy is moot, we could only dismiss the appeals as moot, not the underlying DER orders. Moreover, if DER does not object to the Board vacating DER's orders, then DER could achieve the same result by withdrawing those orders itself.

regard to enforcement or compliance orders by DER, the Board has declined to dismiss appeals as moot where the orders under appeal could have an impact upon subsequent DER actions regarding the issuance and renewal of permits, and upon the assessment of civil penalties. Kerry, supra, Bell Coal Co. v. DER, 1987 EHB 883, see also, Al Hamilton Contracting Co. v. Commonwealth, DER, 90 Pa. Commonwealth Ct. 228, 494 A.2d 516 (1985).

In the instant case, Decom's compliance record with DER could have an effect upon later DER decisions regarding permits and civil penalties. See 25 Pa. Code §§271.201(6), 271.412(b)(5). Therefore, under the precedents cited above, it does not appear that the instant appeals are moot.[3]

With regard to Decom's comment that we may dismiss the appeal at 89-358-F as moot, we decline to do so. By order dated September 19, 1989, we substituted Decom for AES as the Appellant at 89-358-F. Dismissal of this appeal would have no practical impact upon this proceeding.

[3] We note that neither party cited any case law regarding mootness, even though each party filed two responses. If the parties wish to assist the Board in reaching a decision, their energies should be directed toward addressing the issues rather than exchanging verbal jabs.

ORDER

AND NOW, this 3rd day of May, 1990, it is ordered that Decom's objections to the Board's Rule to Show Cause are sustained, and the Rule to Show Cause is discharged. The Board will rule upon Decom's motion for summary judgment in due course.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: May 3, 1990

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M. DIANE SMI
SECRETARY TO THE E

MONESSEN, INC.	:	
	:	
v.	:	**EHB Docket No. 88-486-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 7, 1990**

OPINION AND ORDER
SUR APPELLANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

Synopsis

In reviewing a Motion For Summary Judgment, Pa.R.C.P. 1035 requires that the moving party have shown, via pleadings, affidavits, depositions, answers to interrogatories and admissions, that there are no genuine issues as to material fact between the parties before summary judgment may be rendered. The Motion must be denied where no such showing is made.

OPINION

On November 23, 1988, Monessen, Inc. ("Monessen") appealed various portions of NPDES Permit PA001554, as amended by the Commonwealth of Pennsylvania Department of Environmental Resources on October 26, 1988 ("1988 Amendment"). On October 10, 1989, DER issued a further amendment of this permit ("1989 Amendment") which modified some of the effluent limitations contained in the 1988 Amendment, and Monessen filed an appeal therefrom to this Board at Docket No. 89-559-E.

Our order of December 15, 1989 consolidated these two appeals at the current docket number.

After a hearing on this matter was scheduled and on April 6, 1990, Monessen filed both a Motion For Ruling That Appellee Bears A Portion Of The Burden of Proof and a Motion For Partial Summary Judgment, with a Memorandum of Law supporting each. Monessen's Motion for Partial Summary Judgment seeks, "...irrespective of which party bears the burden of proof...", summary judgment finding the 1989 Amendment "...as unlawful..." and sustaining Monessen's appeal as to the 1989 Amendment. Monessen's Motion asks for this judgment for two reasons. Firstly, Monessen contends it should have Judgment because of DER's alleged non-compliance with 25 Pa.Code §92.61 in issuing the 1989 Amendment. Secondly, Monessen argues DER lacked statutory authority to modify the 1988 Amendment for the reason for which DER issued the 1989 Amendment. Attached to Monessen's Motion are Exhibits A through F. They are copies of correspondence to Monessen from DER, portions of various versions of amended NPDES permits and pages of the Pennsylvania Bulletin. The Motion is not verified or accompanied by affidavits, admissions, pleadings, answers to interrogatories or depositions, though the Motion says the facts are not in dispute.

On April 27, 1990 DER faxed us its Reply In Opposition To Motion For Partial Summary Judgment. We have also received a five-page factual affidavit from DER, to which are attached six exhibits.[1] DER's Reply takes the position that DER did not violate 25 Pa.Code §92.61 in issuing the 1989

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[1]We have also simultaneously received DER's Reply To Motion To Shift Burden of Proof and supporting Brief. Monessen's Motion on this issue and DER's Reply thereto will be dealt with separately. They are not addressed further herein.

Amendment and that the facts in this case support DER's authority to issue the 1989 Amendment. DER's Reply also contends Monessen is not entitled to summary judgment because Monessen has failed to show that the material facts are not in dispute.

Because this latter issue goes to whether there is a basis for us to even consider Monessen's legal arguments for summary judgment, we must address it first. Unfortunately, from Monessen's standpoint, DER's argument on this issue has merit and must be sustained.

There can be no debate about our authority to grant a motion for summary judgment. Summerhill Borough v. Department of Environmental Resources, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). A motion such as that filed by Monessen must be considered in a light most favorable to DER as the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131; Manor Mining & Contracting Corporation v. DER, Docket No. 86-544-F (issued March 9, 1990). Pa.R.C.P. 1035(b) provides in relevant part that a summary judgment shall be entered:

> ...if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

We have adopted this standard when we evaluate the merits of such motions. Newlin Corporation et al. v. DER, 1988 EHB 976; Arthur Richards Jr., V.M.D. et al., Docket No. 89-362-E (Opinion and Order issued April 10, 1990). In support of its motion, Monessen has attached six exhibits, none of which are depositions, transcripts, pleadings, admissions or answers to interrogatories. Monessen has also failed to offer us any affidavits as to the facts, and its motion is neither verified nor supported by a simple affidavit that its

allegations are true and correct. The motion states the material facts are undisputed, but this is not sworn to on Monessen's behalf.

DER's Reply does not concede that the facts are as Monessen states them to be. Rather, the DER Reply avers facts beyond those recited in Monessen's motion which DER says support its arguments in opposition to Monessen's two legal arguments in favor of summary judgment.

Thus, Monessen has failed to prove there are no genuine issues of material fact, and its motion must be denied. Arthur Richards, Jr., V.M.D., supra; Felton Enterprises, Inc. v. DER, 1989 EHB 1231.

O R D E R

AND NOW, this 7th day of May, 1990, Monessen, Inc.'s Motion For Partial Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 7, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

GEORGE W. YEAGLE	:	
	:	
v.	:	EHB Docket No. 89-086-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 7, 1990

OPINION AND ORDER SUR
MOTION TO STRIKE

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to strike a paragraph of Appellant's pre-hearing memorandum is granted because the paragraph contains information regarding an offer of settlement by the Department of Environmental Resources.

OPINION

This proceeding involves an appeal by George W. Yeagle (Yeagle) from a Civil Penalty Assessment (CPA) dated March 13, 1989 imposed by the Department of Environmental Resources (DER). In the CPA, DER assessed a $2000 civil penalty against Yeagle for alleged disposal of demolition waste without a permit along Route 62 in Pine Grove Township, Warren County. This alleged act was in violation of 25 Pa. Code §277.201 and of Sections 201(a) and 501(a) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §§6018.201(a) and 6018.501(a).

This Opinion and Order addresses DER's motion to strike Section A, paragraph 6 of Yeagle's pre-hearing memorandum. This paragraph states:

> [6.] On March 14, 1989, the Appellant was advised, in writing, by the Department that the civil penalty assessed against him was Two Thousand Dollars ($2000). Prior to March 14, 1989, the Department orally advised the Appellant that the matter would be settled if the Appellant sent to the Department a civil penalty in the amount of Five Hundred Dollars ($500). Without any cause, reason or justification, the Department arbitrarily and capriciously increased the civil penalty against the Appellant from Five Hundred Dollars ($500) to Two Thousand Dollars ($2000).

DER contends that the evidence alluded to in Section A, paragraph 6 is inadmissible because it relates to a settlement offer by DER, citing McJunkin v. Kiser, 157 Pa. Super. 578, 580, 43 A.2d 608, 609 (1945). Therefore, DER contends that Section A, paragraph 6 should be stricken as impertinent matter pursuant to Rule 1017(b)(2), Pennsylvania Rules of Civil Procedure. (Pa R.C.P.).

Yeagle filed a response to DER's motion to strike. Yeagle contends that Board proceedings are only "quasi-civil" in nature, although procedure before the Board is governed by the Rules of Civil Procedure. Therefore, Yeagle suggests that offers of settlement are admissible in Board proceedings. In addition, Yeagle argues that the proposed $500 penalty was not presented by DER as an offer of settlement; it was proposed as the amount he was responsible to pay under all the circumstances.

First, we disagree with Yeagle's argument that offers of settlement are admissible in Board proceedings. While the Board is not bound by technical rules of evidence, our rules provide that only "relevant and material evidence of reasonable probative value is admissible." 25 Pa. Code §21.107(a). In Pennsylvania, evidence regarding offers of settlement is deemed inadmissible because such evidence is irrelevant. See Rochester Machine Corp. v. Mulach Steel Corp., 498 Pa 545, 449 A.2d 1366,

1369-1370(1982). Since Pennsylvania courts view this evidence as irrelevant, it may not be admitted in Board proceedings regardless of whether these proceedings are characterized as "civil" or "quasi-civil" in nature.

As to Yeagle's second argument, it is clear to us that DER's statements regarding the $500 amount constituted an offer to compromise. The term "offer to compromise" has been defined as "the settlement of differences by mutual concessions; an adjustment of conflicting claims." Rochester Machine Corp., 449 A. 2d at 1368. In Section A, paragraph 6 of his pre-hearing memorandum, Yeagle states that on March 14, 1989 DER advised him in writing that the civil penalty assessed against him was $2000. Yeagle goes on to state: "Prior to March 14, 1989, the Department orally advised the Appellant that the matter would be settled if the Appellant sent to the Department a civil penalty in the amount of Five Hundred Dollars ($500)." This indicates that Yeagle knew that the $500 amount represented an offer of settlement. This conclusion is buttressed by Yeagle's response to interrogatory 17, which indicates that Yeagle knew DER intended to assess a more severe penalty if he did not agree to pay the $500 amount.[1]

Since the information contained in Section A, paragraph 6 of Yeagle's pre-hearing memorandum relates to an offer of settlement, this information is not admissible as evidence. Therefore, we will grant DER's motion to strike.

---

[1] Moreover, Yeagle has not alleged any facts to show that DER made any specific factual admission as to the propriety of the $500 or $2000 civil penalties; such admissions would be admissible even though they were made in the context of settlement discussions. Rochester Machine Corp., 449 A.2d at 1369.

ORDER

AND NOW, this 7th day of May, 1990, it is ordered that DER's motion to strike Section A, paragraph 6 of the Appellant's pre-hearing memorandum is granted.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: May 7, 1990

cc: **Bureau of Litigation**
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Western Region
For Appellant:
William A. Bevevino, Esq.
Warren, PA

nb

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M. DIANE SMITH
SECRETARY TO THE BOARD

NGK METALS CORPORATION	:	
	:	
V.	:	**EHB Docket No. 90-056-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 8, 1990**

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

Robert D. Myers, Member

Synopsis

A Petition for Reconsideration en banc of an interlocutory order is granted under compelling circumstances. The interlocutory order, upon reconsideration, is affirmed.

OPINION

On April 17, 1990, NGK Metals Corporation (NGK) filed a Petition requesting en banc reconsideration of the Opinion and Order issued April 5, 1990 denying NGK's Petition to Amend Notice of Appeal. We could deny reconsideration because of the interlocutory nature of the underlying Order. However, since the basis of the Order represents a departure from several previous Board opinions, we believe the circumstances are compelling enough to warrant a relaxation of our traditional stance regarding interlocutory matters.

Upon review and reconsideration of the Opinion and Order dated April 5, 1990, we are satisfied that it correctly applies the principles announced in Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of

Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, ____ Pa. _____, 555 A.2d 812 (1989). NGK's attempts to limit and distinguish that case are not convincing. The holding was not dicta, as NGK argues, and effectively nullified the prior Board opinions cited by NGK.

ORDER

AND NOW, this 8th day of May 1990, it is ordered as follows:

1. NGK's Petition for Reconsideration en banc is granted by reason of compelling circumstances.

2. Upon reconsideration, the Opinion and Order sur Petition to Amend Notice of Appeal, issued April 5, 1990, is affirmed.

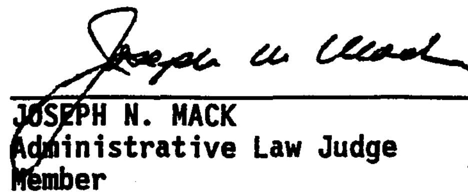
ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 8, 1990

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Eastern Region
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M. DIANE SMIT
SECRETARY TO THE B

MARIO L. MARCON	:	**EHB Docket No. 90-078-E**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NATIONAL WASTE AND ENERGY	:	
CORPORATION, Permittee	:	**Issued:** May 8, 1990

OPINION AND ORDER
SUR PETITION FOR LEAVE
TO APPEAL *NUNC PRO TUNC*

By Richard S. Ehmann, Member

Synopsis

A Petition for Leave to Appeal *Nunc Pro Tunc* will be denied on objection thereto by Respondent where Petitioner fails to set forth sufficient grounds for the granting of such a petition.

OPINION

On or about August 9, 1989, the Department of Environmental Resources ("DER") issued National Waste and Energy Corporation ("National") Permit No. 100280 for a landfill known as the Valley Landfill in Penn Township, Westmoreland County.

No timely appeals of that permit issuance were filed with this Board. On or about February 16, 1990, Mario L. Marcon ("Marcon") filed his Petition for Leave to Appeal *Nunc Pro Tunc* from this August 9, 1989, action of DER. We notified DER and National of this petition by letter dated February 27, 1990, and directed that they file their objections thereto, if any, with us by March

18, 1990. DER has filed such objections which are addressed in this opinion and order. National has not responded to our letter in any fashion.

It has long been the rule that for this Board to have jurisdiction over an appeal, the appeal must be timely filed under 25 Pa.Code §21.52. Rostosky v. Commonwealth, 26 Pa.Cmwlth 478, 364 A.2d 761 (1976). This appeal clearly is not timely.

The sole exception on timeliness is an appeal filed *nunc pro tunc* pursuant to 25 Pa.Code §21.53. Section 21.53 states that the Board may grant leave for an appeal *nunc pro tunc* upon written request and for good cause shown under the standards applicable for similar appeals in Courts of Common Pleas. These standards, as pointed out in Marcon's petition, involve fraud or a breakdown in Board procedures which contribute to the tardy filing. JEK Construction Co. v. DER, 1987 EHB 643. Paragraph 8 of Marcon's petition concedes that neither fraud nor a breakdown in this Board's procedures occurred here. Instead, Marcon argues that DER unintentionally gave Marcon incorrect information about how near his adjacent property National would place municipal wastes, which information Marcon relied upon in deciding not to appeal, and when DER corrected that information (showing the wastes would be closer), Marcon appealed.[1] The petition then argues that under Appalachian Industries, Inc., 1987 EHB 325, and Roderick v. Commonwealth, State Civil Service Commission, 76 Pa.Cmwlth. 329, 463 A.2d 1261 (1983), we allowed an appeal *nunc pro tunc* where non-negligent acts of third parties not part of the litigation process cause the tardy filing. Marcon then concludes that this is what occurred here, so its petition should be allowed.

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[1] Initially Marcon was told 100 feet from the property line, but this was later corrected to 50-100 feet, depending on location, from Marcon's boundary with National's tract. See Exhibits B and D attached to Marcon's Petition.

In response, DER has objected to the petition. For purposes of our ruling on this petition we will treat these objections as if they are a motion to dismiss, since they conclude by asking that the Board deny the petition.

In its objections, DER agrees with everything said by Marcon up to the point that Marcon says Appalachian Industries, Inc. v. DER, *supra*, allows us to grant this appeal. At this point DER avers Marcon knew the ins and outs of filing an appeal with this Board because throughout the period from August 9, 1989, until after he filed the instant petition, he was an appellant before this Board in Picarsic et al. v. DER, EHB Docket No. 88-176-F,[2] which challenged DER's initial issuance of a permit for the Valley Landfill to National's predecessor operator (DER's August 9, 1989, action as to National being a permit transfer for the existing facility). DER thus contends Marcon was familiar with the procedure for timely appeals to this Board.

DER next suggests Appalachian Industries, Inc., *supra*, and Roderick v. Commonwealth, State Civil Service Commission, *supra*, do not go as far as Marcon suggests. DER argues that for a petitioner to fit within these cases someone at DER had to have acted in some way which prevented Marcon from knowing how, where, when, or what to appeal to this Board. In Roderick v. Commonwealth, State Civil Service Commission, *supra*, for example, Roderick alleged that she and her lawyer were told that the agency for which she worked was reviewing her termination and her appeal of her termination should be to her own agency. This was done and after the time for appeal to the Civil Service Commission had expired, Roderick was allegedly told she should appeal

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[2] On February 1, 1990, we issued Marcon a Rule to Show Cause why this appeal should not be dismissed for failure to prosecute which was returnable February 16, 1990. On February 28, 1990, when there was no response to our Rule to Show Cause, we issued an Order dismissing Picarsic et al. v. DER, EHB Docket No. 88-176-F.

there, which she did, only to have her petition for leave to appeal *nunc pro tunc* dismissed. Because of the alleged misdirection as to where to appeal her termination by the agency previously employing her, the court reversed the Civil Service Commission's dismissal of her case and remanded for a hearing. DER maintains it did nothing to point Marcon in the wrong direction as to the procedures for filing an appeal.

Moreover, the cases cited in Roderick, *supra*, for the concept that appeals *nunc pro tunc* are allowed when delay is caused by non-negligent acts of others, do not go as far as Marcon wants this Board to go in granting this petition. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), dealt with a secretary's illness delaying a filing (the delay was ten days). Perry v. Unemployment Compensation Board of Review, 74 Pa.Cmwlth 388, 459 A.2d 1342 (1983), dealt with an appeal which was filed three days late due to a breakdown in a law clerk's car while enroute to a post office for a timely filing. Tony Grande, Inc. v. Workmen's Compensation Appeal Board, 71 Pa.Cmwlth. 566, 455 A.2d 299 (1983), dealt with a three day delay caused by counsel's unavoidable hospitalization. Walker v. Unemployment Compensation Board of Review, 75 Pa.Cmwlth 101, 461 A.2d 347 (1983), dealt with the postal service's failure to provide Walker with the referee's decision and appeal instructions.

Further, since the decision in Bass v. Commonwealth, *supra*, the courts have not routinely jumped on the Bass bandwagon. Moring v. Dunne, 342 Pa.Super. 414, 493 A.2d 89 (1985); Altmire v. Comm. Board of Probation and Parole, 88 Pa.Cmwlth. 592, 495 A.2d 213 (1985). The Commonwealth Court has noted that Bass v. Commonwealth, *supra*, and cases following it are limited strictly to unique and compelling factual circumstances. Comm., Dept. of Transportation v. Johnson, ___ Pa.Cmwlth. ___, 569 A.2d 409 at 411 (1989).

Indeed, there is some suggestion an interpretative retreat may be in order to be sure that Bass v. Commonwealth, *supra*, is conservatively read only to say "...there is a new species of breakdown in court operations, *i.e.* non-negligent conduct by an attorney--who is in some senses an officer of the court." In Re Interest of C.K., 369 Pa.Super. 45, 535 A.2d 634 at 638 (1987). Finally, in Comm., Pennsylvania Game Commission v. Commonwealth Dept. of Envir. Resources, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), decided long after Bass v. Commonwealth, *supra*, the Commonwealth Court held that the time for appeal to this Board cannot be extended absent fraud or breakdown in the Board's operation. Clearly, if this is the case, no such breakdown occurred as to Marcon's right to timely appeal to this Board.

This Board has indicated that it will follow the recent decisions by Commonwealth Court and Superior Court which limit Bass and its progeny to cases involving unique and compelling circumstances. See Lancaster Press, Inv. v. DER, 1989 EHB 337, Borough of Bellefonte, et al. v. DER, 1989 EHB 599, American States Insurance Co. v. DER, EHB Docket No. 89-187-F (Opinion and Order issued April 2, 1990). Applying this standard, it is clear that unique and compelling facts are not present here. Roderick involved a situation where the Appellant was misled as to the appeal procedures, whereas in this case Marcon was misled regarding how close waste could be placed to his property. Misleading an appellant, perhaps intentionally,[3] as to appeal procedures is a more egregious action, which offends one's sense of justice, than misreading a map resulting in miscalculating the exact buffer zones. See Exhibit D to Marcon's Petition. We find that Marcon has not presented unique

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[3] Commonwealth Court stated in Roderick that the Office of Employment Security knew the Appellant was pursuing the wrong avenue of appeal, but chose not to divulge this. 463 A.2d at 1264.

and compelling facts in support of his petition; therefore, his Petition for Leave to Appeal *Nunc Pro Tunc* must be denied.

O R D E R

AND NOW, this 8th day of May, 1990, the Petition for Leave to Appeal *Nunc Pro Tunc* filed on behalf of Mario L. Marcon is denied and this appeal is dismissed.

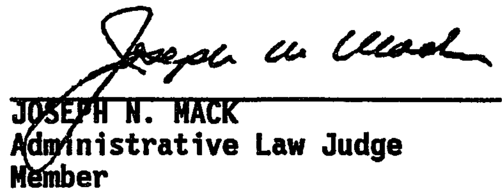
ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 8, 1990

cc: **Bureau of Litigation**
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For Permittee:
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Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

TOWNSHIP OF SOUTH FAYETTE	:	
	:	
v.	:	**EHB Docket No. 89-044-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 10, 1990
and MOHAWK MINING COMPANY, Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss for failure to comply with Pre-Hearing Order No. 1 is denied. The Appellant's pre-hearing memorandum meets minimum standards regarding its recitation of facts. In addition, the absence of citations to legal authority in the pre-hearing memorandum has been cured in the Appellant's response to the motion to dismiss.

OPINION

This is an appeal by the Township of South Fayette (Township), Allegheny County, from an action of the Department of Environmental Resources (DER) granting a Mining Activity Permit to Mohawk Mining Co. (Mohawk). In its notice of appeal, the Township objects to the permit on the grounds that the proposed deep mine, known as the "Maude mine," violates the Township's zoning ordinance, that it will adversely affect the Township's tax base, and that it will have a variety of effects which will be harmful to the environment and

to the well-being of the citizens of the Township.

This Opinion and Order addresses the motion filed by Mohawk to dismiss the Township's appeal for failure to comply with the Board's Pre-Hearing Order No. 1. In this motion, Mohawk contends that the Township's pre-hearing memorandum does not sufficiently specify the effects on the Township and its residents which will allegedly result from Mohawk's operations. Mohawk also argues that the Township's pre-hearing memorandum fails to provide any citations to DER's statutes and regulations. Finally, Mohawk requests that the Board either dismiss the appeal, or, in the alternative, order the Township to file a more specific pre-hearing memorandum.

The Township filed a response opposing the motion. The Township contends that it need not specify in its pre-hearing memorandum all the facts it intends to prove at hearing. The Township also, in the course of responding to Mohawk's allegations, cites various sections of the statutes and regulations administered by DER. Finally, the Township argues that the basis for its appeal is spelled out in ten paragraphs in its notice of appeal.

We will deny Mohawk's motion. Although we would have preferred that the Township's pre-hearing memorandum give a more comprehensive recitation of the facts, its statement of the facts meets minimum standards. Moreover, if Mohawk wanted to know the specific facts which the Township intends to prove, it could have forced the Township to reveal them through discovery.
With respect to the absence of legal citations in the Township's pre-hearing memorandum, this flaw has been cured in the Township's response to the motion to dismiss. Thus, ordering the Township to file a more specific pre-hearing memorandum would serve no valid purpose.

ORDER

AND NOW, this 10th day of May, 1990, it is ordered that Mohawk's motion to dismiss for failure to comply with Pre-Hearing Order No. 1 is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: May 10, 1990

cc: **Bureau of Litigation**
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For Permittee:
Kathleen S. McAllister, Esq.
Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BO

LAUREL RIDGE COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 86-349-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 11, 1990

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources ("DER") met its burden of proof as to the forfeiture of the surety bonds of Laurel Ridge Coal, Inc. ("LRC") posted in regard to LRC's surface coal mines. LRC failed to reclaim these mine sites to the degree required by its DER approved reclamation plan and the regulations governing surface mine reclamation.

Background

On July 15, 1986, we received an appeal by LRC from the June 5, 1986 letter from DER's Bureau of Mining and Reclamation announcing DER's forfeiture of six surety bonds posted in connection with certain LRC mining operations. These mines were operated under Mine Drainage Permits Nos. 3378BC16 and 3374SM78 and are located in Springfield Township, Fayette County.

According to DER's letter, DER was forfeiting the following bonds:

Type of Bond	Acreage	Amount	Bond Number	Surety Company
Surety	12	6,000	152E9350	Travelers Indemnity Co.
Surety	5	5,000	BD1303	Mid-Continent Ins. Co.
Surety	3.2	5,300	352	Fortune Assurance Co.
Surety	10.51	20,010	345	Fortune Assurance Co.
Surety	9.2	18,400	346	Fortune Assurance Co.
Surety	15	37,500	371	Fortune Assurance Co.

In its Notice of Appeal, LRC recites two pages of reasons why its bonds should not be forfeited. They can be summarized by saying that each reason for forfeiture recited in DER's letter is without merit because, as of the appeal date, LRC's mine sites are fully reclaimed, and where this is not so, only minor work remains to be completed.

After receipt of this appeal, and on July 17, 1986, we issued our Pre-Hearing Order No. 1 setting a schedule for discovery and the filing of the parties' pre-hearing memorandums. LRC was granted four extensions of the deadline for filing its pre-hearing memorandum, which was finally filed on February 16, 1988. DER filed its pre-hearing memorandum with us on March 18, 1988.

On March 17, 1989, DER petitioned for leave to reopen discovery. When, after written notice to LRC, there was no objection thereto by LRC, we issued our order of April 26, 1989, granting the petition and allowing discovery by both parties through June 30, 1989. DER then filed interrogatories, deposed LRC's John Martucci and Harry Tueche and sent LRC a set of Requests for Admission. With one extension for the parties to complete discovery, all discovery was completed by August 15, 1989.

Thereafter, on October 30, 1989, this matter was reassigned to

Board Member Richard S. Ehmann. After a conference call with John Martucci for LRC and counsel for DER (LRC having appeared pro se throughout this matter despite our letters to it urging it to retain counsel) on November 2, 1989, we issued our Pre-Hearing Order No. 2 of that same date scheduling this case for trial on December 4, 5 and 6, scheduling a site view on November 20, 1989, and directing the parties to file a Stipulation of facts, documents, issues of law and other matters with us. That order also set a date by which each party was to file with the Board those documents it would seek to introduce into the record at the hearing.

On November 20, 1989, accompanied by Mr. Martucci, DER's staff and a court reporter, we conducted a view of the mine sites involved in this forfeiture proceeding. On November 21, 1989, DER filed a motion for summary judgment. The motion was denied on November 22, 1989 because of the lack of supporting factual materials required under Pa. R.C.P. 1035(d). On November 21, 1989, we also received a letter from LRC's John Martucci requesting a ninety-day continuance to allow LRC to retain counsel. This request was denied by Order dated November 22, 1990, because of the age of the case, the prior scheduling of the hearing date and the fact that we had twice previously (not once as recited in that order) advised LRC in writing to retain counsel, but had had our advice in this regard ignored.

Neither DER nor LRC filed the Joint Stipulation with the Board prior to the hearing, as mandated by our Order of November 2, 1989. DER, however, wrote to us by letter dated November 22, 1989, advising that John Martucci of LRC failed to provide DER's counsel with a date that Mr. Martucci was available to meet to prepare the Joint Stipulation.

On December 4 and 5, 1989, the merits of this appeal were heard. LRC appeared pro se. Prior to the taking of testimony on December 4, 1989,

counsel for DER moved to dismiss this appeal as a sanction for LRC's failure to comply with our Order of November 2, 1989. No Joint Stipulation had been filed and neither had LRC's documents. After hearing argument from both sides on this motion, since our Pre-Hearing Order No. 2 said noncompliance therewith would cause the Board to impose sanctions, we denied the motion insofar as it sought dismissal, but required LRC to state whether it agreed or disagreed with each of DER's proposed stipulations of facts and barred LRC from introducing documentary evidence in its presentation of its case.

Thereafter, on January 2, 1990, we received the transcripts of the hearing and issued an order scheduling the filing of the parties' post-hearing briefs. DER's brief was filed on January 29, 1990.

On February 15, 1990, with the consent of DER's counsel, we issued an Order granting LRC's request for an extension until March 2, 1990 to file its brief. On March 6, 1990, John Martucci filed a handwritten post-hearing brief with the Board on behalf of LRC. On April 10, 1990, Mr. Martucci forwarded to Board Member Ehmann a purported typed version of LRC's handwritten brief. Since the draft adjudication of this matter was prepared by Board Member Ehmann prior to receipt of the typed version of LRC's post-hearing brief, this typed version of LRC's brief was not considered in regard to adjudicating this appeal.

LRC's brief contains proposed Findings of Fact commencing with references such as "Item 9 page 3" and "Item 14 page 4." On examination, these references deal with proposed findings of fact in DER's post-hearing brief. Since we have prepared our own findings of fact directly from the transcript and the other sources referenced above, we will not yield to the temptation to conclude that LRC agrees with all of the proposed findings of fact contained in DER's post-hearing brief other than the 13 findings

referenced in its brief. In addition, LRC's brief contains a discussion of the factual background of this case from which it argues that LRC is not subject to bond forfeiture here because Northbrook Mining was to be responsible for reclamation of these mine sites. The brief also attacks the sitting Board Member's sanctions imposed on LRC at the beginning of the hearing on the merits of LRC's appeal as being unfair and preventing LRC from putting on its case.

Since a party is deemed to have abandoned all arguments not raised in its post-hearing brief under Lucky Strike Coal Company et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988), we will address only these issues in our discussion below.

After a full and complete review of the record, we enter the following Findings of Fact.

Findings of Fact

1. The Appellant is Laurel Ridge Coal, Inc., a Pennsylvania Corporation, whose address at the time the appeal was filed was 619 R Fallowfield Avenue, Charleroi, PA 15022. (LRC's Notice of Appeal and T-40)[1]

2. The Appellee is the Commonwealth of Pennsylvania's Department of Environmental Resources, which regulates surface mining pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. 1396.1 et seq. (SMCRA), the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. and the rules and regulations promulgated thereunder.

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[1] References to T-__ followed by a number is a reference to a page in the three volumes of transcripts from the two days of hearings on the merits and the view. R-__ refers to a response to DER's Request for Admissions. C-__ refers to an exhibit of the Commonwealth. B-__ is a Board Exhibit. All references to the Stipulation of the parties are contained in the transcript and will be identified in that fashion.

3. Harry Tuech is president of LRC. (T-221)

4. John Martucci is secretary of LRC. (Letter to the Board on behalf of LRC pro se from John Martucci dated September 22, 1986, and an undated letter from LRC received by the Board on December 19, 1986)

5. LRC and its subcontractor, Northbrook Mining, Inc., conducted surface coal mining in Springfield Township, Fayette County, at a site called the Speyer Strip under and pursuant to Mine Drainage Permits 3374SM78 and 3378BC16. (T-50, B-1 and R-1)

6. This mining activity was conducted pursuant to the following permits and surety bonds and on the indicated acreages:

Mine Drainage Permit No.	Mining Permit No. (Acres Covered)	Surety Bond No. (Face Amount)
3378BC16	1337-3378BC16-01-0 (10.5 acres)	345 ($20,010)
3378BC16	1337-3378BC16-01-1 (10 acres)	346 ($18,400)
3378BC16	1337-3378BC16-01-2 (15 acres)	371 ($37,500)
3374SM78	1337-1 (12 acres)	152E9350 ($6,000)
3374SM78	1337-1A (5 acres)	BD1303 ($5,000)
3374SM78	1337-1A2 (3.2 acres)	352 ($5,300)

(T-50, R-2, R-4, and B-1)

7. As a condition of its mining permits, LRC posted the surety bonds listed in Finding of Fact No. 6 above, which bonds were conditioned upon full compliance with SMCRA, the Clean Streams Law, the rules and regulations promulgated thereunder and LRC's permits. (T-52)

8. By letter dated June 5, 1986, DER forfeited each of the bonds

identified above and that forfeiture is the subject of this appeal. (T-52 and C-7)

9. Mining Permits 1337-1, 1337-1A and 1337-1A2 are located within the boundaries of Mine Drainage Permit ("MDP") 3374SM78. (C-10 and T-74)

10. All of the area under these mining permits within MDP 3374SM78 was affected by LRC's mining operations. (T-80)

11. LRC's license to mine expired in September of 1982 and no coal was removed from the Speyer Strip thereafter. (T-88)

Mining Permit 1337-1

12. By 1981, the area covered by Mining Permit 1337-1 was rough graded, but it had steep slopes, topsoil was not spread on it and there was very little vegetation. There were erosion gullies on the steep slope on the northeastern side of this site. (T-77-79)

13. This condition was virtually unchanged through 1983 (T-97, 98) and 1986 (T-110-114, C-16)

14. The DER mine inspector's inspection report of November 14, 1986, did indicate that post-forfeiture grading work by LRC (T-119) caused the site to be graded to approximate original contour ("AOC"). (T-138)

15. The present site conditions on the area covered by Mining Permit 1337-1 are not changed. (T-161-166) The eastern outslopes of the mine site are not regraded but sit at the "angle of repose" with the slopes comprised of large rocks, mine spoil, (no topsoil) and only "volunteer" weeds as vegetation. (T-161-162)

16. The erosion and sedimentation control pond on the southeastern corner of the Mining Permit 1337-1 site has its embankment breached so that it cannot function. (T-162)

17. The erosion and sedimentation control pond on the northeastern

side of the Mining Permit 1337-1 mine site which handles storm water runoff from this permit site and from the adjacent sites covered by Mining Permits 1337-1A and 1337-1A2 is also breached and incapable of functioning. (C-17, C-18, T-164)

18. The top of the mine site has some areas with topsoil but other areas are without topsoil or vegetative cover. (T-169)

19. LRC stipulated at the hearing that DER witnesses Robert Musser and John Uzupis are experts on revegetation. (T-170, 184)

20. Well over 1% of the permit area does not have at least 30% ground cover, contrary to the regulations. This includes the eastern outslopes of the site and the flat western portion of the mine site. (T-172)

Mining Permit 1337-1A

21. The area covered by Mining Permit 1337-1A is a 5-acre tract contiguous with a portion of the western border of the area under Mining Permit 1337-1. (C-10)

22. In 1981, this permit area consisted of piles of spoil and a partially backfilled mine pit on the southern portion of the mine site near the border with the area under Mining Permit 1337-1. (T-79)

23. By 1983, the area under Mining Permit 1337-1A had been rough graded. Some grading on the western portion of the site remained to be done, but there were no visible pits or highwalls remaining. No topsoil had been spread, however, and the site had not been revegetated. (T-102-103)

24. At the time of the forfeiture of the bond in 1986, the site was graded, but there was no topsoil spread at the site and none was stored there. The only vegetation on the site were weeds. (T-116, C-16)

25. Today, the site covered by this permit still has no topsoil on it and the plant species are mostly weeds. (T-172-173) There are no legumes on

the site, which makes the growth sparse. (T-172-173) There are bare areas on this site, particularly at the boundary with Mining Permit 1337-1. (T-174)

26. The site lacked a diversity of permanent plants acceptable to DER for mine site reclamation as required by the regulations. (T-173, 174).

Mining Permit 1337-1A2

27. The site covered by Mining Permit 1337-1A2 is bounded on the east by Mining Permit 1337-1 and on the north by Mining Permit 1337-1A. It is a 3.2 acre tract. (C-10)

28. As of 1981, this mine site consisted of spoil piles and an open mine pit partially filled with water. (T-80)

29. By 1983, the pit had been partially backfilled with the mine pit remnants still visible on half the site. (T-103-104) The northern half of the site was graded to AOC, but not topsoiled or revegetated. (T-104)

30. By the time of bond forfeiture, the site covered by Mining Permit 1337-1A2 was graded, but not topsoiled or revegetated. (T-117-118)

31. The vegetation and topsoil conditions on this site at present are like the conditions on Mining Permit 1337-1A. There is no topsoil and no permanent vegetation. There is a large bare area adjacent to the boundary with Mining Permit 1337-1 (T-174) and there are other bare areas on this site. (T-175)

32. This permit area also fails to meet the minimum vegetation standards of the regulations. (T-175)

33. As part of MDP 3374SM78, LRC proposed a post-mining land use for the three permit areas as a wildlife refuge. (C-9, T-176) Such a use requires food and cover for wildlife (T-176 and 177) but at present and without more effort, the site is no refuge. (T-177-178)

34. When coal mining ceased on LRC's sites in the spring of 1983, the

sites should have been reclaimed by the fall of 1983. (T-241)

Mine Drainage Permit 3378BC16

35. MDP 3378BC16 was issued to LRC by DER for a tract of land on the opposite side of a small tributary of Indian Creek from the area covered by MDP No. 3374SM78. (T-74, C-10)

36. Located within the boundaries of MDP 3378BC16 are Mining Permits 3378BC16-01-0, 3378BC16-01-1 and 3378BC16-01-2. (T-74, C-10)[2]

Mining Permit 01-0

37. As of 1981, the entire area of Mining Permit 01-0 had been disturbed by mining, it had not been final graded, and it consisted of spoil piles and a few topsoil piles. (T-81-82) It had not been revegetated. (T-83)

38. Up until 1983, the mine site's condition was unchanged. (T-91)

39. DER inspections of Mining Permit 01-0 in the summer of 1986 showed that the site had been rough graded, but the topsoil was not spread and there was no revegetation. (T-121-123, C-16) There were steep outslopes still on the site and erosion was occurring. (T-123-124) The sedimentation control facilities were not being maintained by LRC. (T-123)

40. As of the present, as admitted by LRC, the outslopes of Mining Permit 01-0 are too steep and not to AOC along the eastern slope of the mine site facing Indian Creek. (T-186, R-7) These slopes are not revegetated to 70% as required by the regulations. (T-186, C-20) Along this same slope, the storm water collection ditches which are part of the erosion and sedimentation controls are breached, so storm water runoff never reaches the sedimentation pond. (T-186-187, C-19-20) There are erosion gullies larger than nine inches

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[2] Throughout the transcripts, these three mining permits were referred to as 01-0, 01-1 and 01-2 respectively. They will be referred to in similar fashion throughout the rest of this adjudication.

on this area, too. (T-190)

41. While portions of the site in the western and northern areas of the permit are properly revegetated, there are significant areas which lack adequate vegetation and these areas exceed the "one percent of the area with less than thirty percent vegetative cover" standard in the regulations. (T-190-191) LRC admits its revegetation efforts do not comply with 25 Pa. Code §87.155. (R-7)

Mining Permit 01-1

42. The area under Mining Permit 01-1 lies adjacent to the west of the area under Mining Permit 01-0. (C-10)

43. In 1981, its condition was the same as that of 01-0 in that the site was not graded but consisted of steep piles of mine spoil and piles of topsoil. (T-83)

44. By 1983, some rough grading had been done but the site had not been returned to AOC yet and spoil piles remained to be graded out. (T-94-95) No erosion and sedimentation controls were in place to prevent the topsoil from eroding off site. (T-96) The site was not revegetated. (T-95)

45. By the summer of 1986, the site was rough graded, but the site was not topsoiled or revegetated. The erosion and sedimentation controls were not functioning properly at least in part because LRC was not maintaining them. (T-127)

46. As of the present time, this site is not adequately revegetated. It does not comply with the 70% vegetative cover standard in 25 Pa. Code §87.155. (T-201, C22) LRC admits this. (R-15) There is no topsoil on the portion of the site lying nearest the township road, and LRC's wrecked hydroseeder is abandoned on the site. The erosion and sedimentation control ditch running from east to west across the site is breached in the southwest

corner of the site near the sedimentation pond so silt runs into the stream barrier and tributary to Indian Creek itself. (T-202-203, C-24-25)

Mining Permit 01-2

47. Land within Mining Permit 01-2 abuts to the north the land within Mining Permits 01-0 and 01-1. (C-10)

48. Mining Permit 01-2 represents the farthest into the hill on MDP 3378BC16 that LRC mined on this tract. (T-84). In 1981, the highwall was about 40 feet high. (T-88)

49. By 1983, LRC had removed approximately half the highwall by backfilling (T-92), but east and south of the highwall there were spoil piles and topsoil piles remaining. The mine's pit and highwall remained in the area of the border between 01-0 and 01-2. (C-11, T-92) The site was not revegetated at all. (T-95)

50. As shown in the photo labeled C-16, as of June 9, 1986, a portion of the highwall was still not backfilled at that time. (C-16, T-114, 117) The remainder of the site was graded but not topsoiled or vegetated. (C-16, T-117)

51. LRC admits that it has not revegetated the area covered by Mining Permit 01-2 to the degree required by 25 Pa. Code §87.155. (R-16)

52. The highwall has been rough graded but not restored to AOC (C-21) and in this area, there is neither topsoil nor vegetation. (C-21, T-193-195) Revegetation is only adequate on the eastern portion of this site. As you go west on the site, both the topsoil and vegetation decrease in amount.

53. LRC's Reclamation Plan approved by DER for the area in MDP 3378BC16 says the post-mining use of this land would be farm land and forest land (C-8, T-204-205) but no trees were planted (T-206) and no legumes are

found on the site. (T-207)[3]

54. LRC did not mine any of the area within MDP 3378BC16 after it lost its license in 1981. (T-96-97)

55. All of the area within MDP 3378BC16 was affected by LRC's mining. (T-90-91)

DISCUSSION

Before the Board in this appeal is a challenge by LRC to DER's forfeiture of six surety bonds posted on behalf of LRC in regard to LRC's mining operations under six mining permits. In reviewing this DER forfeiture action, certain legal precepts must remain before us. The first, of course, is that the burden of proof in this proceeding rests on DER. James E. Martin et al. v. DER, 1988 EHB 1256, and King Coal Company v. DER, 1985 EHB 104.

The second precept is that if DER proves a violation at the operator's mine site, it has a duty to forfeit the bond for that mine site. Morcoal Company v. DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983), John H. Miller v. DER, 1988 EHB 538. Thirdly, in reviewing DER's forfeiture action, we are limited to determining whether the forfeiture was an abuse of discretion, Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

Turning to the six permitted mining permits and the sites bonded thereby, there can be no serious suggestion that any of them has been properly reclaimed. LRC even admits this in certain instances.

The evidence shows neither LRC nor any subcontractor mined the LRC sites before us today after 1982. It also shows LRC affected all of the area

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[3] The findings of fact as to present conditions on each of the six permit areas comport with the visual observations of Board Member Richard S. Ehmann made during the site view on November 20, 1989.

covered by each of the mining permits.

On June 5, 1986, when DER issued its forfeiture letter as to these bonds (we review DER's decision to forfeit as of that date, C.N. & W. Incorporated v. DER, 1989 EHB 432.), the area of Mining Permit 1337-1 area was not reclaimed as required. While it was rough graded and there is a suggestion in a DER inspection report that it was graded to AOC five months after forfeiture, such grading is not enough. The site had not had topsoil spread on it and was not revegetated to the point it could comply with the requirements of 25 Pa. Code §87.155. DER's inspectors testified that the outslopes of the site were just as steep as of the date of hearing as they were in 1986 and, at this point, they are bare rocky spoil material sitting at the angle of repose. Moreover, there is no question that the site has large barren areas on it which are devoid of topsoil or adequate vegetation to control future erosion. As of the date of hearing, the erosion and sedimentation controls on the site were breached and incapable of functioning. It should be noted that when the view was conducted, John Martucci pointed out topsoil on this site available for spreading on the outslopes, but offered no good reason why LRC had not spread it long ago.

Mining Permit 1337-1A has a common border with the edge of Mining Permits 1337-1 and 1337-1A2. Both it and the area covered by Mining Permit 1337-1A2 were neither topsoiled nor revegetated at the time of the forfeiture in 1986. While these two mine sites have since been planted since and have areas in each of them where there is topsoil and good vegetative growth, they also have areas devoid of topsoil which are barren, except for the random weeds, and still other areas where there is only very limited (inadequate) vegetation.

Clearly, the regulations governing site restoration require topsoil

replacement and revegetation, and 25 Pa. Code §§87.99, 87.147(b) and 87.155 set standards for when revegetation has been achieved. Expert opinion from DER's forester witnesses show revegetation has yet to be achieved on any of the three mining permits contained within MDP 3378SM78. DER inspectors and foresters also agree the topsoil was not spread properly on these mining permit areas either. Since these violations alone are sufficient to trigger bond forfeiture under Morcoal, supra, we need not spend time in discussing other alleged reclamation violations.

Briefly, however, we need to note that all of the area covered by all of the six permits was affected by LRC's mining. This is important as to the bonds covering Mining Permits 1337-1 and 1337-1A. These bonds are "proportional bonds", meaning liability under them accrues in proportion to the amount of the permit area affected by mining activity. King Coal Company v. DER, supra. The other four bonds are not proportional, so liability thereon is for the full amount of the bond regardless of the amount of area affected by mining. In any event, however, the testimony establishes that the entire area was affected on each mining permit.

In addition to the three mining permits within MDP 3378SM78, DER issued three more mining permits to LRC for separate portions of the area encompassed by MDP 3378BC16. They are the permits referred to herein as 01-0, 01-1 and 01-2.

At the time DER forfeited the bond in 1986 for Mining Permit 01-0, the testimony established that the site was rough graded. This does not mean it was all backfilled to AOC because the outslopes were still too steep and they remain that way as of the date of hearing. These outslopes run along the eastern side of this 10.5 acre parcel at the boundary between the area under permit and areas unaffected by mining and not under permit, lying adjacent to

Indian Creek. In addition, the testimony shows that as of 1986, LRC had neither spread topsoil on the site nor revegetated it. The outslopes on the eastern and southern sides of the site remain without topsoil or vegetation as of the date of hearing. Indeed, in response to DER's Request for Admissions, LRC admitted it failed to regrade the eastern outslopes to AOC and has not revegetated them. Such a failure violates 25 Pa. Code §87.141(c) which requires rough grading and grading to follow mining by not more than sixty days. It also violates 25 Pa. Code §87.144 which requires that final graded slopes must be returned to "approximate premining slopes or any lesser slope approved by the Department," i.e. to AOC. The admitted lack of vegetation, of course, violates 25 Pa. Code §87.147 which mandates revegetation in accordance with the revegetation plans approved by DER.

Finally, LRC's failure to reapply the topsoil on these areas violates 25 Pa. Code §§87.96 and 87.99, which mandate it be separately removed, stored and uniformly reapplied.

Conditions on Mining Permit 01-1 were and are slightly better than on Mining Permit 01-0. This permit area is regraded properly. DER's main complaint with regard thereto, as sustained by the evidence, is the lack of topsoil and adequate vegetation on this mining permit. Currently, the northeastern portion of the site adjacent to Mining Permit 01-0 is relatively flat. There, topsoil is visible and vegetation is adequate. The farther west one goes on the site, however, the less topsoil and plant life there is. Much of the western portion of Mining Permit 01-1 is bare. The evidence offered by DER did not state whether the lack of topsoil and vegetation applied as to all of the Permit 01-1 area at the time of forfeiture or only a portion of the site. The testimony did establish, however, that topsoil was not spread and the area not revegetated, contrary to the regulations recited above. Moreover,

as to this mining permit also, LRC's response to DER's request for admissions admits a lack of adequate post-mining vegetation.

Mining Permit 01-2 is the last of the six permit areas we are considering in this forfeiture proceeding. As of the 1986 forfeiture, portions of the highwall of the mine were still in existence so the site's rough grading clearly had not been completed. In fairness to LRC, however, LRC did complete the highwall's removal between the forfeiture date and the date of the site view. However, it obviously follows logically if the rough grading is not completed, then the final grading could not have been done and so on through the spreading of topsoil and the seeding to revegetate the mine site. The testimony from DER's staff also established each of these omissions and again LRC admits even now that it has failed to revegetate the permit area.[4]

To all of these site conditions which clearly justify DER's forfeiture, LRC offers no sustainable defense.

LRC says the Board wrongly issued a sanction order against it barring its introduction of documents, and this unfairly precluded its presentation of a defense to forfeiture. As recited above, this Board issued Pre-Hearing Order No. 2 to DER and LRC on November 2, 1990 (after twice telling LRC in writing that LRC should retain counsel to represent it so as to avoid being disadvantaged). That order directed LRC and DER to file a Joint Stipulation as to facts, documents and issues of law. It also mandated that DER and LRC separately prepare and file with this Board--prior to the hearing-copies of the documents each would seek to introduce. The order also said that

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[4] According to LRC's responses to DER's request for admissions, LRC is bankrupt and has no assets, let alone assets with which to reclaim these sites.

sanctions would be imposed by the Board against the offending party for noncompliance with the order. At the view of the site, John Martucci agreed orally, on LRC's behalf and in front of Board Member Ehmann, to meet with DER's counsel to prepare this Stipulation. No such Stipulation was filed and no documents were received from LRC. The result was a DER oral Motion for Sanctions made at the hearing on December 4, 1989. DER sought dismissal or in the alternative some limitations on LRC's ability to put a case before us. (T-42, 43) DER recited a litany of failures by LRC in connection with this case which are not repeated here. LRC's response was that Mr. Martucci's work schedule was too intense to allow for this meeting and when he asked DER to "fax" him some documents, DER mailed them to him instead. At the hearing, and on LRC's behalf, Martucci admitted he read our November 2, 1989 Order and understood that it imposed obligations on LRC to meet with DER. Martucci also admitted that DER had tried to meet with him but alleged that his current job prevented him from having time to meet with DER or comply with the order. (T-45, 46)

Thereafter, Martucci did agree with portions of DER's proposed stipulation (T-49-55) but offered no explanation for his failure to prepare and file LRC's exhibits except as set forth above. Accordingly, DER's motion was denied insofar as it sought dismissal of LRC's appeal, but granted as to the presentation by LRC of documents. (T-57, 59) We expressly adopt and affirm this sanction herein. As Board Member Ehmann stated at the hearing:

> "...Pre-Hearing Order No. 2 is intended not to help the two parties out, but rather to help the Board out in getting the case ready for trial and having it tried expeditiously." (T-57)

Under these circumstances, since Pre-Hearing Order No. 2 notified LRC that if LRC failed to comply therewith, sanctions would be imposed, such a sanction was clearly appropriate under 25 Pa. Code §21.124. Bolivar Borough v. DER,

1987 EHB 11, Conneaut Condominium Group Inc. v. DER, 1987 EHB 107.

The LRC argument on the fact that Mr. Martucci should not have been barred from offering documents which LRC had provided to DER at Martucci's deposition does not address this point, but shows LRC's disadvantage in this case was created by its decision to appear pro se. Deposition exhibits are only that. They are not admissible at the hearing on the merits merely because they were identified at and used in a deposition. No deposition transcript was offered as an exhibit by DER or LRC. The transcript was not even listed in either party's pre-hearing memorandum as an exhibit. Moreover, discovery depositions can inquire into matters which may not be admissible at a hearing. Pa. R.C.P. 4008.1 and Pa. R.C.P. 4011, Frances Nashotka v. DER, 1988 EHB 1050. Thus, there may be documents produced there which are inadmissible before us, and the documents' appearance there neither gives LRC some right to bring it into the hearing nor creates an exception to the sanctions imposed for LRC's noncompliance with our Order of November 2, 1989.

LRC's argument that it should have been allowed to offer documents at the hearing because it would have filed the Stipulation if DER had not failed to fax LRC certain documents misses the point of the sanctions, too. LRC's failure to file its documentary exhibits did not revolve around the filing of the Stipulation specified in paragraph 1 of our Order. It was a separate obligation pursuant to paragraph 2 of the order and was an obligation under that paragraph which belonged solely to LRC. Sanctions for noncompliance with it are just as appropriate as sanctions would have been for noncompliance by LRC with its share of the joint obligation with DER as to the Stipulation's preparation.

Moreover, even if this sanction had not been imposed on LRC by this Board, the outcome would not have changed. None of the documents mentioned by

LRC at the hearing provides LRC a defense to this forfeiture.

The documents mentioned concern (1) agreements between Northbrook Mining Incorporated (Northbrook) and LRC, under which LRC apparently gave Northbrook some of LRC's assets in exchange for Northbrook's agreeing with LRC to reclaim its mine sites and pay some of LRC's creditors, (2) alleged agreements between DER and Northbrook concerning reclamation of areas mined by Northbrook and permit transfers to Northbrook, and (3) agreements between LRC and the owners of the mined lands concerning site reclamation.[5]

None of these agreements, even if they were before us, would change this case's result. Whatever the agreement between Northbrook and LRC, there is no suggestion that DER was party to it. Thus, even if Northbrook agreed with LRC to reclaim LRC's mine sites, such a commitment would at most give rise to a cause of action against Northbrook by LRC or, assuming DER sanctioned it a joint obligation of LRC and Northbrook to DER. The same is true as to an agreement between LRC or Northbrook and the property owners. Absent DER's joining such an agreement or modifying LRC's permits because of such an agreement, it does not change LRC's obligations under SMCRA and 25 Pa. Code Chapter 87 of the regulations as to site reclamation. John H. Miller v. DER, 1988 EHB 538.

Finally, as to any DER/Northbrook agreement regarding permit transfer, the fact is that LRC remained permittee for these sites. Until permit transfer to Northbrook or site reclamation, LRC's bonds were still subject to forfeiture by DER. LRC admits it did not seek transfer of these permits by DER to Northbrook (T-303) and the evidence shows the site was unreclaimed. Accordingly, the documents could have had no impact on this case's outcome.

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[5] Martucci was allowed to use documents to cross-examine DER witnesses (T-141-144, 228, 229).

LRC's second argument is that DER should have forced Northbrook to reclaim the sites covered by Mining Permits 1337-1, 1337-1A and 1337-1A2 rather than pursuing forfeiture. This agreement is irrelevant since the permits and bonds were LRC's permits and bonds and DER proved the violations set forth above as to each mine site. It may be DER could have forced Northbrook to do something on sites it mined, if DER had chosen to do so. Martucci does indicate Northbrook did backfilling and mining for LRC on the 01-0, 01-1 and 01-2 permits (T-272). LRC offered no evidence that Northbrook mined the sites covered by Mining Permits 1337-1, 1337-1A and 1337-1A2, however. Moreover, Northbrook went bankrupt (T-233), so not pursuing that company in such a circumstance while pursuing forfeiture of these LRC bonds for these sites makes sense. Finally, as Commonwealth Court has said before, the fact that someone else may have contracted with a permittee to mine a permitted site does not excuse the permittee in a bond forfeiture when its site is unreclaimed. Morcoal Company v. Commonwealth, DER, 24 Pa. Cmwlth. 108, 459 A.2d 1303 (1983). Since these three sites are unreclaimed, DER's forfeiture action must be sustained.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proof in this forfeiture proceeding. James E. Martin et al. v. DER, supra.

3. The test for our review of DER's forfeiture of LRC's bonds is whether DER abused its discretion in this forfeiture. Warren Sand and Gravel Co. Inc. v. DER, supra.

4. Where DER proves a violation of SMCRA, 25 Pa. Code Chapter 87, or the permittee's permit at the permittee's mine site, DER has a duty to forfeit

the permittee's bonds. Morcoal Company v. Commonwealth, supra.

5. As of the time DER forfeited these six bonds, the six mining permit areas had not been reclaimed in accordance with the standards set forth in 25 Pa. Code Chapter 87.

6. Insofar as LRC's bonds for the sites covered by Mining Permits 1337-1 and 1337-1A are proportional bonds, DER may forfeit the entire bond because all of the acreage at each site was affected by surface mining. King Coal Company v. DER, supra.

7. It constitutes no defense to bond forfeiture for a mine's permittee to have contracted with a third party to mine and reclaim that mine site for the permittee. Morcoal Company v. DER, supra.

8. LRC's noncompliance with our Order dated November 2, 1989, warranted the sanction imposed on it by the Board pursuant to 25 Pa. Code §21.124.

ORDER

AND NOW, this 11th day of May, 1990, it is ordered that Laurel Ridge Coal, Inc.'s appeal from DER's bond forfeiture is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 11, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Stephen Lachman, Esq.
Western Region
For Appellant pro se:
John Martucci

nb

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M. DIANE SMIT
SECRETARY TO THE B

FREDERICK EYRICH and HARLAN J. SNYDER	:	
	:	
v.	:	EHB Docket No. 88-013-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
OLEY TOWNSHIP, Permittee	:	Issued [May 14, 1990]

FURTHER OPINION AND ORDER
SUR DER MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

Where appellants appeal from the "deemed approval" of a proposed amendment to Oley Township's ("Oley") Official Sewage Facilities Plan, which approval occurred because of DER's failure to act on the amendment within the time limits established in 25 Pa.Code §71.16, the appeal is dismissed because the proposed amendment is a plan supplement, not a plan revision. A sanction of "deemed approval" only applies to a plan revision.

OPINION

This appeal began on January 19, 1988, when Harlan J. Snyder and Frederick Eyrich (collectively "Eyrichs") appealed to this Board from DER's failure to act within 120 days on a plan supplement as allegedly required by 25 Pa.Code §71.16. The supplement does not belong to Eyrichs and is not for

their property but is for property owned by Marjorie J. Helfferich ("Helfferich"), to be developed as High Knoll Estates, which property is located in Oley Township in Berks County. According to Eyrichs' appeal, Oley Township ("Oley") is also where Eyrichs are residents.

Oley advised this Board by letter from its solicitor dated June 20, 1989, that it has elected not to participate in this proceeding as to the question of "deemed approval" discussed below. Oley takes this position apparently even though it recognizes the fact that it is a party. Oley is a party by virtue of 25 Pa.Code §21.2 because of the fact that it is Oley which made the submission of the proposed supplement to its own Official Sewage Facilities Plan for the Helfferich property, which submission is now being challenged by Eyrichs.

The only person interested in this matter who has not appeared or intervened by counsel in this case is Helfferich.

After Eyrichs filed their appeal, they filed their Pre-Hearing Memorandum in accordance with our Pre-Hearing Order No. 1 dated January 26, 1988. In response to Eyrichs' Pre-Hearing Memorandum, DER wrote to this Board by letter dated June 15, 1988 and advised that it elected to file no Pre-Hearing Memorandum. DER's letter took the position (taken routinely by DER in third-party appeals) that any duty to defend in this case rested on Oley or Helfferich.

After receipt of the letter dated June 20, 1988 from Oley's solicitor saying Oley would not participate in this matter, and on June 27, 1988, we ordered DER to advise the Board of its position regarding Eyrichs' contentions as to a "deemed approval" of Oley's supplement. On September 1, 1988, DER filed a Memorandum of Law on this matter which contained a Motion to Dismiss

this appeal on the theory that since there had been no "deemed approval" of the supplement by DER, there was nothing to appeal from.

On September 14, 1988, we notified counsel both for Oley and Eyrichs of DER's Motion and directed that if they wished to respond thereto, they file their responses by October 4, 1988. Oley then advised us by letter of June 7, 1989, of its decision not to respond. Eyrichs filed their response to DER's Motion on June 15, 1989.[1] Thereafter William A. Roth left this Board, and on December 19, 1989, this case was assigned to Board Member Richard S. Ehmann.

On February 16, 1990 we issued an Opinion and Order in which we denied DER's Motion To Dismiss. Our opinion, based on the concept that Oley had submitted a plan revision to DER, found that the 120-day "deemed approval" concept in 25 Pa.Code §71.16 applied. The opinion found that more than 120 days had passed and, therefore, DER had approved this revision by operation of Section 71.16. We further ordered DER to file its pre-hearing memorandum and directed the parties to brief the question of whether our Opinion of February 16, 1990 rendered this appeal moot.

On March 16, 1990 Eyrichs filed their Brief opposing a dismissal based on mootness. On March 29, 1990 DER's Pre-hearing Memorandum was filed. On March 29, 1990 Eyrichs filed a Memorandum on the issue of the impact of a "deemed approval" on a third party's right of appeal. On March 30, 1990 DER

---

[1] In the interim period between our letter of September 14, 1988 and Oley's letter of June 7, 1989, DER and Eyrichs filed a joint Motion For Judgment On The Pleadings. When we advised the parties of our reluctance to rule on this Motion citing <u>Ingrid Morning v. DER</u>, 1988 EHB 919, and suggested alternatives to this Motion, the parties withdrew their joint motion by letter dated May 12, 1989. As a result on May 25, 1989, we then ordered that all responses to DER's Motion to Dismiss be filed by June 16, 1989.

filed its Memorandum On Issues Of Mootness. Unfortunately, none of these filings addresses the point on which this appeal turns and on which we dismiss it today.

When this appeal was initially filed, counsel for Eyrichs incorrectly characterized it as an appeal from "Failure of DER to act upon 537 Plan revision...." Thereafter, former Board Member Roth's Order of June 27, 1988 referred to this case as an appeal from a deemed approval of a "537 plan revision" as did DER's counsel in correspondence with this Board.

As to DER's motion to dismiss, both it and the response thereto by Eyrichs' counsel refer to Oley's submission as a plan revision. Based on these representations and our own incomplete review of this matter, our Opinion and Order issued on February 16, 1990 at Frederick Eyrich and Harlan J. Snyder v. DER, Docket No. 88-013-E, was based incorrectly on the position that it was a plan revision which Oley submitted to DER to start this entire matter.

There was no such plan revision submitted. None of the attorneys involved in this case detected this fact. Unfortunately, until we gave this appeal further review we also failed to note that Oley's submission was a plan supplement rather than a revision.

DER's letter of August 5, 1987 from John M. Veneziale to Oley (attached to Eyrichs' Notice of Appeal) speaks of this submission as "your Proposed Official Sewage Facilities Plan supplement." It receives the same reference (as a supplement, not a revision) in DER's letter of January 13, 1988 to Oley, which is Exhibit B to Eyrichs' Pre-hearing Memorandum, and an unmarked exhibit attached to both DER's Motion To Dismiss and its Pre-hearing Memorandum. As we have frequently held in the past, we give deference to

DER's decision as to whether a submission is a plan supplement or a plan revision. Maxwell Swartwood v. DER, 1979 EHB 248, Keim v. DER, 1985 EHB 63. We see no reason to change our posture in that regard here. Accordingly, we will treat Oley's submission as a plan supplement.

Because Oley has submitted a plan supplement to DER, as opposed to a plan revision, 25 Pa.Code §71.16's "deemed approval" concept does not apply. Ingrid Morning v. DER, Docket No. 88-094-M (Issued March 8, 1990). As we said there:

> As such, there is no "deemed approval" sanction for DER's failure to act in a timely manner. Since there is no "deemed approval," there was nothing from which Appellant could appeal.

Since there was no deemed approval issue, there was no DER "action" or "adjudication" which could have been appealed to the Board by Eyrichs. Thus DER's motion has merit and must be granted. Accordingly, we withdraw our prior denial of DER's Motion and grant DER the relief sought.

ORDER

AND NOW, this 14th day of May, 1990, the Board's Order of February 16, 1990 is withdrawn. DER's Motion to dismiss is granted and the appeal of Frederick Eyrich and Harlan J. Snyder is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 14, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

WESTINGHOUSE ELECTRIC CORPORATION	:	
	:	
v.	:	**EHB Docket No. 89-058-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 14, 1990**

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted. Failure to reconsider effluent levels in a final, unappealed National Pollutant Discharge Elimination System (NPDES) permit does not constitute "action" by DER and is not appealable. Moreover, determining or enforcing a duty, arising out of an alleged agreement between the parties, to reconsider effluent levels is outside the scope of this Board's jurisdiction, and failure to perform such a duty is not an appealable action.

OPINION

This proceeding involves an appeal of DER's failure to issue a new or modified NPDES permit to the appellant, Westinghouse Electric Corporation (Westinghouse). Westinghouse owned and operated an elevator components plant in Cumberland Township, Adams County, from January, 1969 to October, 1988. In 1984, Westinghouse installed an air stripping tower to treat contaminated

groundwater at the site. In 1986, DER issued Westinghouse an NPDES (Part I) permit, allowing Westinghouse to discharge from the air stripping tower. Westinghouse did not appeal this permit. Subsequently, Westinghouse shut down the tower periodically, apparently because of operational difficulties. In July of 1988, DER issued an order compelling start-up and continuous operation of the air stripping tower, and Westinghouse appealed this order to the Board. The Board granted a partial supersedeas, deferring operation of the tower until January 21, 1989. Westinghouse renovated the air stripping tower before restarting it. As required by The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.308, Westinghouse had to obtain a modified construction (Part II) permit before it could restart the tower. DER issued the Part II permit on February 2, 1989.

Westinghouse brought this appeal on March 6, 1989, alleging that in September of 1988, DER agreed to reconsider the effluent levels in the Part I permit, but that it never did so.[1]

DER moved to dismiss this appeal on July 11, 1989, arguing that failure to reconsider a final Part I permit is not an appealable action. DER contends that Westinghouse's appeal is aimed at attacking the 1986 Part I permit and so is an impermissible collateral attack on the Part I permit, as any appeal of that is now untimely.

Westinghouse responded to DER's motion to dismiss. Westinghouse argues that DER agreed to reconsider the effluent levels in the Part I permit; that DER has not done this (as evidenced by the fact that no new or modified Part I permit was ever issued); and that this failure or refusal to act

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[1] Westinghouse has made it very clear that this appeal is not from DER's action on the Part II permit; it is from DER's failure to act to revise the effluent limitations in the Part I permit. (Westinghouse memorandum of law, p. 2)

constitutes an "action" or "decision," which the Board has jurisdiction to review. Finally, Westinghouse argues that the renovation of the tower created a "new source" of effluent and changed its legal status, requiring that DER issue a new or adjusted Part I permit (citing 40 C.F.R. §§122.62 and 122.63; 25 Pa. Code §92.7).

We will grant the motion to dismiss. To be appealable to this Board, a DER decision must constitute an "action" affecting the appellant's "personal or property rights, immunities, duties, liabilities, or obligations." 25 Pa. Code §21.2(a); Delta Excavating & Trucking Co., Inc. v. DER, 1987 EHB 319, 323. "Action" is defined as "any order, decree, decision, determination or ruling by the Department [of Environmental Resources] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits...." 25 Pa. Code §21.2(a).

The instant motion raises the issue of whether the DER's failure to act constitutes "action" reviewable by this Board. As support for its contention that DER's failure (or refusal) to act constituted a reviewable action or decision, Westinghouse relies on Springettsbury Twp. Authority v. DER, 1985 EHB 492. But in that case, this Board found that DER had issued a letter denying a specific request for modification of an NPDES permit. Thus, the DER action--denial of a request for modification--clearly came under the definition cited above. In contrast, the instant appeal does not involve a specific request for modification and denial by DER. The only allegation is that DER agreed to act (reconsider) at some point, and it has yet to do so. This set of circumstances more accurately reflects those in a recent case decided by the Commonwealth Court: Marinari v. Commonwealth, DER, ___ Pa. Commw. ___, 566 A.2d 385 (1989). There, the petitioners brought an action in

mandamus to compel DER to process their landfill permit modification application. DER filed preliminary objections, alleging, among other things, that petitioners had not exhausted their administrative remedies by appealing to the Board. The Commonwealth Court found that, even though the petitioners had suffered direct and immediate harm, DER's failure to process the application was not action within this Board's jurisdiction. Specifically, the petitioners' case would not be dismissed for failure to exhaust their administrative remedy because a request to compel DER action lies in equity and does not come within this Board's jurisdiction. Id. at 387, (citing Section 4(a) of the Environmental Hearing Board Act, Act of July 13, 1988 P.L. 530, No. 94, 35 P.S. §7514(a)).

It is clear that Westinghouse bases its appeal on simple inaction by DER. Westinghouse does not request this Board to reverse action already taken by DER, but to compel DER to reconsider and reissue or modify its Part I permit. As in Marinari, the appeal sounds in equity and is beyond the scope of this Board's jurisdiction. Board precedents such as B & D Coal Co. v. DER, 1986 EHB 615 and Duquesne Light Co. v. DER, 1985 EHB 423 which indicate that the Board has jurisdiction to review DER's inaction, are hereby overruled.[2]

Westinghouse's other arguments also lack merit. As to the argument that DER must abide by its agreements, this may be true, but the Board is not the proper forum for an equity action to enforce an alleged agreement. Welch Foods, Inc. v. DER, 1974 EHB 508, 512. As to Westinghouse's argument that DER had a duty to issue a new or modified Part I permit under 40 C.F.R. §§122.62 and 122.63 and 25 Pa. Code §92.7, nothing in these regulations creates such a

---

[2] An exception to this rule may be DER's failure to act upon permit applications pursuant to the Surface Mining Conservation and Reclamation Act, Act of December 10, 1968, P.L. 1167, No. 370, as amended, 52 P.S. §1396.4(c), See Hepburnia Coal Co. v. DER, 1985 EHB 713.

duty.[3]

In summary, the Board lacks jurisdiction to review appeals alleging that DER has failed to act. Therefore, we will grant DER's motion to dismiss.

ORDER

AND NOW, this 14th day of May, 1990, it is ordered that the motion to dismiss filed by the Department of Environmental Resources is granted, and that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

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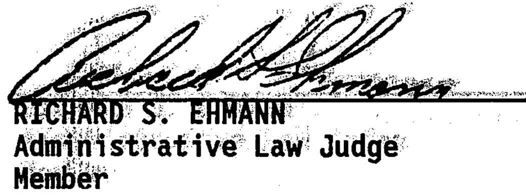
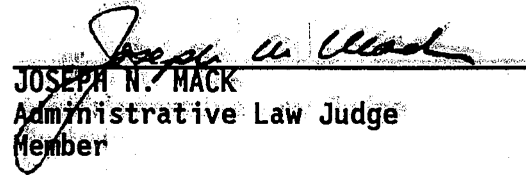
[3] 40 C.F.R. §§122.62 and 122.63, cited by Westinghouse, merely set out reasons for which an NPDES permit may be modified. 25 Pa. Code §92.7 addresses new or increased discharges of pollutants by the holder of an NPDES permit. Where these new or increased discharges will not violate the effluent limitations in the current permit, they need only be reported to the Department. Where the new or increased discharges will violate the effluent limitations in the existing permit, the discharger is required to submit an application and obtain a new permit before increasing the discharges. The only duties created by this section lie with the discharger, not with DER.



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 14, 1990

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M. DIANE SMITH
SECRETARY TO THE BO/

BOROUGH OF BELLEFONTE	:	
	:	
v.	:	**EHB Docket No. 89-219-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 17, 1990

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss filed by the Department of Environmental Resources is granted. A letter from the Department which merely reminds a municipality what is required by a previously issued water allocation permit is not an appealable action.

OPINION

This proceeding involves an appeal by the Borough of Bellefonte (Bellefonte) from a letter of the Department of Environmental Resources (DER) dated July 5, 1989. The letter which has been appealed accompanied a "Permit Compliance Report Form" which DER sent to Bellefonte in connection with the latter's water allocation permit.

This Opinion addresses DER's motion to dismiss, filed on August 25, 1989. Prior to discussing this motion, however, it is necessary to understand the background of this appeal. On September 27, 1988, DER issued a water

allocation permit (No. WA-23A) to Bellefonte. Bellefonte then filed an untimely appeal with the Board, objecting to various conditions of the permit, and requested leave to file its appeal nunc pro tunc. On May 3, 1989, the Board issued a decision denying the request for leave to appeal nunc pro tunc and dismissing the appeal. See Borough of Bellefonte v. DER, 1989 EHB 599. Bellefonte then appealed the Board's decision to Commonwealth Court, which issued a decision on February 12, 1990 affirming the Board's dismissal of the appeal. Borough of Bellefonte et al. v. Commonwealth, DER, ___ Pa. Commonwealth Ct. ___, 570 A.2d 129 (1990). The Board's records indicate that Bellefonte has since filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. As of the date of this Opinion, it does not appear that the Supreme Court has acted upon this Petition.

In its motion to dismiss, DER argues that the July 5, 1989 letter is not appealable. DER contends that paragraph six of the water allocation permit requires Bellefonte to submit a permit compliance report on or before the anniversary date of the permit, and that the letter and form it mailed to Bellefonte on July 5, 1989 merely implemented paragraph six and did not impose any new or different obligations upon Bellefonte. Accordingly, DER argues that the letter is not an action which is appealable to the Board.

Bellefonte filed a response opposing DER's motion. Bellefonte contends that a letter may possess the characteristics of an order and, hence, constitute an appealable action, citing William E. Martin v. DER, 1987 EHB 612. Bellefonte contends that the July 5, 1989 letter constitutes an order because it ordered Bellefonte to complete the permit compliance form. Bellefonte also argues that, apart from whether the letter imposes new obligations, there is an issue as to whether the letter is enforceable in light of Bellefonte's appeal--which was pending at the time Bellefonte filed

its response--to Commonwealth Court.

To be appealable to this Board, a DER decision must constitute an "action" affecting the appellant's "personal or property rights, immunities, duties, liabilities, or obligations." 25 Pa. Code §21.2(a); Delta Excavating & Trucking Co., Inc. v. DER, 1987 EHB 319, 323. "Action" is defined as "any order, decree, decision, determination or ruling by the Department [of Environmental Resources] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits...." 25 Pa. Code §21.2(a). Although DER letters may qualify as appealable actions, letters are not appealable when they merely provide advice as to permit limitations or what the law requires. Chambers Development Co. v. DER, 1988 EHB 198, Sandy Creek Forest v. Commonwealth, DER, 95 Pa. Commonwealth Ct. 457, 505 A.2d 1091 (1986).

Applying these principles to this case, it is clear that DER's July 5, 1989 letter does not constitute an appealable action. This letter stated:

> As a condition for issuing your water allocation permit, which was approved by the Department on September 27, 1988, the Borough of Bellefonte is required to submit a progress report indicating compliance with the water conservation conditions of the permit. The enclosed Permit Compliance Report Form should be completed and returned to our office on or before September 27, 1989.
>
> If you have any questions or need additional information, please contact the Water Conservation/ Technical Assistance Section at 717-541-7805.
>
> Sincerely,
> /s/
> William A. Gast, Chief
> State Water Plan Division

Contrary to Bellefonte's assertions, there is nothing in this letter which would lead us to conclude that it is an order of the Department.

The letter simply recites that completion of the report was a condition of the water allocation permit, and that the form "should" be completed and returned to DER. A letter stating that Bellefonte "should" complete and return the form is hardly the same as "ordering" Bellefonte to do so. See, Mark Basalyga t/a Tamarack Topsoil Co. v. DER, 1989 EHB 388. At most, the letter informed or reminded Bellefonte what was required by the terms of the water allocation permit; this advice did not transform the letter into an appealable action. See, Chambers Development Co., Sandy Creek Forest.

Since the July 5, 1989 letter did not constitute an appealable action, we will grant DER's motion to dismiss.[1]

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[1] Because we are granting DER's motion to dismiss, which goes to the fundamental question of whether we have jurisdiction to hear this appeal, it is not necessary for us to address DER's later filed Motion to Dismiss for Mootness.

ORDER

AND NOW, this 17th day of May, 1990, it is ordered that DER's motion to dismiss is granted, and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 17, 1990

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nb

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M. DIANE SMITI
SECRETARY TO THE B(

MARGARET C. AND LARRY H. GABRIEL, M.D. :
:
v. : **EHB Docket No. 89-582-E**
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: May 17, 1990**

OPINION AND ORDER
SUR MOTION TO QUASH

By Richard S. Ehmann, Member

Synopsis

A letter from the Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") to counsel for Margaret H. and Larry C. Gabriel, M.D. ("Gabriels") declining a request that DER order Neshannock Township to build the sanitary sewer line described in the Township's Official Sewage Plan as serving the development in which Gabriels reside, is not an appealable action. Accordingly, DER's Motion To Quash this Appeal will be granted.

OPINION

On December 1, 1989, Gabriels filed an appeal from DER's undated letter to Gabriels' attorney. DER's letter provided in relevant part:

> As stated in our letter of January 9, 1989, Neshannock Township is obligated to construct sewerage facilities in the Coronado Drive area consistent with the Official Sewage Plan of the Township. The Township's

> committtment [sic] to implement the plan was not qualified on receipt of any grants or low interest loans such as Pennvest.
>
> We support your position in this matter, i.e. that the township should proceed expeditiously to implement its Official Plan. However, due to our limited resources, we are unable to take enforcement action in this matter. We sympathize with your client but feel this is mainly a local matter and can be resolved most efficiently at the local level.

In response to Gabriels' appeal, DER filed a Motion To Quash on March 19, 1990. The Motion argues that DER's letter is not an appealable "action" of DER, that a refusal to sue the township is not an appealable action, that there is no irreversible damage to Gabriels by virtue of DER's failure to act and that DER's refusal to act is an exercise of its enforcement discretion, which exercise is not appealable.

Thereafter, DER and Gabriels filed their pre-hearing memoranda on March 22, 1990 and April 3, 1990 respectively. We received DER's Brief supporting its Motion on April 6, 1990.

On April 9, 1990, Gabriels filed a Motion To Withdraw their appeal without prejudice to their right to refile it in the future. Gabriels based this Motion in part on the fact that Neshannock Township had been awarded funding to build this sewer. In a conference call on April 12, 1990 on this Motion, counsel for DER opposed withdrawal without prejudice because counsel contended that DER's action was not appealable to begin with. In response, Gabriels' counsel orally withdrew the Motion To Withdraw and asked for additional time to respond to DER's Motion To Quash. We granted this request in our Order of April 12, 1990 and Gabriels' Response To DER's Motion To Quash and Brief in support thereof were filed with us on April 20, 1990 as directed.

In their Response and Brief, Gabriels state that they:

> ...agree that the DER has correctly stated the law concerning jurisdiction of this Board. We submit that the parties differ only on the question of whether the Gabriels have suffered the sort of damage to their property interests is of sufficient magnitude to be within the jurisdiction of this Board as a matter of public policy.
>
> [Brief, Page 6]

Gabriels also argue DER's refusal to act violates their constitutional rights to use and enjoyment of their land based on the facts involved in this case.

In Municipal Authority of Buffalo Township v. DER, 1988 EHB 608, we addressed the scope of what is appealable to this Board and we said:

> Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" under §1921-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, and 25 Pa.Code §21.2(a)(1).[1] Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the parties. An appealable action is defined in 25 Pa.Code §21.2(a) as follows:
>
> > "Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

In reviewing this DER Motion we will assume the facts recited in Gabriels' brief are the facts before us. We do this because DER has not put

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[1]These definitions were not changed by passage of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 et seq.

forth an alternative version of the facts and because in construing this motion we review it in the light most favorable to Gabriels. Meadville Forging Company v. DER, 1984 EHB 850, Columbia Park Citizens Association v. DER, 1989 EHB 899.

The instant appeal is based upon DER's refusal to exercise its prosecutorial discretion in the manner sought by Gabriels. As we have previously decided, such a refusal by DER is not an adjudicatory action subject to our review. Ralph Edney v. DER, 1989 EHB 1356; Downing v. Commonwealth, Medical Education and Licensure Board, 26 Pa.Cmwlth. 517, 364 A.2d 748 (1976); Consolidation Coal Company v. DER, 1985 EHB 768. Accordingly, we are compelled to dismiss Gabriels' appeal.

Gabriels' argument that their constitutional rights have been violated does not change this result. DER does not deny the existence of Gabriels' constitutional rights and neither does this Board. However, the existence of Gabriels' rights does not in turn create for Gabriels the right to have DER "...institute legal proceedings against Neshannock Township to compel implementation of the Neshannock Township Official Sewage Plan" as requested in the Prayer For Relief in Gabriels' Notice of Appeal. Gabriels have neither pointed to any case or statutory law to support such a contention nor directed the Board to any authority for the proposition that this is the proper forum for protection of those rights.[2]

---

[2]Gabriels' citation to Article 1, Section 11 of the Constitution does not do this since it only talks of Courts being open and provides for suits against the Commonwealth in the fashion directed by the legislature. Obviously this Board is not a court of general jurisdiction. Commonwealth, Department of Environmental Resources v. Leechburg Mining Co., 9 Pa.Cmwlth. 297, 305 A.2d 764 (1973); Eva E. Varos et al. v. DER, 1985 EHB 892; Al Hamilton Contracting Co. v. DER, 1989 EHB 383.

Therefore, we must grant DER's Motion, and, thus, we enter the following Order.

O R D E R

AND NOW, this 17th day of May, 1990, DER's Motion to Quash is granted and it is ordered that the appeal of Margaret H. Gabriel and Larry C. Gabriel, M.D. is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 17, 1990
cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Western Region
For Appellants:
Martha E. Bailor, Esq.
Stanley W. Greenfield, Esq.
Pittsburgh, PA

rm

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717-787-3483
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M. DIANE SMIT
SECRETARY TO THE B

DEER LAKE IMPROVEMENT ASSOCIATION et al., :

v. : EHB Docket No. 90-148-E
Issued: May 17, 1990

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and
AMERIKOHL MINING, INC., Permittee

OPINION AND ORDER
SUR APPELLANT'S MOTION TO
STAY PROCEEDINGS

<u>Synopsis</u>

In a third party appeal from issuance of a surface mining permit, A Motion to Stay Proceedings, based on the pendency of a proceeding before the Township's Zoning Hearing Board and an argument of judicial economy, will be denied when the Motion is filed at the inception of the appeal to this Board. The surface mining permit is conditioned on compliance by permittee with such local zoning ordinances and the proceeding before the Board at this stage involves discovery by the parties and preparation of their respective pre-hearing memorandums, so there is virtually no judicial time to economize on.

OPINION

On April 10, 1990, an appeal was filed with this Board by Deer Lake Improvement Association, Inc.; Elmer Barthel, President of this association; "and all of the owners of property within the Deer Lake's plan of lots..." ("Deer Lake"). Deer Lake is appealing the March 12, 1990 issuance by the Commonwealth's Department of Environmental Resources ("DER") of Surface Mining Permit 26890106 to Amerikohl Mining, Inc. ("Amerikohl") for a proposed mine to be located in Wharton Township, Fayette County. On April 13, 1990, we issued our Pre-Hearing Order No. 1 giving the parties 75 days to complete discovery and directing Deer Lake to file its pre-hearing memorandum with us by June 27, 1990. (DER and Amerikohl are to respond fifteen days later)

On April 24, 1990 Deer Lake filed a Motion to Stay Proceedings. The motion contends Amerikohl's permit states in paragraph 9 that mining activities cannot begin unless Amerikohl complies with all ordinances enacted pursuant to the Municipalities Planning Code, the Act of July 31, 1968, P.L. 805 No. 247, as amended. It then states Amerikohl has sought a special use permit from the Wharton Township Zoning Hearing Board but that Board has not reached a decision with regard to Amerikohl's request. Finally, Deer Lake concludes that for reasons of judicial economy and saving of time, proceedings in this appeal should be stayed pending resolution of the zoning matter.

In its reply to Motion to Stay Proceedings, Amerikohl agrees it is seeking a special use permit, from the Township's zoning board that its Surface Mining Permit is written as stated in Deer Lake's Motion, and that no decision on its special use permit has been rendered. Amerikohl continues, stating that the Zoning Board's hearings are concluded, and argues that since the only activity in the proceeding at this stage is discovery, and Amerikohl

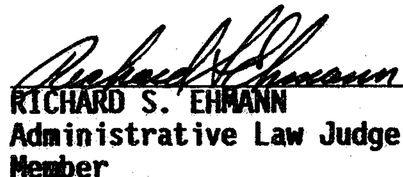
wants to conduct its discovery now, there is judicial economy to be obtained through a stay. DER takes no position on this Motion.

The zoning board proceedings concerning zoning and our proceeding in Deer Lake's appeal are wholly separate from one another because of the way in which DER wrote paragraph 9 of Amerikohl's permit. We will not decide zoning issues in our proceeding. City of Scranton v. DER et al., 1986 EHB 1223. Moreover, Amerikohl is correct when it says that at this stage only discovery is occuring in this matter. There is no effort of this Board involved in discovery by each party and thus no judicial economy or saving of this Board's time that would occur if we were to grant the motion. If we arrive at the date for a hearing on the merits of this appeal and the zoning proceeding is still unresolved, perhaps Deer Lake's motion might be attractive: as we are not to that point we enter the following order.

O R D E R

AND NOW, this 17th day of May, 1990, upon consideration of the Motion to Stay Proceedings filed on behalf of appellants and the reply thereto on behalf of Amerikohl Mining, Inc., it is ordered that the motion is denied. The parties shall proceed as directed in our pre-hearing Order No. 1 dated April 13, 1990.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 17, 1990

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M. DIANE SMI
SECRETARY TO THE E

JEK CONSTRUCTION COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 90-111-E**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 18, 1990**

OPINION AND ORDER
SUR MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

An appeal based in part on an oral expression of opinion and in part on a letter containing the opinion of employees of the Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") about potential problems with use of a specific tract for a municipal solid waste landfill, is dismissed as not being from a final DER action or adjudication, because appellant has yet to submit an application for a municipal solid waste permit in regard to that site. Oral expressions of opinion by DER staff members, standing alone, do not constitute a final action or adjudication by DER giving rise to a right of appeal.

OPINION

On March 13, 1990, JEK Construction Company, Inc. ("JEK") commenced the instant proceeding by filing its Notice of Appeal. JEK appeals from the March 2, 1990 letter signed by Anthony D. Orlando, who signed the letter as

DER's Southwestern Regional Manager of the Bureau of Waste Management. The Notice of Appeal also states it appeals from "...decisions of the Department of Environmental Resources enumerated in the pre-application meeting of February 16, 1990."

The rambling seven-page portion of JEK's Notice of Appeal which purports to specify the reasons for JEK's appeal states JEK applied to DER in 1988 for a permit to operate a municipal waste landfill. The appeal says that in May of 1988 DER suggested to JEK (it is not clear whether this was before or after the aforementioned solid waste permit application was filed) that it should either secure a waiver of the applicability of 25 Pa.Code Chapter 105 as to the proposed landfill site or obtain a permit for the site issued pursuant to the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, as amended, 32 P.S. §693.1 et seq., and the regulations found in 25 Pa.Code Chapter 105. As a result, JEK says it applied for a waiver or, alternatively, a permit. Thereafter, on October 13, 1989, DER's Bureau of Dams and Waterways Management wrote to JEK saying:

> This letter is to inform you that the Department has completed a review of your application submitted on June 14, 1988, for a permit to construct and maintain rock underdrains in two tributaries to Maple Creek for the purpose of constructing a municipal waste landfill in Fallowfield Township, Washington County. On October 5, 1989, a Water Obstruction and Encroachment Permit for this project was signed and forwarded to Mr. Charles Duritsa, Regional Director, Pittsburgh Regional Office. The permit, however, is not valid until a waste management permit is issued by the Department.
> (This letter is attached to JEK's Notice of Appeal)

JEK's appeal then says that in a pre-application meeting (occurring at an unspecified date but apparently subsequent to the October 13, 1989 letter) with DER, it was told by DER that the regional groundwater had to be

considered in the application and JEK should "propose a site design so that it would not be within 100 feet of a perennial stream or 8 feet of the regional groundwater." JEK then argues a DER letter of December 28, 1989 (not attached to its appeal) indicates a predisposition of DER not to honor the approved permit to install the rock underdrains ("rock drain permit").

Thereafter, JEK says, on February 16, 1990, JEK and DER had another pre-application meeting and DER is alleged to have said the two streams on which JEK wanted to install its rock underdrains are perennial and therefore construction of the rock underdrains in the streams would be considered ground water manipulation. JEK's appeal says that contrary to DER's statements, the streams have intermittent, not perennial, flows. Next, JEK says DER "orally" advised JEK that DER would not approve a landfill permit where rock underdrains in these streams would be located beneath JEK's proposed landfill. JEK also says this statement and DER's letter of March 2, 1990 represent a <u>de facto</u> revocation of the rock drain permit. DER's letter of March 2, 1990 is attached to JEK's Notice of Appeal. It says in pertinent part:

> I had hoped that our meeting on February 16, 1990 would be beneficial to your client by outlining some of the potential problems at this site. However, upon receipt of your February 19, 1990 letter there are still some misunderstandings and I would like to take this time to provide further clarifications.
>
> It should be noted that the Bureau of Dams and Waterway Management has not issued a permit. The Bureau of Dams and Waterway Management has completed a review of the application, but the Water Obstructions and Encroachment Permit will not be issued unless the Bureau of Waste Management issues a permit. At this time, your client does not have a permit to construct a rock drain in the unnamed tributary of Maple Creek.
>
> It should also be noted that your position, that the unnamed tributary of Maple Creek is intermittent, is not supported by information received from your client's consultants. Based on the information from both Duncan,

> Lagnese & Associates, Inc. and Skelly and Loy, portions of this stream are perennial. Investigations by both the Pennsylvania Fish Commission and our staff also indicate that portions of the unnamed tributary are perennial. We discussed the potential problems associated with the site's location relative to perennial streams, but it is difficult to provide comments without the benefit of an application to review.
>
> The Department has not deprived your client the use of its property. <u>If your client wishes to pursue the option to construct and operate a municipal waste landfill, then an application must be submitted. The Department will make a final determination only after a technical review of a complete application.</u>
> (Emphasis supplied)

JEK concludes in part that DER's decision is final because nothing JEK "...can submit in terms of a permit application...will or may change [DER's] position..." which is a <u>de</u> <u>facto</u> denial of both the rock drain permit and the solid waste permit. JEK also alleges that DER told it at the February 16, 1990 meeting that even if a Solid Waste Management Application was submitted, a permit would not be issued as long as the rock underdrain proposed was part of it. Finally, JEK states the proposed landfill is not economically feasible at the proposed site, absent use of the rock underdrains.

In response to this Notice of Appeal, DER has filed a Motion To Dismiss which states that while JEK did apply for the rock drain permit, JEK has not submitted an application to DER for a municipal solid waste permit.[1] DER's Motion states the meeting it had with JEK on February 16,

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[1]Pending disposition of its Motion To Dismiss, DER simultaneously filed a motion to block depositions of its staff as noticed by JEK. After oral argument by counsel on that motion in a conference telephone call, we entered our Order dated March 21, 1990. The Order stayed discovery by both parties pending our decision on the Motion To Dismiss and established a schedule for briefing the issues in the Motion To Dismiss and filing of affidavits to support the respective positions on the Motion To Dismiss.

1990 concerned what information should be included in a solid waste permit application and its letter of March 2, 1990 responded to a letter from JEK's counsel to try to clear up continuing misunderstandings. It is DER's position that its letter to JEK says it is difficult to comment on potential problems in an application when the application has yet to be submitted, so if JEK wants to pursue its concept, it should file an application. DER's Motion says that DER's March 2, 1990 letter merely restates comments made orally to JEK on February 16 and in other meetings, concerning the rock drain permit's status and potential problems with locating a landfill near a perennial stream. Accordingly, DER concludes the letter and statements in the meeting are not an action or an adjudication of JEK's rights and therefore no appeal will lie.

Nearly in accordance with the deadline in our March 21, 1990 Order, DER filed its Brief and the affidavit of Mr. Orlando. The affidavit supports DER's position that the meeting was to discuss potential problems if JEK applied for a municipal solid waste permit in regard to this specific site. The potential problems about this site on which DER commented included (a) groundwater issues related to 25 Pa.Code §273.252(b); (b) information from JEK's consultants showing the stream to be perennial; and (c) "...as a general matter [DER] does not issue...permits for landfills that affect perennial streams...". According to his affidavit, Orlando says DER advised JEK to propose a landfill away from the perennial portions of two streams on their proposed landfill site.

In accordance with our March 21, 1990 Order, JEK's counsel filed its Brief on JEK's behalf. Included with it are two supporting affidavits and

various extensive exhibits.[2] JEK's Brief raises six reasons why it feels the Motion should be denied. It says:

1. DER's actions constitute an adjudication of JEK's rights because the rock drain permit's issuance vests JEK with rights which are affected by DER's refusal to consider issuing a permit for a landfill to be constructed, in part, on top of the rock drains and such a refusal impacts the validity of the rock drain permit and gives rise to a right to appeal.

2. DER's actions and decisions in the meeting and its March 2, 1990 letter are not a preliminary exchange of information but an unwritten DER determination that DER will not issue a municipal solid waste permit to JEK for this site, if it uses the rock underdrain concept approved in the rock drain permit.

3. DER changed the status of JEK's rock drain permit because DER first blessed an application for the municipal solid waste permit without regard to the impact on the two streams by issuance of the rock drain permit and now DER says it will not approve landfill construction using the concepts approved in the rock drain permit.

4. Public policy is well served by this Board's deciding these issues prior to submission of JEK's application for permit, because it conserves time, money and personnel expenditures by permit applicants and DER.

---

[2]Contrary to the assertion in JEK's Notice of Appeal that JEK had previously applied for the solid waste permit, JEK's Brief and affidavit concede that no application for a municipal solid waste permit is pending before DER.

5. DER's position that all or portions of each of these two streams on JEK's proposed site are perennial, is a DER decision made now which will affect everything JEK does in the future as to any landfill permit application it may submit. Accordingly, because DER had received all the information which JEK says is needed to make this decision prior to stating the streams are perennial, the decision should be reviewed now.

6. DER was in error when it stated that construction of rock underdrains in the streams (whether intermittent or perennial) pursuant to the rock drain permit was groundwater manipulation, because placing a surface stream in a rock underdrain and covering the drain with a landfill does not make the stream flow into groundwater.

We will not recite herein the allegations in JEK's fourteen pages of affidavits or approximately three-inch-thick stack of exhibits thereto. In sum they support the contentions in JEK's brief and oppose the allegations in the affidavits filed on behalf of DER.

On April 12, 1990, DER's counsel faxed us DER's Brief In Response To JEK's Brief In Opposition To Commonwealth's Motion To Dismiss, with an accompanying affidavit and letter. No objection thereto was received from JEK's counsel. This DER Brief, accompanying affidavit and letter say that the rock drain permit was never issued to JEK by DER and that JEK was well aware of this. Accordingly DER argues, JEK cannot rely on an alleged change of status or revocation thereof to claim a ground for appeal.

On April 23, 1990, JEK's counsel filed JEK's Reply To Commonwealth's Response Brief and affidavit in support thereof. In addition to rehashing some of JEK's prior arguments, this Reply contends the materials supporting the "Commonwealth's Response Brief" dealt with JEK's request for a waiver rather than the rock drain permit which JEK again insists was issued by DER.

In many locations throughout its initial Brief, JEK recognizes at least two of the major problems confronting the Board, if it were to sustain JEK's position and deny DER's Motion To Dismiss. The first problem is that JEK has not submitted an application to DER for a municipal solid waste permit. The second problem is the lack of a writing from DER to JEK (other than the letter of March 2, 1990) communicating the alleged DER decisions. Thus JEK wants the right to appeal what it interpreted DER's oral statements to mean, as opposed to appealing a writing which the Board can evaluate for itself.

In Municipal Authority of Buffalo Township v. DER, 1988 EHB 608, we addressed the scope of what is appealable to this Board and we said:

> Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" under §1921-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, and 25 Pa.Code §21.2(a)(1). Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the parties. An appealable action is defined in 25 Pa.Code §21.2(a) as follows:
>
> > "Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions

> endangering waters of the Commonwealth; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."
>
> These definitions are easy to state but are often very difficult to apply. A review of prior Board decisions in this area discloses an inevitable lack of consistency, with the rulings necessarily turning on the particular facts involved. Board precedence is only of marginal value, as a result, and the decision in the present case will depend upon the facts presented in the documents in the record. While the precise wording of the documents is important, it is the substance that controls. Meadville Forging Company v. DER, 1987 EHB 782.

Whether it is a DER action or an adjudication which is appealed, each contemplates a writing reflecting DER's position, just as we implied in Municipal Authority of Buffalo Township v. DER, supra. Neither DER's counsel nor JEK's counsel has pointed us to a case where an oral statement by a DER employee has been held to be such an appealable action or adjudication. Our own research has failed to disclose such a case either. We believe this lack of cases on oral statements comes about for a good reason. DER acts pursuant to statutes and regulations which require permits in writing, detailed written applications, and the myriad of other pieces of paper which form the gasoline on which DER's bureaucratic engine runs. For better or worse and whether we like it or not, we exist in a regulated world where the final word is a written word. Persons may have oral discussions, but their commitments to each other in this regulated world are on paper (in one form or another). It is that paper which records precisely what a party means others to conclude as to its position on various matters.

A writing allows an adjudicatory body to review what has transpired rather than what each side subjectively and retrospectively thinks has occurred. Thus a DER letter saying a company needs to propose more monitoring

wells and must submit the additional well locations by a definite date, shows DER's command that a company adhere to a specific course of conduct and is an appealable action. Meadville Forging Company v.DER, 1987 EHB 782. However, we found a letter from DER saying that a solid waste permit contains a volume limit and if the permittee wants to exceed that volume, it should seek to modify its permit, is not appealable because we could not see it changing the permitee's status. Chambers Development Company v. DER, 1988 EHB 198. The same result occurred when DER wrote to several municipalities telling them an interceptor sewer was overloaded so DER could no longer accept planning modules providing for connections thereto. In Swatara Township Authority v. DER, 1987 EHB 757, we held that since planning modules were not denied in DER's letter until a module was submitted and denied, there was no appealable DER action. It appears from the affidavits and exhibits that here we have two different and opposing views as to what was said at a meeting. As we said in Municipal Authority of Buffalo Township v.DER, supra, the expression of opinion without binding legal effect is not appealable. We do not have a DER command to act in a particular fashion.

JEK's position that the oral representations are appealable is made the more difficult by the fact that JEK has yet to apply for a permit. As we have said before, expression of an opinion on DER's behalf while a permit application is still under review is not appealable because that opinion could change and the DER final decision will be reflected in the permit as issued or denied. Snyder Township Residents For Adequate Water Supplies v. DER, 1984 EHB 842. If this is true when permits are under review, it must be even truer (if that is possible) when a party has yet to file its application for permit. At least until there is an application pending, anything said by DER or

written in its letters can have no binding legal effect with regard to issuance of the as yet "unapplied for" permit.

Even if JEK had filed an application for permit, the result would be the same. Lancaster County Network v. DER, 1987 EHB 592. DER has alerted JEK to problems on the site and confirmed this in a letter. The letter concludes by saying "[DER] will make a final determination only after a technical review of a complete application." Thus JEK may submit a proposal with rock underdrains in intermittent portions of the stream only, with no use of the stream areas at all, or with rock underdrains used everywhere coupled with a further showing the entire length of both streams only has intermittent flow, or it may decide not to apply for a permit. If an application for permit is made, DER's decision based on JEK's application will be final and appealable to us at that time. Sandy Creek Forest, Inc. v. DER, 95 Pa.Cmwlth. 457, 505 A.2d 1091 (1986). Until that time, JEK is a non-applicant and there has been no change in its legal status by virtue of DER's letter or the meetings. North Penn Water Authority et al. v. DER, 1988 EHB 215.

Special mention must be made at this point of the extraordinary nature of JEK's request. JEK is asking for a review of preliminary oral opinions expressed by DER's staff prior even to the filing of an application for permit. It is seeking what is in essence "declaratory relief" by this Board as to those opinions. As a Board, we are not charged with the duty of reviewing all opinions expressed by DER staff members in the course of administration of all of the environmental statutes. Al Hamilton Contracting Co. v. DER, 1989 EHB 383. We review only those DER acts which are adjudications or actions. We will not begin second guessing DER throughout each stage of each matter. We cannot issue DER's permits. Nor can we review

every decision concerning an application for a permit at the instant DER makes the decision during the lengthy process of application review. To do so would require us to virtually assume DER's role. Nothing in the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7511 et seq. envisions our having such a role. We are not empowered to grant such declaratory judgement relief. Eva E. Varos et al. v. DER, 1985 EHB 892.

A word or two also needs to be said concerning JEK's assertions as to the rock drain permit. Nothing produced by JEK has shown that permit to have been issued by DER to JEK, contrary to JEK's assertion. JEK applied for the permit and upon completion of the review thereof by the hydraulics/waterways management staff on October 13, 1989, the permit was not issued. Clearly, under the facts before us the permit could not have been issued at that point without violating 25 Pa.Code §105.21(a)(2). As pointed out in DER's Reply, the rock drain permit was sent from DER's waterways management staff to DER's solid waste management staff which is waiting for JEK to submit JEK's application for a municipal solid waste permit. When and if JEK's solid waste application comes in, then it is clear that rock drain permit will be reviewed again as to solid waste issues and compliance with the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.01 and the regulations promulgated thereunder as mandated by section 105.21(a)(2). This will occur in the course of reviewing the municipal solid waste permit application. Thereafter, a municipal solid waste permit with a rock drain permit may be issued or denied, but until then it is clear JEK has no rock drain permit. This permit coordination by DER is mandated by 25 Pa.Code §105.24(a). It is also clear JEK took no timely appeal from DER's decision to handle the rock drain permit in this fashion. Of course it cannot

do so now because collateral attacks on prior DER decisions are not permitted. Toro Development Company v. Commonwealth, 56 Pa.Cmwlth. 471, 425 A.2d 1163 (1981); Pittsburgh Coal and Coke, Inc. v. DER et al., 1986 EHB 704. As a result, JEK's status vis-a-vis this rock drain permit remains unchanged, as does the permit's status itself.

Accordingly, it is clear that DER's Motion is well founded and we enter the Order set forth below.

O R D E R

AND NOW, this 18th day of May, 1990, it is ordered that DER's Motion To Dismiss is granted. The appeal by JEK at the above docket number is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
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DATED: May 18, 1990

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M. DIANE SMI
SECRETARY TO THE

WESTERN PENNSYLVANIA WATER COMPANY AND ARMCO ADVANCED MATERIALS CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 88-325-E

Issued: May 21, 1990

OPINION AND ORDER
SUR MOTION TO SHIFT BURDEN OF PROOF
PURSUANT TO 25 PA.CODE §21.101 (b)(4)

Synopsis

In an appeal from issuance of a water allocation permit to Western Pennsylvania Water Company ("WPWC") by the Department of Environmental Resources ("DER"), Armco Advanced Materials Corporation's ("Armco") motion to shift the burden of proof to DER, pursuant to 25 Pa.Code §21.101(b)(4), must be denied. DER's only actions in regard to WPWC's water allocation permit and its water supply system are regulatory in nature. Since DER is not operating these reservoirs or withdrawing water from these streams, it is not engaging in the activity of water withdrawal and reservoir operation, hence 25 Pa.Code §21.101(b)(4) does not apply.

OPINION

The above captioned appeal represents the consolidation of two appeals from the issuance of Water Allocation Permit No. WA-153D on July 27, 1988 by DER to WPWC.

WPWC appealed on August 22, 1990 and challenged the continuous flow (conservation releases) volumes mandated to occur at all times from WPWC's Thorn Run and Lake Oneida Reservoirs. WPWC claims DER's action in mandating the releases exceeds its authority to act. WPWC also urges the volumes required to be released are unreasonable and endanger the safety and economic well-being of WPWC's customers and the general public, not to mention endangering the aquatic community in the Lake Oneida Reservoir and Thorn Run Reservoir.

Armco also appealed from issuance of this permit but, unlike WPWC, Armco says DER's decision was in error because the continuous flow volumes are too small and insufficient to protect public health, water quality and stream users downstream of these two reservoirs. Thus, one appellant says in issuing this permit, DER did too much and the other says it did not do enough.

After consolidation of the appeals, with discovery concluded and the pre-hearing memorandums filed, we issued our Pre-Hearing Order No. 2 on April 2, 1990 and scheduled this matter for a hearing to commence on June 12, 1990.

On April 20, 1990, Armco filed its Motion To Shift The Burden Of Proof from Armco to DER pursuant to 25 Pa.Code §21.101(b)(4). WPWC has taken no position on this Motion. As expected, DER has filed a Memorandum of Law opposing same and contending the burden of proof is Armco's pursuant to 25 Pa.Code §21.101(c)(3). We agree.

The relevant portions of the two subsections of 25 Pa.Code §21.101 provide:

> (b) The Department shall have the burden of proof in the following cases:

...

(4) When it seeks to engage in activities which are objected to as environmentally harmful.

...

(c) A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board:

...

(3) When a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation.

Under 25 Pa.Code §21.101(c)(3), in the routine case, DER correctly points out that where a "non-permittee" challenges a DER decision to issue the permit, the burden is on this third party. Hill v. DER, 1988 EHB 228. Our inquiry does not stop here, however, because 25 Pa.Code §21.101(c) states that this is the rule "...unless otherwise ordered by the Board...", and Armco's Motion seeks entry of such an "otherwise" order.[1]

According to Armco's Notice of Appeal and its Motion, Armco is challenging DER's decision to issue this permit to WPWC with regard to withdrawal of water from Connoquenessing Creek and a tributary thereof at a point on Connoquenessing Creek upstream of the point where Armco uses this stream. At no point does Armco say DER is owning, maintaining or operating the two reservoirs, withdrawing water from the creek, or furnishing water to the general public in the Butler area. Armco concedes this is being done by WPWC. Thus, factually, all that DER has done here is to regulate aspects of WPWC's activity in operating its water supply business. Accordingly, DER is not engaging in the activity of withdrawing water from this creek. If DER

[1]The suggestion in DER's brief that Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), affirmed 521 Pa. 121, 555 A.2d 812 (1989), requires such a holding here is incorrect, as neither that case nor any of the other cases cited by DER was decided with consideration of the impact of 25 Pa.Code §21.101(b)(4).

were doing so, running a treatment plant with a discharge to a water of the Commonwealth or clear cutting one of the state forests it manages, we might conclude it had the burden of proof under 25 Pa.Code §21.101(b)(4), when the activity was challenged. At present, however, we see no way to read this section other than to say it means DER must engage in the regulated activity as opposed to regulating same. As stated in Armco's own Memorandum of Law, to read this language otherwise would be to create an exception to Section 21.101(c)(3) as to third party appeals which swallows the rule. Reading Section 21.101(b)(4) as we have, both subsections retain meaning and effect.

Our decision is not altered by the holdings in David D. Beitman et al. v. DER, 1974 EHB 297; Concerned Citizens For Orderly Progress et al. v. DER et al., 1976 EHB 56, affirmed 36 Pa.Cmwlth. 192, 387 A.2d 989 (1978); Maskenozha Rod and Gun Club et al. v. DER et al., 1981 EHB 244, affirmed sub nom, Marcon, Inc. v. Commonwealth, DER, 76 Pa.Cmwlth. 56, 462 A.2d 969 (1983). None of these decisions addressed Section 21.101(b)(4). Moreover, while each of these cases allowed a shift in the burden of proof from the third party appellant, the shift came after that appellant had produced sufficient evidence in the hearings on the merits to justify requiring DER or the permittee to show this Board the legality or propriety of the permit. At present, we have neither stipulated facts nor evidence in a record before us which justifies such a shift.[2] It may be that at the hearing on the

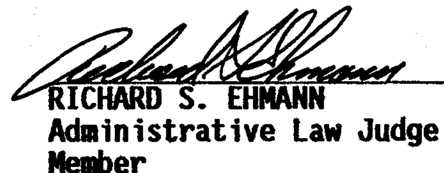
[2]Armco attached exhibits to its Motion which Armco argues show that DER ignored both the recommendations of the Fish Commission as to release volumes needed to protect downstream aquatic life and DER's own guidelines as to release volumes, and set a release volume number on the basis of whether WPWC would challenge it or not. While the exhibits could be read to suggest this, they are not evidence in our record as yet. Further, there has been no footnote continued

appeal's merits, Armco will offer us such evidence and argue for a shift in burden either at that time or when we write our adjudication; this opinion does not foreclose such action. Our ruling on such a request must await it and the merits hearing. At this time such a ruling is premature and we must deny this motion.

O R D E R

AND NOW, this 21st day of May, 1990, upon consideration of Armco's Motion Of Appellant To Shift Burden Of Proof, it is ordered that the Motion is denied for the reasons set forth in the above opinion.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 21, 1990

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continued footnote
opportunity for rebuttal or explanation thereof by WPWC or DER. As a result we cannot consider these offerings by Armco as evidence and shift the burden based thereon.

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MONESSEN, INC.

v. : **EHB Docket No. 88-486-E**

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: May 21, 1990**

OPINION AND ORDER
SUR MONESSEN, INC.'S MOTION FOR
RULING THAT APPELLEE BEARS A PORTION OF
THE BURDEN OF PROOF

Synopsis

Where, without application from the permittee or the permittee's consent, the Department of Environmental Resources ("DER") amends a permittee's NPDES Permit, and in so doing imposes more stringent effluent limitations as to specific contaminants therein, the burden of proof is properly placed on DER, under 25 Pa.Code §21.101(a), in the appeal therefrom by the permittee. Permittee's Motion to assign this burden to DER is granted.

OPINION

Monessen, Inc. ("Monessen") owns a coke plant in Monessen, Westmoreland County, which it apparently purchased from Wheeling-Pittsburgh Steel Corporation. As part of acquiring the facility, it, on October 26, 1988, asked DER to transfer NPDES Permit PA001554 to Monessen, which permit is for the discharges from this coke plant. In making the transfer, DER revised

the Permit's effluent limitations, in part to reflect the elimination of the contribution of certain pollutants from the Monessen Works' blast furnace and sinter plant, which were not being operated. Monessen appealed that transfer and modification of the NPDES Permit ("1988 Amendment") to the Board on November 23, 1988 and the case was assigned the instant docket number.

On October 18, 1989, DER issued an amendment to this NPDES permit, ("1989 Amendment"), which further modified the effluent limitations which had been previously set in the 1988 Amendment as appealed by Monessen. In turn, on November 19, 1989, Monessen filed an appeal from DER's latest amendment and that appeal received docket number 89-559-E.

On December 15, 1989, we issued an order consolidating these two appeals at the instant docket number. On March 5, 1990, we issued our Pre-Hearing Order No. 2, scheduling this case for trial in June of 1990.

Under cover of a letter dated April 5, 1990, Monessen filed both a Motion For Partial Summary Judgment and a Motion to determine that DER bore a portion of the burden of proof in this consolidated appeal. Included therewith were memoranda of law supporting each motion. On April 27, 1990, DER "faxed" us two responses opposing both Motions, an Affidavit supporting its responses and a single Brief which is written to oppose both of Monessen's Motions. We have dealt with the Motion For Partial Summary Judgment in our Opinion and Order dated May 7, 1990 and do not address the matters raised therein in this Opinion.

While Monessen accepts that pursuant to 25 Pa.Code §21.101(c)(1) it has the burden of proof as to its contentions vis a vis the 1988 Amendment, Monessen argues that DER should have this burden as to the 1989 Amendment. Monessen makes this argument on two separate grounds. First, it says the 1989

Amendment was a *sub silentio* revocation of the 1988 Amendment and, pursuant to 25 Pa.Code §21.101(b)(2), DER bears the burden of proof when it revokes a permit. Monessen also argues that since it never sought the 1989 Amendment, DER acted unilaterally in making these changes to Monessen's effluent limitations. Monessen then says that since DER asserts these more stringent limitations must be met, under 25 Pa.Code §21.101(a), DER is asserting the affirmative as to each such change and bears the burden of proving them.

DER responds that it made the changes set forth in the 1989 Amendment in response to Monessen's challenge to the 1988 Amendment and Monessen's request (made after it filed its first appeal) that DER modify the effluent limitations in the 1988 Amendment. DER asserts that Monessen's appeal of the 1988 Amendment takes the position that DER had made the effluent limits too stringent because Monessen was entitled to a large credit as to specific pollutants in the discharge based on the type of treatment technology it had installed (and began to operate after commencing the appeal of the 1988 Amendment). DER says it investigated Monessen's claim as to this credit and was so close to giving Monessen the credit that DER had published a revised permit containing the credit Monessen had sought for comment. During this comment period DER says it gave still further study to Monessen's request and concluded that Monessen was not entitled to this large credit, but was only entitled to a smaller credit which is reflected in the 1989 Amendment. From this scenario DER argues that while Monessen did not formally apply for the 1989 Amendment, Monessen was indeed seeking an amendment of the permit issued in 1988, so Monessen should bear the burden of proof. DER also argues that amendment of a small portion of Monessen's NPDES permit (as occurred through the 1989 Amendment) is not a revocation of the complete permit issued

(the 1988 Amendment). Further, DER argues that there is a difference between a permit revocation and an amendment. DER says that in 25 Pa.Code §21.101(b)(2), dealing with DER's burden of proof, "revocation" is the only word used. This, it says, means that there is a recognized difference between revocation and amendment or both words would have appeared in the regulation. Accordingly, it concludes amendment is not revocation for purposes of shifting the burden of proof to DER.

25 Pa.Code §21.101(a) provides in part:

> In proceedings before the Board the burden of proceeding and the burden of proof shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue.

While we have written about Section 21.101(a) and the other subsections of this regulation many times: Dunkard Creek Coal, Inc. v.DER, 1988 EHB 1197; Luzerne Coal Corporation v. DER, Docket No. 87-481-E, (Opinion and Order issued January 2, 1990); Ohio Farmers Insurance Co. v. DER, 1981 EHB 384; Township of South Park v. DER, 1983 EHB 602; Clymar Sanitary Landfill v. DER, 1983 EHB 223; Western Hickory Coal Co. v. DER, 1983 EHB 89; Joseph D. Hill v. DER, 1988 EHB 228; T.R.A.S.H., LTD. et al., 1989 EHB 487; Sechan Limestone Industries, Inc. v. DER, 1985 EHB 533, Monessen's Brief is correct that there are no prior decisions by this Board which exactly cover the factual scenario existing in this appeal.

Despite this lack of specific precedent, the general principle announced in §21.101(a) still applies. It has long been the rule in this state that he who asserts the affirmative bears the burden of proving same. O'Neill v. Metropolitan Life Insurance Co., 345 Pa. 232, 26 A.2d 894 (1942); Dunkard Creek Coal, Inc., supra. See also Packel and Poulin, Pennsylvania

Evidence §301.(1987). Here the question thus becomes: Is Monessen a permit applicant asserting entitlement to the permit as modified in 1989 or is it more appropriately a recipient of a DER directive (in the form of the 1989 Amendment) to provide a higher degree of treatment to its wastes.

The key to the answer to this question appears to be the fact that Monessen did not make application to DER for the 1989 Amendment. Monessen sought a permit transfer in 1986 and appealed from DER's action in modifying the permit's effluent limitations during transfer of this permit. Thereafter, without Monessen making application to DER for a further amendment of its Permit, Monessen and DER explored settlement of the appeal through a further permit amendment giving Monessen a specific pollutant credit set forth in 40 C.F.R. §420.13(a)(3). Monessen was almost given this credit by DER but, at nearly the last minute, DER determined Monessen was ineligible for it while nevertheless being eligible for another pollutant credit set forth in 40 C.F.R. §420.13(a)(1). DER, still without Monessen making application to it for either credit, issued Monessen the 1989 Amendment, which further limits the amount of certain pollutants which Monessen may discharge from its treatment plant.

DER concedes that Monessen never made a formal application for the 1989 Amendment. It is also clear that pursuant to 25 Pa.Code §§92.33 and 92.5, Monessen must now meet the effluent limitations in the 1989 Amendment or stand liable civilly and criminally under Sections 601, 602 and 605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.601, 602 and 605. Under these circumstances, there is no doubt that it is DER which has asserted the affirmative here. DER is imposing these more stringent limits on Monessen's discharge. If Monessen's existing treatment

facilities cannot consistently achieve the limits, Monessen will have to upgrade them to the point they can do so. Accordingly, DER must bear the burden of proof that it is justified in imposing those specific effluent limitations in the 1989 Amendment which Monessen has challenged.

DER's argument, that if we shift this burden DER can never amend a permit without facing a similar Motion, does not present any reason to reverse conclusion reached above. Any amendment which is sought by the permittee and refused by DER will be treated as a refusal to grant a permit under 25 Pa.Code §21.101(c)(1), and the burden of proof will fall upon the permittee if it appeals. At the same time, however, DER cannot avoid the burden of proof placed on it by §21.101(b)(3) when it orders a party to act to abate water pollution, by unilaterally issuing a permit amendment with tighter effluent limitations, instead of such an order.

Monessen's argument of a _sub silentio_ revocation of the 1988 Amendment by issuance of the 1989 Amendment also lacks merit. Contrary to Monessen's assertion, DER clearly did not revoke the 1988 Amendment. DER merely modified a portion of it. Revocation and modification are not identical and, as to NPDES permits, are not intended to be synonyms by 25 Pa.Code, Chaper 92. This is evident from Section 92.51(2) and (5) which provide in pertinent part:

> (2) That the permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:
> (i) Violation of any terms or conditions of the permit;
> (ii) Obtaining a permit by misrepresentation or failure to disclose fully relevant facts.
> (iii) A change in a condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.
> ...

> (5) That if a toxic effluent standard or prohibition, including a schedule of compliance specified in the effluent standard or prohibition, is established under section 307(a) of the Federal Act (33 U.S.C.A. § 1317(a)) for a toxic pollutant which is present in the permittee's discharge and the standard or prohibition is more stringent than a limitation upon the pollutant in the NPDES permit, the Director will revise or modify the permit in accordance with the toxic effluent standard or prohibition and so notify the permittee.

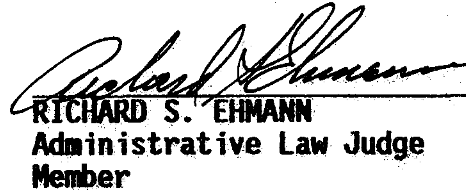
Because both words are used in the regulation, it is obvious the Environmental Quality Board intended the regulations to read as if "modify" or "revise", on the one hand, and revocation, on the other, could occur separately. Here no revocation occurred. As DER correctly points out, a revocation would have left Monessen without any permit and that is not what either Monessen or DER say resulted when the 1989 Amendment was issued by DER.

In light of the above, we enter the following Order:

O R D E R

AND NOW, this 21st day of May, 1990, it is ordered that Monessen's Motion For Ruling That Appellee Bears A Portion Of The Burden Of Proof is granted. As to the effluent limitations in the 1989 Amendment which are challenged by Monessen for being more stringent than those in the 1988 Amendment, DER shall bear the burden of proof pursuant to 25 Pa.Code §21.101(a).

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 21, 1990

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WESTERN PENNSYLVANIA WATER COMPANY and ARMCO ADVANCED MATERIALS CORP.	:	
	:	
v.	:	**EHB Docket No. 88-325-E (Consolidated)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 23, 1990**

OPINION AND ORDER
SUR MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

A motion for partial summary judgment of the Department of Environmental Resources, (DER), based upon the contention that both the permittee and the third party appellant should be barred by the doctrine of res judicata from litigating issues pertaining to a continuous flow requirement in a water allocation permit issued in 1988 because of their failure to appeal an "identical" condition in a water allocation permit issued to the same permittee in 1981, is denied because it is not clear that no genuine issue of material fact exists as to whether the requisite "identity of the thing sued for" is present.

OPINION

On July 27, 1988, the DER issued Water Allocation Permit No. WA-153D to Western Pennsylvania Water Company, (WPWC), now known as Pennsylvania-American Water Company. WPWC timely filed its notice of appeal from the permit with this Board on August 22, 1988. Having received notice by publication in the September 10, 1988 Pennsylvania Bulletin and alleging it has a plant located in Butler Township, Butler County, on Connoquenessing Creek, downstream from the water withdrawal authorized by the water allocation permit, ARMCO Advanced Materials Corporation, (ARMCO), filed a separate notice of appeal from the issuance of the permit. We entered an Order directing consolidation of the two matters on April 14, 1989.

The permittee contends in its appeal, inter alia, that the continuous flow requirements of WA-153D imposed by DER are beyond DER's authority to impose and moreover, are too stringent. At the same time, ARMCO's appeal alleges that DER's continuous release flow requirements from Lake Oneida Reservoir and Thorn Run Reservoir in Conditions Nos. 8 and 9 of the permit are insufficient to protect public health, aquatic life and water quality downstream from the reservoirs.

On April 20, 1990, DER filed a motion seeking partial summary judgment. The Board received responses from each of the appellants on May 2, 1990. In its motion, DER avers the conservation release required from the Thorn Run Reservoir by Condition No. 9 of WA-153D is identical to the conservation release required from the Thorn Run Reservoir in Condition No. 13

of the issuance of the 1981 permit, ARMCO did not appeal the terms of that permit to the Board. DER contends it is entitled to partial summary judgment because there is no genuine issue of material fact that the appellants are barred by the doctrine of res judicata from challenging Condition No. 9 of Water Allocation Permit No. WA-153D. DER has attached a supporting affidavit to its motion by which one of its employees, Thomas L. Denslinger, swears to the truth of these facts. ("Denslinger Affidavit".)

In reviewing a motion for summary judgment, we must consider it in the light most favorable to the non-moving party, i.e., WPWC and ARMCO. Monessen, Inc. v. DER, Docket No. 88-486-E (issued May 7, 1990); Robert C. Penoyer v. DER, 1987 EHB 131. Further, Pa. R.C.P. 1035 provides in pertinent part that summary judgment shall be entered, ".....if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We use this standard in evaluating the merits of motions for summary judgment. Monessen, supra; Newlin Corporation et al. v. DER, 1988 EHB 976.

The doctrine of res judicata has been held to bar a proceeding seeking modification of obligations imposed by prior unappealed DER action. Primrose Mining, Inc. v. DER, 1978 EHB 191. As DER points out in its brief in support of its motion, we have said four conditions must concur before res judicata can apply: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons or parties; and (4) identity of the parties for or against whom the claim is made. See Primrose Mining, supra; Bethelhem Steel Corporation v. DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978). "If these four elements are present, matters which were or could have been

litigated in a prior proceeding may not be relitigated or litigated in a subsequent proceeding." Bethlehem Steel, supra, 37 Pa. Cmwlth, 390 A.2d at 1389.

In its response to the motion for partial summary judgment, WPWC concedes that the continuous flow requirement of Condition No. 9 of Permit WA-153D is identical to Condition No. 13 of WA-10:1, but takes the position that the two permits must be considered beyond the confines of the language of the two conditions in order to understand its contention that the conditions are not identical. Rather than requiring such a release only from the Thorn Run Reservoir as was required by the 1981 permit, WPWC urges the 1988 permit also requires a conservation release from Lake Oneida Reservoir. Further, WPWC alleges compliance with both mandatory combined release requirements is impossible if it is still to meet the water supply needs of the public, and the added release requirement for Lake Oneida Reservoir therefore impacts upon the flow requirement imposed by Condition No. 9 of WA-153D. Also, WPWC contends that since 1981, siltation of Thorn Run Reservoir has occurred due to strip mining in the area which has reduced the storage capacity of that reservoir. Thus, WPWC urges that circumstances have materially changed since the 1981 permit was issued, and, therefore, res judicata principles are inapplicable.

ARMCO, in its response to the motion for partial summary judgment, admits that Condition No. 13 of the 1981 permit required WPWC to maintain a minimum conservation release rate from Thorn Run Reservoir identical to the requirement imposed on the water company in Condition No. 9 of the 1988

requirement imposed on the water company in Condition No. 9 of the 1988 permit, but denies that as to ARMCO the two conditions are identical. Instead, ARMCO avers that the 1981 permit at Condition No. 11 required WPWC to build a larger dam in the vicinity of the present Thorn Run Reservoir dam,[1] and that Condition No. 13 of the 1981 permit envisioned 1.04 cfs to be an interim release rate until the expanded Thorn Run Reservoir dam was constructed. Additionally, ARMCO contends the fact that DER no longer requires WPWC to build a larger dam in the vicinity of the Thorn Run Reservoir is a change in circumstances which precludes entry of partial summary judgment, as to itself, on res judicata principles.

Comparing the two conditions, Condition No. 9 of the 1988 permit provides:

> 9. A continuous flow of not less than 1.04 cubic feet per second, equivalent to 0.67 million gallons per day, shall be maintained at all times in the stream immediately below the Thorn Run Reservoir. The permittee shall install accurate measuring and

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1 Condition No. 11 of water allocation permit WA-10:1 provides:

> 11. The permittee shall construct a larger dam located in the vicinity of the present Thorn Run Reservoir dam. The construction may be accomplished in two phases, where Phase I construction would increase the present storage in Thorn Run Reservoir from 560 acre-feet to 3,400 acre-feet. Phase II construction would provide a reservoir having storage of 4,600 acre-feet. The permittee is granted a total maximum withdrawal of four and one-half million (4,500,00) gallons per day until Phase I construction is completed and the reservoir is 100% full, when the maximum allowable withdrawal at the Oneida Valley Treatment Plant shall be increased to eight million (8,000,000) gallons of water per day. Upon the completion of Phase II construction and after the reservoir is 100% full, the maximum withdrawal at the Treatment Plant shall be a total of ten million (10,000,000) gallons of water per day.

> Department monthly, and the original field records shall be available at all times for inspection by representatives of the Department. The required measuring devices shall be installed and readings shall begin within one year from the date of this permit[.]

(Condition No. 9, Permit No. WA-153D, Exhibit C to Denslinger Affidavit.)

Condition No. 13 of the 1981 permit provides:

> 13. A continuous flow of not less than 1.04 cubic feet per second, equivalent to .67 million gallon [sic] per day, shall be maintained in the stream immediately below the Thorn Run Reservoir. Upon completion of Phase I or Phase II construction of the Thorn Run Reservoir, a continuous flow of not less than 1.59 cubic feet per second, equivalent to 1.03 million gallons per day, shall be maintained in the stream immediately below the expanded Thorn Run Reservoir. Accurate measuring devices, as approved the Department of Environmental Resources shall be installed to measure this flow. Daily records of this flow shall be submitted to the Department of Environmental Resources on a monthly basis.

(Condition No. 13, Permit No. WA 10:1, Exhibit A to Denslinger Affidavit.)

WPWC's argument that the conditions are not identical has merit because DER's motion draws the issue of whether the conditions are identical too narrowly, without considering the overall impact of the minimum continuous flow amounts on the factual background of what is being challenged, i.e., the 1988 permit requires releases from two reservoirs rather than from only Thorn Run Reservoir.

Likewise, DER's challenge cannot be sustained as to ARMCO, but for a slightly different reason. As ARMCO points out in its response to the motion, Condition No. 13 in the 1981 permit was based upon the expected expansion of the Thorn Run Reservoir, and that permit mandated the minimum continuous flow

amount while simultaneously requiring the construction of two phases of new dam construction. No dam was constructed, however, and DER took no steps to force such construction. Moreover, the 1981 permit set a higher amount of flow for the period of time after completion of construction. The 1988 permit no longer requires such an expansion. Although the minimum continuous flow requirements of the two permits are the same, in light of the assertions made by the non-moving parties, it is not clear that there is an identity of the things sued for in the case, (i.e., Condition No. 9 of the 1988 permit and No. 13 of the 1981 permit). We accordingly reject the applicability of res judicata principles to bar either WPWC or ARMCO from contesting Condition No. 9 of WA-153D in this appeal, and deny DER's motion for partial summary judgment based thereon.

ORDER

AND NOW, this 23rd day of May, 1990, it is ordered that the Department of Environmental Resources' Motion for Partial Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

Richard S. Ehmann
Administrative Law Judge
Member

DATED: May 23, 1990

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BETHAYRES RECLAMATION CORPORATION	:	**EHB Docket No. 83-227-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
LOWER MORELAND TOWNSHIP	:	**Issued:** May 29, 1990

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

By Maxine Woelfling, Chairman

Synopsis

A petition for supersedeas is denied where the petitioner fails to meet the standards articulated in 25 Pa.Code §21.78. The entry of a supersedeas order does not prohibit the Department from taking subsequent regulatory action to modify the conditions of a permit, for a supersedeas is not an adjudication on the merits. While petitioner did demonstrate a likelihood of success on the merits of its claim that there was no justification from the standpoint of groundwater pollution for a dewatering requirement in its solid waste management permit, it did not demonstrate a likelihood of success on the merits of its claim that dewatering would create the risk of an environmental catastrophe. Because petitioner's claim of irreparable harm is related to its claim of potential environmental catastrophe, it did not make a showing that it would suffer irreparable harm as a result of the dewatering requirement. Petitioner also related its assertion of potential environmental catastrophe to its claim that the public would suffer no harm if the dewatering requirement

were superseded; this, too, fails in light of little likelihood of success on the merits of this claim and in light of continued malodors from the disposal site.

OPINION

This matter has a lengthy history which began with the October 6, 1983, filing of a notice of appeal by the Bethayres Reclamation Corporation (Bethayres). Bethayres, which operates a demolition waste landfill at the site of a former quarry in Lower Moreland Township, Montgomery County, was the recipient of a September 29, 1983, order from the Department of Environmental Resources (Department) directing it to take various measures to abate air and water quality problems stemming from Bethayres' alleged failure to collect, treat, and dispose of leachate at the landfill. Bethayres also filed a petition for supersedeas of the Department's order, and the Board granted a supersedeas on the record of the October 6, 1983, hearing on the petition. The Board's supersedeas order was modified on November 17, 1983.

On October 21, 1983, Lower Moreland Township (Lower Moreland) also filed a notice of appeal from the Department's order to Bethayres, contending that the Department's order was not adequate to address the environmental problems at the Bethayres landfill. The Lower Moreland appeal was docketed at 83-238-M and consolidated with the Bethayres appeal at Docket No. 83-227-M on February 3, 1984.

The Department issued another order to Bethayres on February 23, 1984, alleging that Bethayres had violated the Department's September 29, 2983, order, as well as the Board's October 6 and November 17, 1983, supersedeas orders. Bethayres appealed this order on February 28, 1984, at Docket No. 84-082-M and also filed a petition for supersedeas. The Board conducted

five days of hearings on the supersedeas petition and, by order dated April 4, 1984, superseded and modified certain portions of the Department's order, permitting Bethayres to continue disposing of demolition waste.

Although there were discussions among the parties, particularly Bethayres and the Department, the two appeals were dormant until late 1986. The Department and Bethayres executed a consent order and agreement on October 23, 1986, and Lower Moreland appealed the consent order to the Board on November 20, 1986. That appeal was docketed at 86-636-W, and the Board, by order dated January 14, 1987, consolidated it with Docket No. 83-227-W at the earlier docket number. On February 24, 1987, Docket No. 84-082-M was consolidated with Docket No. 83-227-W at the earlier docket number. A view of the premises was conducted on April 3, 1987, and hearings on the merits commenced on April 7, 1987.

During the course of the April 10, 1987, hearings on the merits, the parties stipulated that the consent order which was the subject of the appeal originally docketed at 86-636-W was intended to be an interim document and that Bethayres' permit amendment application which was then pending before the Department would be the Department's final disposition of issues relating to gas collection and destruction at the Bethayres site (N.T. II 583-587).[1] The Board thereafter, at the parties' request, delayed scheduling additional days of hearings so that the Department could complete review and take final action on Bethayres' permit amendment application.

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[1] The transcripts of the hearings on the petition for supersedeas at Docket No. 84-082-M will be referred to as "N.T. I-___." The transcripts of the hearings on the merits of the consolidated appeals will be referred to as "N.T. II-___," and the transcripts of the hearing on the petition for supersedeas in the consolidated appeals will be referred to as "N.T. III-___."

Finally, on December 8, 1987, the Department amended Solid Waste Management Permit No. 101168 (solid waste permit). Bethayres appealed the permit amendment to the Board on January 7, 1988, and that appeal was docketed at 88-005-W. Lower Moreland appealed the issuance of Bethayres' amended permit to the Board on January 8, 1988, and its appeal was docketed at 88-006-W. The Board consolidated the newest appeals at Docket No. 88-005-W by order dated January 13, 1988.

The Department, joined by Bethayres, moved to dismiss Docket No. 83-227-W as moot, since the amended permit issued to Bethayres "vitiated" the consent order at issue in that consolidated appeal. Lower Moreland opposed the motion, and the Board denied it in an opinion and order at 1988 EHB 220. The Board also consolidated Docket No. 88-005-W with Docket No. 83-227-W at the earlier docket number, and, on June 13, 1988, denied Lower Moreland's motion for partial summary judgment regarding the leachate level in the landfill and the passive gas collection system (see 1988 EHB 496).

Further hearings on the merits were conducted on June 27-30, July 21-22, 28-29, and August 23-25, 1988. The parties stipulated that the only remaining issues were the leachate pumping requirements, the gas collection system, final elevations, and the amount of the closure bond.

On December 29, 1989, Bethayres filed a petition for supersedeas of Condition No. 8 of the amended solid waste permit, which reads as follows:

> The groundwater well in the quarry must be maintained at 13 feet below sea level through mechanical means. This level must be attained and be kept at this level or below by January 1, 1990 or at the time of final closure, whichever comes first.

The Board's prior supersedeas order in April, 1984, required the level of leachate in the landfill to be maintained "below 93 feet of elevation at all

times." And, at the time of the hearings on the merits, Bethayres was maintaining the water level at approximately 78 feet mean sea level (MSL). A hearing on the petition was conducted on January 19, 1990, with the hearing limited to the issues of irreparable harm and harm to the public in light of the already extensive hearings on the merits. The parties stipulated to the inclusion of testimony of the hearings on the merits; during the course of those hearings the parties stipulated to the inclusion of the records of the prior proceedings in the consolidated appeals. The filing of the parties' memoranda of law in support of their respective positions was completed on February 5, 1990.

Bethayres contends that it has met the standards for grant of a supersedeas enunciated in 25 Pa.Code §21.78. It proffers the evidence it presented during the hearings on the merits in support of its contention that it has a likelihood of prevailing on the dewatering issue.[2] In summary, Bethayres alleges that Condition No. 8 is a violation of the Board's April 4, 1984, supersedeas order, that the applicable law and regulations do not mandate dewatering the landfill to minus 13 feet MSL, that Bethayres' 1979 solid waste permit only required dewatering if there was groundwater contamination, and that no groundwater contamination is occurring, as the gradient of groundwater flow is into the landfill. Bethayres then asserts that dewatering to minus 13 feet MSL would interfere with the degradation of the materials in the landfill, allowing the introduction of oxygen into the fill, thereby creating a risk of spontaneous combustion, and resulting in accelerated gas production,, especially of malodorous oxygenated hydrocarbons.

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[2] Throughout the course of these proceedings Bethayres has always challenged the necessity for dewatering the landfill to minus 13 feet MSL and has contended that dewatering to this level would result in the creation of an environmental risk.

The creation of this environmental risk (i.e., fire and malodors), Bethayres theorizes, constitutes harm to the public, as well as irreparable harm to Bethayres in that it will have to deal with the resultant problems created by dewatering to minus 13 feet MSL.

The Department and Lower Moreland oppose Bethayres' petition for supersedeas, arguing that Bethayres has not met the standards for grant of a supersedeas in the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.* (the Environmental Hearing Board Act), and 25 Pa.Code §21.78. They adopt the arguments regarding dewatering in their post-hearing briefs to support their assertions that Bethayres is not likely to succeed on the merits of the dewatering issue. Lower Moreland also points out that the Board cannot enter a supersedeas where pollution, or threat of pollution, exists, as is the case here with continuing malodors and groundwater contamination. And, finally, Lower Moreland and the Department assert that Bethayres, by failing to raise the issue of the effect of the Board's April 4, 1984, supersedeas order in its post-hearing brief, has waived this issue, and that, even if Bethayres is not deemed to have waived this issue, the 1984 supersedeas order only operates to maintain the status quo pending an adjudication on the merits and does not proscribe future regulatory conduct by the Department.

In order to be entitled to a supersedeas, Bethayres must show, by a preponderance of the evidence, (1) that it will suffer irreparable harm, (2) that it is likely to prevail on the merits, and (3) that there is no likelihood of injury to the public or other parties. Where pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas cannot be granted, §4(d), Environmental Hearing Board Act, 25 Pa.Code §21.78, and CPM Energy Systems, Inc. v. DER, EHB Docket No.

88-162-MR (Opinion issued April 5, 1990). For the reasons which follow, Bethayres is not entitled to the grant of an order superseding Condition No. 8 of its amended solid waste permit.

Likelihood of Success on the Merits

In ascertaining whether Bethayres has a likelihood of succeeding on the merits of the dewatering issue the Board undertakes this evaluation:

> A petitioner's chance of success on the merits must be more than speculative, but he need not be required to establish his claim absolutely. Fisher v. Department of Public Welfare, 497 Pa. 267, 439 A.2d 1172 (1982). Rather, the petitioner garner a *prima facie* case of showing a reasonable probability of success. Mourat v. C.P. Ct. of Lehigh Co., 515 F.Supp 1074 (E.D. Pa. 198__)...

Houtzdale Municipal Authority v. DER, 1987 EHB 1. Bethayres contends that it has a reasonable probability of success on the merits for two reasons: the Department's imposition of Condition No. 8 was contrary to applicable law and regulations and the Board's April 4, 1984, supersedeas order and the imposition of the condition was an abuse of discretion because the dewatering of the landfill to minus 13 feet MSL was unnecessary and would result in the creation of greater environmental harm. We reject both these arguments.

Authority for Imposition of Condition No. 8

We will first address Bethayres' contention that the inclusion of Condition No. 8 in its amended solid waste permit was contrary to applicable law and regulations. We do not agree with Bethayres' contention in this regard. The Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (the Solid Waste Management Act) invests the Department with broad authority to control the disposal of solid waste through, *inter alia*, a permitting program. In particular, §104(7) of the Solid Waste Management Act empowers the Department to

> issue permits, ...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;

Similarly, §503(a) of the Solid Waste Management Act authorizes the Department to condition permits for the disposal of solid wastes. The then-applicable regulations for Class III demolition waste disposal sites set forth at 25 Pa.Code §75.33(c)(3)(v) also recognize the Department's power to impose measures relating to leachate collection and treatment for the protection of groundwater.[3] Thus, the Department certainly had the authority under the relevant law to impose Condition No. 8, if it otherwise were not an abuse of discretion.

Bethayres next argues that Condition No. 8 was imposed in violation of the Board's April 4, 1984, supersedeas order at Docket No. 84-082-M. In examining this question, it is useful to review general principles regarding the grant of a preliminary injunction, as a supersedeas is analogous to a preliminary injunction, Tenth Street Building Corporation v. DER, 1985 EHB 829, 831. The purposes of a preliminary injunction were stated in Soja v. Factoryville Sportsmen's Club, 361 Pa.Super. 473, 522 A.2d 1129, 1131 (1987) as "to preserve the status quo and prevent imminent and irreparable harm which might otherwise occur before the merits of the case can be heard and determined (citations omitted)." However, as noted in Consol. Coal v. Dist. 5, United Mine Workers, 336 Pa.Super. 354, 485 A.2d 1118, 1122 (1984), "A preliminary injunction cannot serve as a judgment on the merits since, by definition, it is a temporary remedy granted until that time when the parties' dispute can be completely resolved." And, according to 15 Standard Pennsyl-

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[3] These regulations were superseded by 25 Pa.Code §§277.1-277.322, which became effective on April 9, 1988.

vania Practice 2d §83.184:

> Neither the granting nor the denial of an interlocutory injunction amounts to an adjudication of the ultimate rights in controversy. A preliminary injunction is limited by the fair construction of its language to matters in which the plaintiff is then engaged and to those pending or in immediate contemplation, and should not be extended so as to have the force and effect of a final injunction granting general relief for the future.

Consequently, under the circumstances herein, the Board's previous supersedeas order does not stand as a conclusive determination of the leachate pumping and the Department was not proscribed from taking subsequent regulatory action through the issuance of a permit amendment. Similarly, the Board may here modify its earlier supersedeas order, for that order was issued obviously without contemplation of the subsequent regulatory actions.[4]

Substantive Arguments

Having disposed of these legal arguments, we will now proceed to examine Bethayres' substantive arguments concerning leachate pumping by first addressing its thesis that pumping leachate down to minus 13 feet MSL would introduce oxygen to fill and, therefore, create conditions which will be conducive to spontaneous combustion.

This thesis was advanced by Bethayres' two consultants, Dr. James J. Smith and Dr. Martin Alexander. Dr. Smith is the president of Trillium, Inc. and is a chemist and environmental consultant (N.T. II 1096). It is his opinion that the water within the fill acts as a heat sink for the heat

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[4] Lower Moreland and the Department argue that Bethayres waived the issue of the Board's prior supersedeas order by not raising it in its post-hearing brief. Bethayres' failure to raise this "issue" in its post-hearing brief is irrelevant, as the Board reaches its determination on supersedeas relief through the application of different legal standards.

generated by the microbial decomposition of materials in the fill because there is no other material available to do so and that the water also moderates the chemical reactions in the fill (N.T. 1104). He further believes that dewatering would generate increased gas production, thereby overloading the presently adequate (in his opinion) gas collection system and raising the possibility of gases contaminating the groundwater (N.T. II 1108, 1109, 1113). The introduction of oxygen into the fill as a result of dewatering would, he postulates, also increase the possibility of spontaneous combustion in dry spots in the fill (N.T. II 1112). The spontaneous combustion would produce noxious odors which would overload the gas collection system (N.T. II 1113). Dr. Martin Alexander, a professor of soil science at Cornell University, gave testimony to rebut Lower Moreland's position, concurring with the opinion of Dr. Smith.

Lower Moreland countered this opinion with the testimony of Dr. John Keenan, an Associate Professor at the University of Pennsylvania (N.T. II 2125). It is Dr. Keenan's contention that there is no mechanism to increase the temperature in the unsaturated zone of the landfill because the thermophilic[5] organisms migrate downward into the mesophilic zone,[6] where they die because the temperature is too low for them to survive (N.T. II 2182-2183). Dr. Keenan also stressed that the micro-organisms themselves were not the source of heat in the fill and that because the microbial system within the fill is self-regulating, increases in temperature would stabilize or decrease biological activity (N.T. II 2142, 2168). It was also his theory that the

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[5] Micro-organisms which prefer temperatures in the range of 45 to 70 degrees Celsius (C).

[6] Micro-organisms which prefer temperatures in the range of 20 to 45 degrees C.

rate of microbial activity in unsaturated conditions is lower than in saturated conditions because the water in saturated conditions serves as a mechanism for transporting nutrients in and toxic end-products of microbial activity out (N.T. II 2148). Similarly, Dr. Keenan contended that methane gas production follows the same pattern as microbial activity (N.T. II 2143). As for Bethayres' spontaneous combustion theory, Dr. Keenan rejects this because well-defined conditions not present in a landfill are necessary for the occurrence of spontaneous combustion (N.T. II 2173). Furthermore, given the types of materials deposited in the landfill, the temperature would have to rise to 400°-500° Fahrenheit (F) (190.2^{o}C-245.8^{o}C)[7] to ignite the materials in the landfill (N.T. II 2168). Dr. Keenan also related the presence of odors in the landfill to saturated conditions, since anaerobic (saturated) decomposition produces hydrogen sulfide ("rotten egg") gas as a result of the breakdown of proteins and/or sulfate metabolism (N.T. II 2157-2165). One would, Dr. Keenan states, expect sulfate metabolism at the Bethayres landfill because of gypsum,[8] or plasterboard, deposited in the landfill (N.T. II 2165). He also noted that it is a basic environmental engineering principle to introduce oxygen to remove odors (N.T. II 2152-2153).

As is often the situation with complex scientific and technical issues, it must be determined whether one expert is more credible than the other and, if both are equally credible, whether greater weight must be assigned to the opinion of one expert. T.R.A.S.H. Ltd. and Plymouth Township v. DER et al., 1989 EHB 487, aff'd No. 1030 C.D. 1989 (filed April 20, 1990).

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[7] Official notice is taken of the fact that temperature in degrees F is equal to nine-fifths of the temperature in degrees C plus 32.

[8] Official notice is taken that gypsum is hydrous calcium sulfate, with the chemical formula $CaSO_4 \cdot 2H_2O$.

As between Dr. Smith and Dr. Keenan, we find Dr. Keenan to be more credible, given his research and publications. He has done research on anaerobic processes, including the production of gas, and leachate generation, production and treatment; 30 to 35 of his publications relate to anaerobic metabolism, leachate generation and treatment, and methane gas production (N.T. II 2128-2131). Dr. Smith, on the other hand, functions primarily as a chemist. His cross-examination by Lower Moreland and the Department brought out his general unfamiliarity with the literature relating to landfill temperatures and the relationships between biochemical reactions and temperature (N.T. II 1167-1172). Furthermore, he admitted that he was unaware of anything in the Bethayres landfill that would combust spontaneously and that there was no data which showed that a landfill could reach a temperature as high as the kindling point of cellulose (450°F) (N.T. II 1179-1182).

As between Dr. Keenan and Dr. Alexander, we find them to be equally credible, but must assign greater weight to Dr. Keenan's testimony. Dr. Alexander has done no research on landfills, although his general work concentrates on microbiological organisms and soils (N.T. II 2698-2702). Most telling, however, is his extremely superficial knowledge of the conditions in the Bethayres landfill and his unfamiliarity with the purpose of this litigation (N.T. II 2763-2776).

While Bethayres has not demonstrated a likelihood of success on the merits of its claim that dewatering the landfill poses an environmental risk, it is possible that it may have a likelihood of success on the merits with respect to its claim that dewatering to minus 13 feet MSL is unnecessary. In evaluating this claim, we have reviewed testimony of the hearing on the merits and testimony in the 1984 supersedeas hearings.

The record points to two reasons for dewatering the quarry - preventing groundwater contamination and eliminating the saturated anaerobic conditions in the fill which are conducive to the production of odorous gases. If either or both of these reasons are supportable, the issue then becomes one of to what elevation the landfill must be pumped.

For pumping to be substantiated from the basis of prevention of groundwater contamination, there must be some interconnection between the quarry and the surrounding groundwater system. Although the general groundwater movement in the area is west to east toward the Pennypack Creek, there is an inflow of groundwater to the quarry of four to five gallons per minute (N.T. I 252). There is no evidence of any significant deep groundwater flow from the quarry (N.T. II 787, 792, 812) and it is an area of low hydraulic conductivity (N.T. II 834-835). Thus, there appears to be no interconnection between the quarry and the surrounding groundwater system.

Even if there was evidence of interconnection, the testimony establishes no necessity to pump down as low as minus 13 feet MSL, which was the original elevation to which the quarry was mined (N.T. II 165, 281). This level is below the regional water table (N.T. II 281) and well below the elevation of the Pennypack Creek, which is 100 to 123 feet MSL (N.T. II 814). Furthermore, even if the quarry were to be dewatered to the level of 90 feet MSL, it is still 23 to 30 feet below the level of the surrounding wells (N.T. II 914-915). So, there appears to be no basis, from a groundwater contamination standpoint, of dewatering to minus 13 feet MSL.

We have already concluded that there is a relationship between odorous conditions and saturation in the fill. The question then becomes whether dewatering to any particular level is necessary to eradicate malodors. The parties advance two extreme positions - dewatering to the old quarry floor

or dewatering to the level authorized by our previous supersedeas order. While there is precious little on the record to correlate water elevation with gas generation, at this point, it is Bethayres' burden to substantiate its position that dewatering to minus 13 feet MSL is unnecessary. Since there is nothing on the record relating to leachate elevation and gas generation, it is impossible to hold that Bethayres has satisfied its burden on this issue.[9]

Irreparable Harm to Bethayres and Harm to the Public

Bethayres' claims of irreparable harm and harm to the public are primarily related to the environmental catastrophe which will ensue if spontaneous combustion occurs in the fill after dewatering and the environmental risk of malodors from dry fill. Since we have already rejected Bethayres' claims regarding potential spontaneous combustion and gas generation, we must also reject its claims regarding irreparable harm and harm to the public as a result of spontaneous combustion and gas generation. Furthermore, Mr. Mignatti's testimony is that the increase in costs to pump down to minus 13 feet MSL rather than maintain the current level of pumping is slight (N.T. III 9-10). As for harm to the public, there is a great deal of evidence

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[9] The Department suggests in the testimony of Lawrence Lunsk that the dewatering requirement is derived from the then-new municipal waste regulations. The regulation which was applicable to this demolition waste disposal site, 25 Pa.Code §75.33, gives little clue as to why the dewatering requirement was imposed. Indeed, its requirement that the seasonal high water elevation be a minimum of 40 inches below the surface does not logically apply to disposal in a quarry such as Bethayres'. The new municipal waste regulations, which became effective on April 9, 1988, and thus were inapplicable when the permit amendment was issued by the Department in late 1987, 25 Pa.Code §§277.164 and 277-259, do not provide much assistance, either. Although the testimony of several Department witnesses (i.e. Messrs. Lunsk and Buntin) indicates that disposal in quarries will be prohibited under these regulations unless dewatering occurs, the regulations do not, on their face, contain such a prohibition. And, it appears that the Department will exercise discretion in making such determinations, as it will review, *inter alia*, surface and groundwater flow and groundwater pumping data (see 25 Pa.Code §277.164(b)(1).

on the record in the hearing on the merits and the two supersedeas hearings concerning complaints of malodors by residents of Lower Moreland Township. Continuation of malodorous conditions constitutes harm to the public and since the evidence supports the relationship between malodors and saturated fill conditions, the permit condition related to dewatering cannot be superseded.

ORDER

AND NOW, this 29th day of May, 1990, it is ordered that Bethayres Reclamation Corporation's petition for supersedeas is denied and Paragraph 4 of the Board's April 4, 1984, supersedeas order at Docket No. 84-082 is vacated.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 29, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

CITY OF HARRISBURG	:	
	:	
v.	:	EHB Docket No. 88-120-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 30, 1990
and PENNSYLVANIA FISH COMMISSION, Intervenor		

**OPINION AND ORDER SUR
REQUEST FOR RECONSIDERATION OR,
IN THE ALTERNATIVE,
MOTION TO CERTIFY QUESTIONS FOR INTERLOCUTORY APPEAL**

By Terrance J. Fitzpatrick, Member

Synopsis

A request for reconsideration and an alternative motion to certify questions for interlocutory appeal are both denied. The Department's disagreement with the Board's conclusions does not constitute an exceptional circumstance which would warrant reconsideration of an interlocutory order. In addition, the Board will not certify questions regarding discovery for interlocutory appeal because they are not controlling questions of law and because an immediate appeal to resolve these questions will not materially advance the ultimate termination of the litigation.

OPINION

The procedural history of this case is described in previous opinions, City of Harrisburg v. DER, 1989 EHB 365, 1989 EHB 373. This Opinion and Order addresses the "Request for Reconsideration or, in the Alternative,

Motion to Amend Order to Certify Questions for Interlocutory Appeal" filed by the Department of Environmental Resources (DER) on May 9, 1990.

DER's request for reconsideration and motion to certify were filed in response to the undersigned's April 30, 1990 Opinion and Order disposing of nine motions involving discovery issues. In particular, DER requests that the Board reconsider its conclusions that:

> (1) conversations between the Department's administrative staff and its counsel leading to a specific adjudicatory decision or to formation of a general policy are not subject to the Attorney-Client Communication Privilege and protected from disclosure;
>
> (2) memoranda prepared by the Department's counsel, in anticipation of litigation, which reflects counsel's legal theories, mental impressions, opinions, legal research and conclusions regarding the case are not subject to the Attorney [Work Product] Privilege and protected from disclosure by the privilege and the rules of civil procedure regarding discovery; and
>
> (3) the counsel retained by Acres International may enter an appearance as a non-party to this proceeding.

(DER request for reconsideration, pp 1-2.) DER argues that reconsideration of these conclusions is warranted because "exceptional circumstances" are present. In particular, DER claims that the Board's Opinion will "discourage the Department's administrative staff from seeking legal advice during the decision making process and [will] deprive the Department of effective representation once litigation ensues." (DER memorandum of law, p. 2.)

DER's motion to certify questions for interlocutory appeal was filed in the alternative to its request for reconsideration. In this motion, DER asks the Board to certify the following questions to Commonwealth Court:

> A. May the Department assert the Attorney-Client Privilege for communications between its staff and the attorneys appointed by the Governor's Office of General Counsel pursuant

to the Commonwealth Attorneys Act to provide legal advice and representation for the Department?

B. May the Department assert a privilege for memoranda prepared by the Governor's Office of Chief Counsel pursuant to the Commonwealth Attorneys Act to provide legal advice and representation for the Department when those memoranda were prepared in anticipation of litigation and reflect the attorneys' mental impressions, theories, opinions, advice and conclusions which are otherwise protected by Rule 4003.3 of the Pennsylvania Rules of Civil Procedure?

The City of Harrisburg (City) filed a response to DER's request for reconsideration and motion to certify. With regard to the request for reconsideration, the City argues that DER has failed to demonstrate either a lack of opportunity to brief the issues or any other compelling circumstance to justify reconsideration. See 25 Pa. Code §21.122(a). In response to the motion to certify, the City contends that the questions listed by DER do not meet the standards for certification in that they do not present a "controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." See The Judicial Code, 42 Pa. CS §702(b). The City argues that DER's questions involve discovery issues and, thus, they do not constitute "controlling questions of law." The City also argues that the questions as framed by DER do not reflect the Board's conclusions.

Acres International Corp. (Acres) also filed a response opposing DER's request for reconsideration. Acres contends that DER has not alleged any exceptional circumstances to justify reconsideration of the Board's denial of DER's motion to quash Acres' entry of appearance. Acres also reiterates arguments in support of the Board's denial of DER's motion.

The Board's regulations provide that reconsideration will be granted only for "compelling and persuasive reasons," which are generally limited to instances where:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §21.122(e). With regard to interlocutory orders, such as the one involved here, reconsideration will be granted only when "exceptional circumstances" are shown. Elmer R. Baumgardner, et al. v. DER, 1989 EHB 400.[1]

DER's request for reconsideration will be denied because there are no "exceptional circumstances" present here. DER simply disagrees with the Board's conclusions.[2] DER's argument that the Board's ruling on the Attorney Client and Attorney Work Product Privileges will discourage DER's

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[1] The City argues that the Board will not grant reconsideration of interlocutory orders, citing Chemical Waste Management, Inc. v. DER, 1982 EHB 482. However, the Board has relaxed this inflexible rule and will now grant reconsideration of interlocutory orders when exceptional circumstances are present. See Baumgardner, 1989 EHB 400, 402 (note 4).

[2] We must say, however, that in its memorandum of law DER has certainly presented its arguments in more elaborate detail than it did prior to our ruling. Few, if any, of the cases cited by DER in its memorandum of law were cited previously. Moreover, DER's memorandum of law raises, for the first time, arguments based upon the Commonwealth Attorneys Act (Act of October 15, 1980, P.L. 950, 71 P.S. §732-101 et seq.) and the Rules of Professional Conduct. The proper time to cite cases and present new arguments is before the Board rules, not after.

administrative staff from seeking legal advice during the decision making process does not constitute exceptional circumstances. This argument is based upon pure speculation. Moreover, since the Board and Commonwealth Court have held that there is no Deliberative Process Privilege in Pennsylvania,[3] DER's decisionmakers will no more be discouraged from seeking legal advice than they will be from seeking technical or policy advice.[4]

We also find that DER's motion to certify questions for interlocutory appeal must be denied. The standard for granting certification is set out in the Judicial Code:

> When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order.

42 Pa. CS §702(b). The questions presented by DER fail to meet this standard. While there may be room for disagreement on these discovery questions, they do not constitute controlling questions of law. In addition, we cannot imagine how an immediate appeal from our April 30, 1990 order will materially advance

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[3] See Commonwealth, DER v. Texas Eastern Transmission Corp., ___ Pa. Commonwealth Ct. ___, 569 A.2d 382 (1990).

[4] DER did not advance any argument why the Board's ruling that counsel for Acres could enter an appearance presented exceptional circumstances; therefore, we summarily deny DER's request for reconsideration of this ruling. We also deny DER's request in its memorandum of law that the Board "clarify its position concerning deposition testimony and specifically provide that the City be required to identify and produce individuals to testify concerning their entitlement to water quality certification." (DER memorandum of law, p. 17.) If DER wants to know who will testify for the City at the upcoming hearing, we believe it can obtain this information through normal discovery procedures.

the ultimate termination of this litigation. We are not at liberty to ignore the clear language of the Judicial Code, 42 Pa. CS §702(b); therefore, DER's motion to certify must be denied.

ORDER

AND NOW, this 30th day of May , 1990, it is ordered that:

1) The Department's request for reconsideration of our April 30, 1990 Opinion and Order is denied.

2) The Department's motion to certify questions for interlocutory appeal is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: May 30, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

NGK METALS CORPORATION	:	
	:	
V.	:	**EHB Docket No. 90-056-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 8, 1990**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A Petition for Supersedeas is denied when the Petitioner (a recipient of a NPDES Permit) fails to show a likelihood of prevailing on the merits of the issues presented - (1) whether DER violated the law or abused its discretion in setting a January 1, 1991 final compliance date for achieving water-quality based effluent limits for beryllium and copper when there is no presently known technology for achieving those limits but where compliance could be achieved by connecting to a public sewer system; and (2) whether DER violated the law or abused its discretion in treating beryllium as a probable human carcinogen in setting the water-quality based effluent limit. The Board held out the possibility of a supersedeas later if it develops that connection to the public sewer system is not, in fact, possible by the final compliance date and if DER denies an extension.

OPINION

On February 1, 1990 NGK Metals Corporation (NGK) filed a Notice of Appeal from the December 21, 1989 issuance by the Department of Environmental Resources (DER) of Amendment No. 3 to National Pollutant Discharge Elimination

System (NPDES) Permit No. PA 0011363, pertaining to NGK's beryllium alloy manufacturing facility in Muhlenberg Township, Berks County (NPDES Amendment No. 3). On February 9, 1990 NGK filed a Petition for Supersedeas, to which DER filed an Answer on March 2, 1990. A hearing on the Petition was convened in Harrisburg on March 13, 1990 by Administrative Law Judge Robert D. Myers, a Member of the Board, but was continued pending a determination of the issues properly before the Board. Another hearing was scheduled and held in Harrisburg on May 21, 1990, at which both parties were represented by legal counsel. Post-hearing briefs were filed by the parties on May 31, 1990. The record consists of the pleadings, a hearing transcript of 207 pages and 22 exhibits.

In its Petition, NGK requested a supersedeas with respect to the following conditions of NPDES Amendment No. 3:

1. the final mass unit and concentration limits for beryllium and copper;
2. the monitoring requirements for acrolein and acrylonitrile;
3. the interim and final mass unit and concentration limits, and related monitoring requirements for hexavalent chromium, silver and lead;
4. the requirement to complete a Toxics Reduction Evaluation (TRE) for acrolein, acrylonitrile and lead; and
5. the permit compliance schedule insofar as it relates to the permit conditions challenged in the appeal.

The evidence presented by NGK at the hearing dealt primarily with the effluent limits for beryllium and copper; and these are the only issues

discussed in NGK's post-hearing brief. All other issues, therefore, are deemed waived for the purposes of the supersedeas: Kwalwasser v. DER, 1986 EHB 24, 39.

To be entitled to a supersedeas, NGK must show, by a preponderance of the evidence, (1) irreparable harm, (2) the likelihood of prevailing on the merits, and (3) the unlikelihood of injury to the public or other parties. If pollution or injury to the public health, safety or welfare exists or is threatened during the supersedeas period, the supersedeas cannot be granted: section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514 (d); 25 Pa. Code §21.78.

NGK's primary objection to NPDES Amendment No. 3 concerns the effluent limits for beryllium and copper that will go into effect January 1, 1991. A brief historical review is necessary to put this objection in proper perspective. This NPDES Permit was issued initially on August 8, 1986 to Cabot Corporation, bearing an expiration date of August 8, 1991. The gross discharge limits for beryllium and copper allowed by Part A of the Permit were "technology-based", in essence, even though no technology-based limits had been set for the beryllium/copper forming industry. DER set the limits on what it believed could be achieved technologically, without letting the quality of the discharge worsen. Part C, Section D (other requirements), of the Permit stated that the permittee was also expected to achieve specified water-quality based effluent limits that were more stringent than those in Part A. No final date was set for compliance with these more stringent limits. The permittee was required to conduct a Toxics Reduction Evaluation (TRE) with respect to beryllium and copper (and some other pollutants not involved in the supersedeas), beginning the TRE by September 30, 1986 and completing it by June 30, 1987.

After NGK acquired the facility from Cabot Corporation, DER issued Amendment No. 1 to the NPDES Permit on May 6, 1987. This Amendment is identical to the original Permit but names NGK as the permittee. Amendment 2 to the NPDES Permit was issued by DER on January 25, 1988. The only change material to this supersedeas was an extension of the completion date for the TRE from June 30, 1987 to March 31, 1988. NGK retained BCM Environmental Engineers to do the TRE and, at some point, submitted a report to DER dated April 1988.[1]

NGK also undertook the expenditure of approximately $700,000 to install a wastewater treatment system[2] employing the Best Available Technology (BAT), as defined by the U.S. Environmental Protection Agency (EPA), for the nonferrous metals industry generally. BAT for the beryllium/copper forming industry specifically has not yet been adopted by EPA. This wastewater treatment system was designed and constructed during 1989 and went into operation in February 1990. It was designed to meet the "technology-based" limits of the NPDES Permit but is not capable of achieving the more stringent water-quality based limits.

Having received NGK's TRE on beryllium and copper and having received NGK's May 1, 1989 request for an increase in discharge flow from 392,000 gallons per day to 457,000 gallons per day, DER undertook a review of NGK's NPDES Permit. This review also was prompted by changes to Chapter 93 of DER's regulations which became effective in March 1989. On May 25, 1989 DER sent to

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[1] The TRE was not offered into evidence and we are unaware of its contents.

[2] This project was prompted by operational problems experienced in late 1988 and early 1989 that produced a discharge that exceeded the limits for beryllium and copper. These violations were concealed from NGK management and DER by a supervisor who was later removed from his position. NGK paid to DER a civil penalty in the amount of $225,000 for these violations.

NGK a draft NPDES Amendment No. 3 which proposed, in Part A, two sets of effluent concentrations for beryllium and copper. Those in the first set, permissible until June 30, 1990, were identical to those previously allowed in Part A. Those in the second set, however, were considerably more stringent.[3] Those concentrations, intended to go into effect on July 1, 1990, were as follows:

Pollutant	Mass Units (lbs. per day)		Concentrations (mg/l)		
	Avg. Monthly	Max. Daily	Avg. Monthly	Max. Daily	Instantaneous Max.
Beryllium	Not detectable using EPA method No. 210.2				
Copper	0.12	0.19	0.032	0.049	0.08

In its cover letter accompanying the draft, DER acknowledged that the more stringent water-quality based limits to go into effect on July 1, 1990 could not be achieved using BAT. DER urged NGK to consider a phase-out of its stream discharge and a connection to the Township of Muhlenberg's sanitary sewer system which flows to the City of Reading's sewage treatment plant.[4] In its response dated July 7, 1989, NGK requested that the existing Part A effluent limits for beryllium and copper be retained. In support of this request, NGK (1) referred to scientific data which, in its opinion, warranted a modification of the beryllium limits set forth in Table 1, Appendix A, of

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[3] More stringent even than the water-quality based limits in prior versions of the NPDES Permit.

[4] It was explained at the hearing that the effluent limitations imposed on NGK are so stringent because the discharge goes to Laurel Run, a stream with flows only 2.3 times the discharge flow. By sending the discharge to the City of Reading's sewage treatment plant where it would be part of a heavy volume and discharged into a much larger watercourse, the beryllium and copper would be significantly diluted.

Chapter 16 of DER's regulations; and (2) stated conditions that, in its opinion, warranted a reduction of the published stream criteria for copper, as permitted by 25 Pa. Code §93.4(b).

NGK also argued that the time constraints for achieving more stringent limits were unreasonable. As an alternative, it proposed that the existing Part A limits remain in effect through the remaining life of the Permit (August 8, 1991) and that NGK undertake a technology study (after debugging the wastewater treatment system then being designed and built) to determine whether any alternative tertiary treatment system existed to reduce further the beryllium and copper concentrations in the discharge. This study was to be completed and the results submitted to DER within 12 months after being started, with progress reports being submitted quarterly.

DER rejected NGK's requests in a letter dated September 19, 1989, and again urged NGK to connect to the Township of Muhlenberg's sanitary sewer system.[5] NGK continued to pursue its requests for retaining the existing Part A limits for beryllium and copper. At a meeting with DER in Harrisburg on November 17, 1989 it presented and discussed information regarding the potency of beryllium as an oral carcinogen. On December 19, 1989 it sent a letter to DER in which it detailed process changes designed to reduce flows to its wastewater treatment plant. It reiterated its commitment to pursue a technology study seeking improved tertiary treatment, and stated its intention to continue pursuing a discharge into the City of Reading's sewage treatment

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[5] The time limit for compliance with the more stringent effluent limits was based primarily on the time estimated to be necessary for NGK to connect to a sanitary sewer system.

plant. With respect to the latter, NGK reported that two discussions with city officials had made it clear that the option of discharging industrial wastes was closed to NGK.

When DER issued NPDES Amendment No. 3 in its final form two days later, it retained the same two sets of effluent limitations for beryllium and copper proposed in the draft. The effective date for the second set was moved back to January 1, 1991, however. In the cover letter, DER stated that it had evaluated all of the material presented by NGK but had concluded that the proposed limitations should be retained. DER noted specifically that EPA had recently recalculated an oral potency factor for beryllium and had come up with a figure nearly the same as the one calculated in 1980 that had been used to develop the water-quality based criterion for beryllium.

During the latter part of 1989 (prior to DER's final issuance of NPDES Amendment No. 3), NGK solicited proposals for performing the technology study seeking improved tertiary treatment. NGK has now retained SAK Environmental Technologies to do the study as outlined in a letter dated March 7, 1990 and which is expected to take a minimum of 9 to 10 months. This study will be completed and its results evaluated in time to be incorporated in NGK's application for renewal of its NPDES Permit which must be filed by February 1991.

NGK also has continued to explore the possibility of connecting to a sanitary sewer system. Additional capacity has been added to the City of Reading's sewage treatment plant but has not yet been allocated among the municipalities contributing flows to that plant, one of which is the Township of Muhlenberg. Without this allocation, the Township is unable to apportion its share of the additional capacity among its existing or potential customers.

NGK argues (1) that it should be permitted to continue operating under the technology-based limits until the NPDES Permit expires in August 1991, (2) that, in the meantime, it should have the time necessary to do the technology study seeking improved tertiary treatment, (3) that the water-quality based limit for beryllium is not supported by adequate scientific evidence, (4) that the water-quality based limit for copper is unreasonably stringent, and (5) that the option of connecting to a sanitary sewer system is not available to it. If NGK is not relieved of the responsibility for achieving the water-quality based limits by January 1, 1991, it will be forced either to shutdown its operations by that date (idling its 400 employees) or to expend funds on unnecessary or unproven wastewater treatment equipment - funds that could not be recovered from DER or any other source.

This constitutes irreparable harm, in NGK's view, and we are inclined to agree - especially since DER acknowledges that the existing wastewater treatment system represents BAT and that technological improvements are not likely to result in a discharge meeting the latest water-quality based criteria: Silverbrook Anthracite Inc. v. DER, 1988 EHB 365; Baumgardner v. DER, 1988 EHB 786.

The likelihood of NGK prevailing on the merits is less clear. DER was obligated to compel NGK to bring its discharge into compliance with the more stringent water-quality based criteria applicable to Laurel Run. Since the discharge from this particular facility (then owned by Cabot Corporation) did not meet the water-quality based criteria when the NPDES Permit was issued in 1986, DER inserted a schedule of compliance (as required by 25 Pa. Code §92.55) without specifying a final compliance date. Cabot Corporation, initially, and NGK, subsequently, were given time to study methods of reducing

the beryllium and copper concentrations to acceptable levels. That study was completed in April 1988. Upon receipt of the study, DER was fully justified in setting a final compliance date for NGK's discharge. The date set - January 1, 1991 - gave NGK a one-year period to take the necessary steps; but NGK was aware 7 months earlier that a final compliance date was being proposed.

We cannot agree with NGK that these actions of DER constitute either a violation of law or an abuse of discretion. DER was not required to consider the economic impact upon NGK specifically of having to meet the water-quality based limits: Mathies Coal Company v. Commonwealth, Department of Environmental Resources, ____ Pa. _____, 559 A.2d 506 (1989); and was required to consider the technologic feasibility only within the context of its own regulations.

25 Pa. Code §95.4 gives DER the discretion to grant dischargers extensions of time for achieving water-quality based effluent limitations under certain circumstances. NGK made no request pursuant to this regulation, perhaps because of subsection (b)(3) which prohibits DER from granting an extension of time to a discharger which has a history of noncompliance with the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq; the regulations promulgated under the CSL; or the terms or conditions of a permit. As noted in footnote 2, NGK had violated the effluent limits of its NPDES Permit in 1988 and 1989 and had paid a substantial civil penalty as a result. Whether or not DER would have concluded that these

violations amounted to a "history of noncompliance" disqualifying NGK for an extension of time is uncertain, because NGK never activated the provisions of §95.4.[6]

NGK did raise 25 Pa. Code §93.4(b), however, with respect to the water-quality based copper limits. In its July 7, 1989 response to the draft NPDES Amendment No. 3, NGK stated its belief that the provisions of this regulation applied to Laurel Run, justifying a deviation from published stream criteria. 25 Pa. Code §93.4(b) reads as follows:

> (b) Less restrictive uses than those currently designated for particular waters listed in §93.9 may be adopted where it is demonstrated that:
> (1) The existing designated use is not attainable because of natural background conditions;
> (2) The existing designated use is not attainable because of irretrievable man-induced conditions; or
> (3) Application of effluent limitations for existing sources more stringent than those required under 33 U.S.C. §1311, in order to attain the existing designated use, would result in substantial and widespread adverse economic and social impact.

In its letter of September 19, 1989 DER informed NGK that no "substantial justification has been provided for considering less restrictive water uses for Laurel Run." It went on to state that the size of the stream has no bearing on the issue and that the elevated pH upstream of NGK's discharge does not affect the toxicity of copper. NGK made no further effort to convince DER

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[6] DER's witness James Newbold testified that, even though NGK had not asked for an extension under §95.4, DER nonetheless considered its applicability and concluded that NGK was disqualified. We are not challenging this testimony; only suggesting that the conclusion was reached in a vacuum.

that NGK had satisfied the conditions of §93.4(b), and NGK presented no evidence at the hearing to convince the Board that DER abused its discretion when it refused to adopt less restrictive water uses for Laurel Run.[7]

Since NGK did not pursue the regulatory provisions which permit DER to consider technologic feasibility[8], we have no basis for faulting DER for not giving greater weight to that factor. Of course, DER is convinced that NGK's technologic problems can be solved by hooking onto a sanitary sewer system, the technologic feasibility of which is not, apparently, in issue. In any event, DER's imposition of the water-quality based limits for beryllium and copper appears to have been an appropriate exercise of discretion - on the basis of the evidence before us at this time.

NGK launched a major attack upon the beryllium limit set by DER, arguing that it is not supported by adequate scientific evidence. Beryllium is a "toxic pollutant" as defined in section 502 of the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C.A. §1362[9]. According to this definition, beryllium is one of a group of pollutants capable of causing death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions or physical deformations in organisms (or their offspring) exposed to them. Because of their harmful nature, toxic pollutants are subject to special requirements adopted pursuant

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[7] NGK presented evidence that the water-quality based copper limit set by NPDES Amendment No. 3 is considerably more stringent than the water-quality based copper limit in prior revisions of the Permit. NGK presented no evidence to show that this action was improper, however.

[8] 25 Pa. Code §93.4(b) also permits DER to consider "substantial and widespread adverse economic and social impact." While this goes far beyond the specific economic impact upon NGK, it necessarily includes that impact.

[9] Copper also is a toxic pollutant. For a complete listing, see 40 CFR §401.15.

to the guidelines set forth in Chapter 16 of DER's regulations. This Chapter recognizes two types of toxic pollutants - (1) those for which there is a threshold level below which no adverse effects will be seen and (2) those for which there is no safe level of exposure: 25 Pa. Code §16.31. Carcinogens (cancer-causing agents) are placed in the latter category: 25 Pa. Code §16.33(a). The determination of whether or not a toxic is a carcinogen is based on its listing as such by EPA, the International Agency for Research on Cancer or the National Toxicology Program: 25 Pa. Code §16.33(m)(1). If a cancer potency (slope factor) value has been developed for a particular toxic, as evidenced by its listing on EPA's Integrated Risk Information System (IRIS), DER uses either the EPA-developed criteria or develops its own criteria using the cancer potency value: 25 Pa. Code §16.33(m)(2). Table 1 of Appendix A lists the specific criteria DER uses in development of effluent limits for NPDES permits: 25 Pa. Code §16.51.

When DER issued the draft NPDES Amendment No. 3, it treated beryllium as a carcinogen and required that it be removed from NGK's discharge to the extent of being non-detectable. This requirement was derived from the criteria set forth in Table 1 of Appendix A which, in turn, was based upon EPA data. NGK reacted to this requirement in its letter of July 7, 1989 by presenting findings which, in NGK's opinion, warranted a modification of the criteria as permitted by 25 Pa. Code §16.41. After reviewing this material, DER denied NGK's request for modification of the beryllium criteria. In its letter of September 19, 1989 in which this denial was communicated to NGK, DER set forth its conclusion that beryllium is a carcinogen "via the oral route." The letter goes on to state that, consistent with DER policy, "which is protective in ambiguous cases," beryllium will continue to be treated as an oral carcinogen.

NGK continued to pursue the matter, presenting the information at a November 17, 1989 meeting with DER in Harrisburg. When the final NPDES Amendment No. 3 was issued on December 21, 1989, DER again responded to the beryllium issue raised by NGK. In the cover letter, DER informed NGK that it was adhering to its previous conclusion that beryllium is an oral carcinogen. In the letter, DER referred to an oral potency factor recently calculated by EPA, after a re-evaluation of the data, which had not yet been added to the IRIS data base.[10]

NGK argues that DER abused its discretion by (1) accepting data unsupported by proper scientific evidence and (2) using data which had not yet been added to the IRIS data base at the time NPDES Amendment No. 3 was issued. At the hearing, NGK presented an epidemiologist and DER presented a toxicologist, both of whom discussed and assessed the data pertaining to beryllium as a carcinogen. The two documents principally referred to by these experts are Health Assessment Document for Beryllium, EPA Office of Research and Development, November 1987; and Toxicological Profile for Beryllium, Agency for Toxic Substances and Disease Registry, U.S. Public Health Service, December 1988. Both documents report that (1) adequate data exists to show that beryllium is carcinogenic in animals by inhalation, (2) some data exists to suggest that beryllium is carcinogenic in animals by ingestion, (3) some data exists to suggest that beryllium is carcinogenic in humans by inhalation, and (4) no data exists to suggest that beryllium is carcinogenic in humans by ingestion.

Because of uncertainties in the human data, both documents refer to those conclusions as "equivocal" or "controversial." Both documents also

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[10] The factor was added to the IRIS data base on January 1, 1990, classifying beryllium as a "probable human carcinogen."

conclude that, on the strength of the animal studies, beryllium should be treated as a probable human carcinogen by inhalation. While the evidence pertaining to ingestion is uncertain and debatable, "the potential for human carcinogenicity by this route cannot be dismissed;" "if an agent is carcinogenic by one route it is potentially carcinogenic by any route." The IRIS data on beryllium by ingestion, as updated on January 1, 1990, basically agrees with these two documents but goes farther and actually calculates a potency factor.

On the basis of the evidence presented to us at this stage of the appeal, we cannot conclude that DER abused its discretion in treating beryllium as an oral carcinogen. While there are no definitive studies establishing that connection in humans, the evidence that is available is sufficient to prompt both EPA and the U.S. Public Health Service to label beryllium a "probable human carcinogen." We cannot fault DER's conservative approach in this sensitive area of widespread public concern.

We also are not convinced that DER's use of IRIS data base information two weeks prior to its publication in the data base somehow violates the law. DER had obtained the information over the telephone from EPA personnel, and it was confirmed by the published data subsequently obtained. Moreover, this information was merely corroborative of the data DER had already reviewed. DER's treatment of beryllium as an oral carcinogen was apparent in the draft NPDES Amendment No. 3 issued some 7 months earlier. While this treatment was re-evaluated on the basis of data submitted by NGK and data obtained by DER, the basic decision was never altered and the effluent limit was never changed.

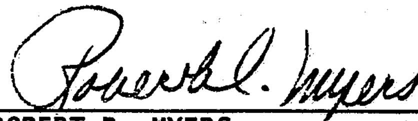
Having concluded that NGK is not likely to prevail on the merits of the issues before us, we find it unnecessary to discuss any other factors relevant to the granting of a supersedeas.

We find it appropriate to add, however, that, since DER's final compliance date for achieving the water-quality based criteria in NPDES Amendment No. 3 was established primarily on the basis of the amount of time necessary for NGK to connect to a sanitary sewer system, it is possible that DER may extend the date if such connection is not possible by January 1, 1991 through no fault of NGK. We have not been presented with any evidence concerning the amount of time required to complete that connection once the necessary approvals have been issued. Consequently, we have no way of knowing whether or not the six months remaining are sufficient. If the connection cannot, in fact, be made by the deadline and if DER denies an extension, it is possible that a supersedeas might be in order at that time. We venture no opinion beyond a possibility because a supersedeas necessarily must depend on conditions existing at the time it is requested.

ORDER

AND NOW, this 8th day of June 1990, it is ordered that the Petition for Supersedeas filed by NGK on February 9, 1990 is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 8, 1990

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