Environmental Hearing Board

Adjudications
and
Opinions

1990

Volume II

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COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1990

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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.

1990

ADJUDICATIONS

OPINIONS AND ORDERS

1990 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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HARRISBURG, PA 17101
717-787-3483
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M. DIANE SMIT
SECRETARY TO THE BO

FRANCES SKOLNICK, et al.	:	
	:	
v.	:	**EHB Docket No. 89-290-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 11, 1990**
and GPU NUCLEAR CORPORATION, Intervenor	:	

OPINION AND ORDER SUR
MOTION TO LIMIT THE ISSUES

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to limit the issues is granted in part and denied in part in an appeal involving the Department of Environmental Resources' (DER) grant of an exemption, from the plan approval and operating permit requirements of the Air Pollution Control Act, for a system designed to evaporate contaminated water. Issues concerning compliance with other environmental statutes and whether DER considered alternatives to the evaporation system are irrelevant in this appeal. The issue of the psychological effects resulting from operation of the system will not be considered because this issue was not raised in Appellants' notice of appeal. However, Appellants will not be precluded from raising issues concerning the operation of the system and the conditions of operation.

OPINION

This proceeding involves an appeal filed by Frances Skolnick, Susquehanna Valley Alliance, Three Mile Island Alert, Concerned Mothers and

Women, and People Against Nuclear Energy (collectively, the Appellants) from a letter of the Department of Environmental Resources (DER) dated August 3, 1989. In this letter, DER stated that no plan approval or operating permit was required for GPU Nuclear Corp. (GPUN) to install and operate an evaporation system to clean and dispose of water which had been contaminated as a result of the accident at Unit 2 of the Three Mile Island Nuclear Generating Station. The basis for this exemption was DER's finding that the evaporation system was an air contamination source of "minor significance." See 25 Pa. Code §127.14(8).[1]

The Appellants filed a petition for supersedeas on October 3, 1989. On November 30, 1989, after holding two days of hearings, the undersigned issued an Opinion and Order denying the petition.

This Opinion addresses a motion to limit issues filed by GPUN. In this motion, GPUN argues that four issues raised in the Appellant's pre-hearing memorandum are beyond the scope of this proceeding. The Appellants filed a response to GPUN's motion. We will address these issues individually.

1. **Compliance with statutes regulating the disposal of solid, hazardous, and radioactive waste.**

Among the "contentions of law" stated in Appellants' pre-hearing memorandum are contentions that GPUN may not proceed with its evaporation plan without first securing a permit pursuant to Section 401 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.401, and that the Low Level Radioactive Waste Disposal Act, Act of February 9, 1988,

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[1] Unless such an exemption is granted, plan approval and an operating permit are required to construct and operate an air contamination source. See Section 6.1(a) and (b) of the Air Pollution Control Act, Act of January 8, 1960, P.L. 219, as amended, 35 P.S. §4006.1(a) and (b).

P.L. 31, No. 12, 35 P.S. §7130.101 et seq., prohibits evaporation of the contaminated water in that it requires isolation of radioactive waste from the biosphere for the length of the hazardous life of the wastes. See 35 P.S. §7130.102. GPUN argues that these issues are beyond the scope of this proceeding. The Appellants counter that they raised the issue of low-level waste in their notice of appeal, and that this issue is relevant.[2]

We agree with GPUN that both of these contentions of law address issues which are beyond the scope of this proceeding. The mere fact that the Appellants have raised issues in their notice of appeal does not mean that these issues are within our jurisdiction. The focus of the instant proceeding is whether DER erred in exempting GPUN's evaporation system from the plan approval and operating permit requirements of the Air Pollution Control Act. The Appellants' arguments concerning the Solid Waste Management Act and the Low Level Radioactive Waste Disposal Act amount to arguments that DER has failed to enforce these other environmental statutes against GPUN. In effect, the Appellants are attempting to raise in this appeal issues regarding DER's inaction under these other statutes. The Board lacks jurisdiction to decide such issues. See Westinghouse Electric Corp. v. DER, EHB Docket No. 89-058-F (May 14, 1990), Gabriel v. DER, EHB Docket No. 89-582-E (May 17, 1990).

Accordingly, we will grant GPUN's motion as to issues regarding compliance with the Solid Waste Management Act and the Low Level Radioactive Waste Disposal Act.

2. **Alleged psychological effects resulting from the evaporation process.**

Appellants allege at page 3 of their pre-hearing memorandum that the

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[2] The Appellants did not specifically respond to GPUN's objection to the issue Appellants raised concerning Section 401 of the Solid Waste Management Act, 35 P.S. §6018.401.

population surrounding the plant will suffer adverse psychological effects as a result of the evaporation process. GPUN contends in its motion that the Board may not consider this issue because Appellants failed to raise it in their notice of appeal. GPUN also argues, in the alternative, that psychological effects are not relevant to this proceeding. The Appellants contend that they raised this issue in their notice of appeal in that they raised "public health issues." (Response, p. 4) Moreover, Appellants contend that DER had a duty to consider psychological effects in determining whether to exempt the system.

Our review of the Appellants' notice of appeal indicates that the issue of psychological effects was not raised either explicitly or implicitly; therefore, the issue may not be raised at the hearing. Appellants contend that Objections 1, 6, 8, and 9 in their notice of appeal raise "public health issues,"--a term which purportedly includes psychological effects. However, the only objection which mentions "public health" is number six, and the context in which the term is used indicates clearly that the focus was physical rather than psychological health effects.[3]

Since the Appellants did not raise the issue of psychological effects in their notice of appeal, the Board may not consider this issue. See, 25 Pa. Code §21.51(e), NGK Metals Corp. v. DER, EHB Docket No. 90-056-MR (April 5, 1990). Therefore, it is not necessary for us to address whether psychological effects would otherwise be relevant in this type of proceeding.

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[3] The sentence reads: "DER's determination that releases from evaporation are 'protective of public health' (reference omitted) has no basis in scientific fact since it is accepted universally that there is no safe threshold of exposure to ionizing radiation." (notice of appeal, objection no. 6).

3. **Alternative Waste Disposal Technologies.**

Appellants state at page one of their pre-hearing memorandum that there are alternatives to evaporation of the radioactive water, such as on-site storage, which would protect public health and prevent pollution. GPUN argues in its motion that this issue is irrelevant because DER had no duty to consider alternatives, citing York County Solid Waste and Refuse Authority v. DER, et al., 1988 EHB 373. Appellants respond that under Article I, Section 27 of the Pennsylvania Constitution, DER must mitigate the adverse effects of the project, and that DER did address alternatives to evaporation in the letter under appeal.

Issues regarding alternatives to the evaporation system are irrelevant. The Board has ruled that Article I, Section 27 of the Pennsylvania Constitution does not compel consideration of alternatives absent a showing that the project under review is likely to result in significant environmental harm. Township of Indiana v. DER, 1984 EHB 1, 33, York County Solid Waste and Refuse Authority v. DER, 1988 EHB 373, 377-378. If the evidence at the hearing were to show that the evaporation system would result in significant environmental harm,[4] then it would be clear that DER erred in determining that the evaporation system was a source of "minor significance." Thus, we would simply reverse DER's decision exempting the evaporation system from the requirements for plan approval and an operating permit, and it would be unnecessary to consider the question of alternatives. Therefore, the question of alternatives to evaporation is irrelevant.

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[4] The evidence introduced at the supersedeas hearing did not show a likelihood of significant environmental harm. Frances Skolnick, et al. v. DER, 1989 EHB 1304, 1308-1309, 1312-1313.

4. **Operation of the system and conditions of operation.**

GPUN contends that four paragraphs in Appellants' pre-hearing memorandum raise irrelevant "enforcement-related issues." These paragraphs relate, in general terms, to how the evaporation system will be operated and to the operating conditions which DER imposed in its letter. The Appellants contend that these issues are relevant.

We agree with Appellants that the issues regarding operation of the sytem and the conditions of operation are relevant. This is not a simple case involving an allegation that the permittee will refuse to comply with the conditions of a permit. The question here is more one of whether the system will work as designed rather than whether GPUN will make an effort to comply with the conditions, or whether DER will enforce the conditions.[5] It appears that the Appellants are questioning whether DER had sufficient assurance up front that the system would work as designed. Stated differently, Appellants seek to question whether DER had any basis, in reality as opposed to theory, for concluding that the evaporation system would be an air contamination source of minor significance. It is appropriate for Appellants to question this because DER's grant of an exemption to GPUN was based on a case-by-case approach rather than a clearly delineated set of standards in DER's regulations.[6]

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[5] In support of its argument, GPUN quotes the statement in our Supersedeas Opinion that "the conditions inserted by DER are, in our view, sufficient to assure proper functioning of the system." (Opinion at p. 10, note 7). This statement was based upon the evidence at the supersedeas hearing and was not intended to preclude evidence on this point at the hearing on the merits.

[6] DER has published a list of sources it considers exempt, but the exemption granted here was based upon DER's reservation of power to exempt sources not included on the list. We discussed this issue in an earlier footnote continued

Therefore, we will not preclude Appellants from raising issues regarding operation of the system and the adequacy of the conditions of operation.

ORDER

AND NOW, this 11th day of June, 1990, it is ordered that GPUN's motion to limit issues is granted in part and denied in part, as follows:

1) Appellants are precluded from raising issues concerning compliance with the Solid Waste Management Act and the Low Level Radioactive Waste Disposal Act.

2) Appellants are precluded from raising issues concerning the psychological effects of operation of the evaporation system.

3) Appellants are precluded from raising the issue that DER should have considered alternatives to the evaporation system.

4) Appellants are not precluded from raising issues concerning the operation of the evaporation system and the conditions of operation.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: June 11, 1990

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Frances Skolnick
Lancaster, PA
For Intervenor:
John Proctor, Esq.
Washington, D.C.
nb

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continued footnote
opinion dated November 7, 1989. Frances Skolnick, et al. v. DER, 1989 EHB 1214, 1216-1217.

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M. DIANE SMI
SECRETARY TO THE

MUSTANG COAL & CONTRACTING CORPORATION	:	**EHB Docket No. 89-494-MJ**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 11, 1990**

OPINION AND ORDER
SUR MOTION TO STRIKE APPELLANT'S
PRE-HEARING MEMORANDUM OR DISMISS APPEAL

By Joseph N. Mack, Member

Synopsis

Where a pre-hearing memorandum fails to meet the requirements of Pre-Hearing Order No. 1, the Board, upon motion of the Department of Environmental Resources, will strike the memorandum and order the appellant to refile its Pre-Hearing Memorandum in accordance with Board rules or suffer sanctions.

OPINION

Mustang Coal and Contracting Corporation ("Mustang") operates a surface mine in Woodward Township, Clearfield County, Pennsylvania pursuant to permit No. 17823174. On September 22, 1989, the Department of Environmental Resources ("DER") assessed a civil penalty against Mustang in the amount of $11,000, alleging that Mustang had conducted surface mining in an area north

of that covered by permit No. 17823174 without first submitting, and obtaining DER approval of, a bond covering the surface area affected. Mustang filed a notice of appeal on October 20, 1989.[1]

The Board, in response to the appeal, issued Pre-Hearing Order No. 1 dated October 25, 1989, which required a pre-hearing memorandum detailing the following:

A. Statement of facts each party intends to prove.

B. Contentions of law and detailed citations to authorities, including specific sections of statutes, regulations, etc., relied upon.

C. Description of any scientific tests relied upon by any party and summary of testimony of experts.

D. Order of witnesses.

E. List of documents sought to be introduced into evidence, copies of which shall be attached.

F. Indicate dates on which you are not available for hearing.

Mustang's pre-hearing memorandum, which was filed by its president, without counsel, on February 14, 1990, is not responsive to the pre-hearing order in most areas. Specifically, Mustang responds to A and B above by stating that it operates and has operated within the law under its mining permit. It responds to C by stating that certain survey work has been done to sustain its contention that it is operating on a permitted area. It did list its witnesses and documents, but did not attach the documents as required.

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[1]Paragraph 2(a) of Mustang's notice of appeal states that the action for which review is sought is "Violations of the Surface Mining, Conservation and Reclamation Act and the Clean Streams Law, Compliance Order No. 894077, Woodward Township, Clearfield County." Attached to the notice of appeal are several documents, including a copy of DER Compliance Order No. 894077 and a copy of the aforesaid civil penalty assessment.

On February 23, 1990, DER filed a motion to dismiss or, in the alternative, to strike the pre-hearing memorandum. Mustang responded on March 15, 1990, by filing objections to DER's motion, again without counsel, and attached certain surveys in an attempt to cure some of the deficiencies of the pre-hearing memorandum as filed.

However, since Mustang's pre-hearing memorandum fails to meet the requirements of our Pre-Hearing Order No. 1, we will grant DER's motion to strike Mustang's pre-hearing memorandum, and will require Mustang to file a new pre-hearing memorandum which specifically addresses all the requirements set out in Pre-Hearing Order No. 1, including but not limited to all facts which Mustang intends to prove, all surveys and information on property lines which Mustang plans to introduce at hearing, and all contentions of law on which it relies, complete with detailed citations.

The following Order is entered:

O R D E R

AND NOW, this 11th day of June, 1990, DER's Motion to Strike is granted. The document purporting to be Mustang's pre-hearing memorandum is stricken. Mustang shall file a new pre-hearing memorandum on or before June 28, 1990. The pre-hearing memorandum shall fully and specifically comply with all of the requirements of Pre-Hearing Order No. 1. Mustang shall be barred from offering physical evidence or testimony or advancing any legal arguments not specifically set out in its pre-hearing memorandum, nor shall it be permitted to offer any documents not attached thereto. Failure to comply with this Order may result in sanctions, up to and including dismissal of the Appeal. DER shall file its pre-hearing memorandum on or before July 15, 1990.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 11, 1990

cc: **Bureau of Litigation**
Harrisburg, PA
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Central Region
For Appellant:
Peter R. Swistock, Jr., President
Mustang Coal & Contracting Corp.
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M. DIANE SMI
SECRETARY TO THE

GERALD C. BOOHER	:	
	:	
v.	:	**EHB Docket No. 89-204-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 12, 1990

OPINION AND ORDER

Synopsis

A Petition for Clarification will be granted to correct a misstatement in an earlier Order.

OPINION

This case involves an appeal by Gerald C. Booher ("Booher") on July 18, 1989 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, Act of July 7, 1980, P.L. 380, 35 P.S. §6018.605. The assessment was issued in connection with an unappealed Administrative Order which DER issued to Booher on January 10, 1989. In his appeal, Booher is challenging not only the amount of the civil penalty assessed, but also the January 10, 1989 order.

Under cover of letter dated October 20, 1989, DER filed with this Board a Motion to Limit Issues, asserting that since Booher failed to timely appeal the January 10, 1989 Order, he is now collaterally estopped under the

principles of administrative finality from challenging the factual or legal basis for the Administrative Order, and that the appeal should, therefore, be confined to challenging solely the fact of his failure to comply with the Administrative Order and the reasonableness of the amount of the civil penalty.

By Order dated March 21, 1990, this Board denied DER's motion based on the holding of the Commonwealth Court in Kent Coal Mining Co. v. DER, 121 Pa.Cmwlth. 149, 550 A.2d 279 (1988), which involved facts and statutory language similar to the instant case. In that case, the Court held that the appellant, Kent Coal Mining Company, had the right to contest the underlying violation, as well as the civil penalty, in its appeal of the penalty assessment.

Based on Kent, the Board's Order of March 21, 1990 held that Booher had the right to contest not only the civil penalty assessment, but also the basis for the Administrative Order issued by DER. However, in so holding, the Board's Order incorrectly refers to DER's January 10, 1989 "Administrative Order" as a "Notice of Violation". On April 23, 1990, DER filed a Petition for Clarification of this matter. We hereby provide that clarification. The "Notice of Violation" discussed on pages 1-2 of the Board's March 21, 1990 Order should, in fact, read "Administrative Order".

DER's Petition also seeks clarification with respect to the Board's decision in Goetz v. DER, EHB Docket No. 89-509-MR (Opinion issued March 13, 1990), which allegedly involved the same issue as that in Booher. However, it is the Board's opinion that Goetz is distinguishable from Booher in that the facts of the violations were res judicata by virtue of an order from the Commonwealth Court in an enforcement proceeding relating to the Department's

administrative order. Consequently, DER's request for clarification on this issue is denied.

O R D E R

AND NOW, this 12th day of June, 1990, it is ordered that DER's Petition for Clarification, dated April 23, 1990, is granted in part and denied in part, as set forth in the Opinion above.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 12, 1990

cc: **Bureau of Litigation**
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SECRETARY TO THE

T & R COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 87-426-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 13, 1990

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment will be denied where it fails to meet the requirements of Pa.R.C.P. 1035. However, the Board will treat the motion as a motion in limine to narrow the issues of the matter before the Board to those raised in Appellant's Notice of Appeal.

OPINION

This matter is an appeal filed October 2, 1987 from two compliance orders issued by the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER" or "the Department") on August 26, 1987 and September 3, 1987 to T&R Coal, Inc. ("T&R" or "the appellant") which cited the appellant for failure to revegetate a mine site in violation of 25 Pa.Code §89.86(e); Section 18.6 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.24 ("SMCRA"); and Section

611 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.611 ("CSL"). The Board issued Pre-Hearing Order No. 1 on October 7, 1987, requiring the filing of pre-hearing memoranda by the parties. T&R filed its pre-hearing memorandum on December 21, 1987 and DER filed its pre-hearing memorandum on March 17, 1988.

In its notice of appeal and pre-hearing memorandum, T&R admits that its attempt at revegetating the mine site in the Spring of 1987 failed, but contends this failure was due to extremely dry weather during the early growth period. T&R further asserts that the area was replanted, that it will be monitored for growth, and that scarce areas will be reseeded.

On January 11, 1989 the matter was set for hearing by the Board on March 29, 1989. On March 3, 1989 DER filed a Motion For Summary Judgment, and the hearing was cancelled pending a ruling on that motion.

In support of its Motion For Summary Judgment, DER contends that, since T&R's pre-hearing memorandum admits that its attempts at revegetating the mine site have failed, there is no genuine issue of material fact. DER argues that any inability on the part of T&R to adequately revegetate the site is no defense to non-compliance with the Department's rules and regulations. Lastly, DER asserts that the issue of penalty assessment raised in T&R's pre-hearing memorandum is irrelevant since T&R failed to raise this issue in its notice of appeal.

Motions for summary judgment are governed by Rule 1035 of the Pennsylvania Rules of Civil Procedure. Rule 1035 specifically requires that the motion rest upon "the pleadings and any depositions, answers to

interrogatories, admissions on file and supporting affidavits."[1] In ruling on a motion for summary judgment, the Board must review it in a light most favorable to the non-moving party. Penoyer v. DER, 1987 EHB 131.

In the present case there are no sworn pleadings, depositions, interrogatories or requests for admissions on which to base a motion for summary judgment. The moving party has additionally not seen fit to attach an affidavit in support of its motion to supply, if available, further facts or sworn testimony to satisfy the rule.

The Board faced a similar situation in Monessen, Inc. v. DER, EHB Docket No. 88-486-E (May 7, 1990). In that case, Monessen's Motion for Partial Summary Judgment was not verified, and although it contained six exhibits, it was not accompanied by any supporting affidavits, admissions, pleadings, answers to interrogatories, or depositions. The Board denied the motion, holding that Monessen had failed to prove there were no genuine issues of material fact.

Since the motion now presented by DER also fails to provide any supporting documentation on which to base a finding that there is no genuine issue of material fact, it must also be denied.

However, the motion does legitimately raise a concern with the issues presented in the appellant's pre-hearing memorandum, i.e. the question of assessment of fines, and the question of the authority of DER to levy such

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[1]Rule 1035(b) reads in part as follows: "The judgment sought shall be rendered 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." The Board has adopted this standard in evaluating the merits of a motion for summary judgment. Newlin Corp. v. DER, 1988 EHB 976. See also Summerhill Borough v. DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978).

fines. As DER correctly points out, these issues were not raised in the appellant's notice of appeal, and therefore, the appellant is now precluded from raising them. 25 Pa.Code §21.51(e).

We will deny DER's motion for summary judgment for the reasons set out herein. However, we will treat the motion as a motion in limine and restrict the appellant in the presentation of his appeal to the subject matter of his appeal as filed, i.e. the issue of revegetation of the mine site as defined in the compliance orders appealed. There is no indication that any fines or civil penalties have been assessed by DER and, further, that issue is foreclosed by the scope of the appeal as filed.

The Board therefore enters the following order.

O R D E R

1) The Department's Motion for Summary Judgment is denied.

2) The appellant will be limited in the presentation of his appeal to evidence relating to the revegetation or lack thereof at the mine site, the subject of the compliance orders.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 13, 1990

cc: **Bureau of Litigation**
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GANZER SAND & GRAVEL, INC.	:	
	:	
v.	:	**EHB Docket No. 89-585-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 13, 1990

OPINION AND ORDER
SUR PETITION TO INTERVENE

Synopsis

The Board will deny a Petition to Intervene when it fails to establish that the petitioner has a substantial, direct, and immediate interest in the subject of the appeal.

OPINION

The matter before the Board is a Petition to Intervene filed by Greene Township in the above-captioned action on April 6, 1990.

This action was initiated by an appeal of Ganzer Sand & Gravel Company ("Ganzer") on December 1, 1989 from the Department of Environmental Resources' ("DER") November 2, 1989 revocation of a solid waste permit for a proposed landfill in Greene Township, Erie County. The basis for the revocation was Ganzer's alleged failure to fulfill the collateral bond requirements of the permit for the years 1986 and 1988. In its pre-hearing memorandum, Ganzer states that the bond deficiency has been corrected.

On April 6, 1990, Greene Township petitioned the Board for leave to intervene in this proceeding. The question now before the Board is whether Greene Township has the necessary standing to intervene in this matter.

The concept of "standing" is outlined in the case of Franklin Township v. DER, 500 Pa. 1, 452 A.2d 718 (1982). There the Court confirmed its earlier decision in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), which held that in order for a party to have standing, his interest in the subject matter of the litigation must be substantial, direct, and immediate. The Court in Franklin Township held that a county and township had a substantial, direct, and immediate interest in the establishment of a landfill within their boundaries such as to give them standing to challenge issuance of a permit for the landfill.

The instant case does not involve the issuance of a permit, but, rather, Ganzer is appealing DER's revocation of its solid waste permit based on an alleged bond deficiency. The scope of this appeal is limited to reviewing whether DER abused its discretion or acted arbitrarily in revoking Ganzer's permit. Warren Sand & Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975).

The Board's rules and regulations provide that petitions for leave to intervene must set forth the "specific grounds for the proposed intervention, the position and interest of the petitioner in the proceeding and a statement of the reasons why said interest is or may be inadequately represented in such proceeding." 25 Pa.Code §21.62(a). Intervention shall not be permitted where an intervenor fails adequately to allege how its interests would be adversely affected if the petition is denied. Erie Sewer Authority v. DER, 1987 EHB 391.

In its Petition to Intervene and supporting brief, Greene Township has listed only vague, non-specific reasons as to its interest in this appeal.[1]

Given the narrow scope of this appeal, we hold that Greene Township has failed to set forth any direct, substantial, immediate interest in the specific subject matter of the appeal which would entitle it to intervene in this action. Furthermore, the Petition fails to enumerate any of the regulations, ordinances, landfills, or other concerns which the Township claims will be "implicated" in this matter.

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[1]The reasons specified by Greene Township are as follows:

(a) The permit initially given and now revoked from Ganzer Sand and Gravel is for a site located within the municipal boundaries of Greene Township.

(b) Certain regulations and ordinances of Greene Township may be implicated by the resolution of the above captioned matter.

(c) The resolution of the above captioned matter may implicate other landfill sites located within the municipal boundaries of Greene Township.

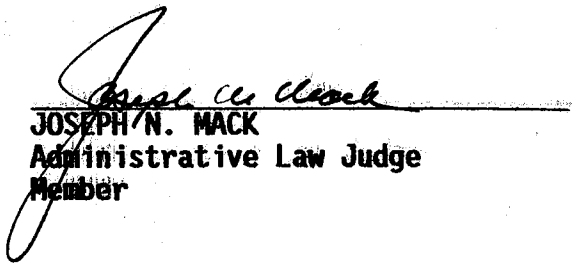
(d) Greene Township's position is that Ganzer Sand and Gravel should not be allowed to revive its revoked permit; and, instead, a permit should be issued to Ganzer Sand and Gravel only if Ganzer Sand and Gravel complies with all rules and regulations promulgated and in effect at the time of its new application for a permit.

(e) The resolution of the above captioned matter may affect the general health, welfare, and safety of all residents of Greene Township.

O R D E R

AND NOW, this 13th day of June, 1990, Greene Township's Petition to Intervene is hereby denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 13, 1990

cc: **Bureau of Litigation**
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For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BO

CONCERNED CITIZENS OF EARL TOWNSHIP et al.	:	
	:	
V.	:	**EHB Docket No. 88-516-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 15, 1990**
and DELAWARE COUNTY SOLID WASTE AUTHORITY,	:	
Permittee	:	

OPINION AND ORDER
SUR
SUNDRY DISCOVERY MOTIONS

Synopsis

Among various actions on several discovery motions, the Board (1) denies a Motion to Compel after supplemental answers to Interrogatories have satisfied legal requirements; (2) denies a Motion to Compel with respect to challenges to answers to Interrogatories that could have been raised in a previous Motion to Compel with respect to the same Interrogatories; (3) denies a Motion to Compel a party to designate a substitute person to be deposed on certain subjects when the only objection to the person originally designated is that he deferred technical engineering questions to the party's engineering consultants; (4) denied that portion of a Motion seeking to prohibit the deposition of engineering consultants who are expert witnesses but who also may be in possession of discoverable facts; and (5) deferred action on that portion of a Motion seeking comprehensive discovery of all expert witnesses.

OPINION

As seems to happen frequently in current litigation, these consolidated appeals are snowbound in discovery with legal counsel so busy

generating a blizzard of paperwork they have no time to clear pathways. Instead, they throw that burden on the Board. Several discovery disputes are again ripe for determination, demanding time and resources that the Board could employ more productively elsewhere. Nevertheless, they must be resolved. The antagonists are Frank J. Szarko (Szarko), one of the Appellants, and Delaware County Solid Waste Authority (DCSWA), the Permittee.

1. DCSWA's Motion to Compel Concerning Szarko's Answers to DCSWA's 1st Set of Interrogatories

DCSWA filed this Motion on March 29, 1990, seeking an Order compelling Szarko to provide answers to certain Interrogatories and compelling Szarko to provide more responsive and complete answers to certain other Interrogatories. Szarko filed a Response to the Motion on April 23, 1990, indicating that the supplemental answers he would file by April 27 would address many of the "deficiencies" raised by DCSWA. DCSWA filed a Reply on May 14, 1990 reporting that the supplemental answers had not been provided as promised. Szarko did file the supplemental answers on May 23, 1990.

Reviewing the Interrogatories, and the answers as supplemented, we conclude that the requirements should be satisfied when the reports of Thomas Cahill and Dr. John Adams are produced. If, upon review of those reports, DCSWA believes that the requirements have not been satisfied, it may renew its Motion.

2. Szarko's Motions to Compel Discovery

On April 24, 1990 Szarko filed a document containing two separate Motions to Compel Discovery directed against DCSWA. DCSWA filed its response on May 21, 1990.

(a) Motion to Compel a more specific answer to Appellant's First Set of Interrogatories and Request for Production of Documents

By this Motion, Szarko seeks an Order compelling DCSWA to provide more specific answers to Interrogatory Nos. 9, 16, 21, 23, 25, 27, 32, 34, 36, 37, 38, 39, 42, 43 and 45 of Szarko's First Set. These Interrogatories were answered on by DCSWA on September 29, 1989.

In its Answers, DCSWA objected to Interrogatory Nos. 10, 11 and 12, but provided Answers to the other Interrogatories. Many of these Answers were simply "DCSWA document production," referring to documents produced previously. Szarko filed a Motion to Compel with respect to Interrogatories 10, 11 and 12 on December 5, 1989, and the Motion was granted in a Board Opinion and Order dated January 26, 1990. Szarko has now filed a second Motion to Compel, dealing with the same set of Interrogatories but involving those answered by "DCSWA document production."

The question before us is whether this second Motion to Compel should be denied on the grounds that Szarko waived any further challenge to DCSWA's Answers by not including them in his first Motion to Compel.

Pa. R.C.P. 4006, governing Answers to Interrogatories directed to a party, provides in (a)(2) that the "party submitting the interrogatories may move the court to dismiss an objection and direct that the interrogatory be answered." Pa. R.C.P. 4019(a)(1)(i) authorizes the court, on motion, to make an appropriate order if a party fails to provide sufficient Answers to Interrogatories. Motions filed under these two Rules typically are titled Motions to Compel. Although derived from different Rules, the Motions seek the same essential relief - an order compelling the other party to answer the Interrogatories and to answer them fully and completely.

The Rules of Civil Procedure impose no time limit on the filing of Motions to Compel, whether under Pa. R.C.P. 4006 or Pa. R.C.P. 4019.[1] The Rules also are silent on the number of Motions to Compel that may be filed and on the matter of waiver if all challenges are not raised in one Motion. The parties have not cited any case authority on the subject and our independent (limited) research has not discovered so much as a mention of the issue.

Given these circumstances, it is tempting to dismiss the waiver argument raised by DCSWA and proceed to a discussion on the merits. We are constrained, however, by our regard for orderly process and the efficient use of the Board's time and resources. In an appeal that follows the normal procedure, we see no reason why the Board (and opposing legal counsel) should be asked to deal piecemeal with challenges to Answers to Interrogatories. Since there is no prescribed time deadline for filing a Motion to Compel, it is reasonable to expect a movant to include all of his challenges in one Motion.[2] Accordingly, any challenge raised in a second or subsequent Motion must be supported by exceptional circumstances. This may include, inter alia, a showing that the challenge, by the exercise of reasonable diligence, could

---

[1] It may be presumed that such a Motion must be filed during, or soon after the close of, the discovery period so as not to delay the trial. The Rules place no time limits on discovery, however, and the civil courts have wide discretion in regulating it: Wertz v. Kephart, 374 Pa. Super. 274, 542 A.2d 1019; Goodrich - Amram 2d §4001:3, pp. 27-28. This includes the power to place time limits on it: Lombardo v. DeMarco, 350 Pa. Super. 490, 504 A.2d 1256 (1985). The Board's Rules of Procedure at 25 Pa. Code §21.111 limit discovery to 60 days without Board permission. Typically, 75 days are granted automatically in Pre-Hearing Order No. 1 and requests for additional time are liberally approved for limited periods of time.

[2] This statement is not contradictory. While the discovery period in Board proceedings is limited, forcing the litigants to act expeditiously, ample time is afforded to enable discovery to be a deliberative process. Extensions of time, though limited, are freely granted; and the Board takes care to see that a litigant is not prejudiced by an undue curtailment of discovery.

not have been raised earlier. This is the procedure the Board has adopted in other areas (see Elmer R. Baumgardner et al. v. DER, 1989 EHB 400) and we believe it is also relevant here.

Szarko filed his first Motion to Compel on December 5, 1989 - 67 days after the date on which DCSWA served its Answers to Interrogatories, a time period fully adequate for Szarko to have analyzed the Answers in their entirety. The second Motion to Compel was filed on April 24, 1990 - 140 days after the date on which the first Motion was filed and over 200 days after the date on which DCSWA served its Answers to Interrogatories. Exceptional circumstances to justify such a delay must be exceptional indeed.

Szarko's second challenge to DCSWA's Answers to Interrogatories complains about the voluminous nature of DCSWA's documents (50,000) and seeks to have DCSWA designate the particular documents which pertain to each subject of inquiry. As noted in our Opinion and Order on Szarko's first Motion to Compel, DCSWA's document production lasted from March 10, 1989 to September 12, 1989. Szarko was involved in copying these documents and was fully aware of their voluminous nature when DCSWA served its Answers to Interrogatories on September 29, 1989. The challenge which Szarko did not raise for nearly 7 months could have, and should have, been raised in the first Motion to Compel. There are no exceptional circumstances to account for his failure to do so; and, accordingly, the second Motion to Compel will be denied.

(b) Motion to Compel Appropriate Designation for Deposition of DCSWA.

On February 28, 1990, Szarko served DCSWA with a Notice of Deposition naming DCSWA as the deponent (pursuant to Pa. R.C.P. 4007.1(e)) and requiring DCSWA to designate a person or persons to testify on matters dealing with (1) groundwater and surface water management at Colebrookdale Landfill, (2) any

violations of any environmental statutes in 1988 and 1989, (3) the compliance status and history of the Landfill under Section 503(c) and (d) of the Solid Waste Management Act, and (4) erosion, silt and sedimentation management at the Landfill. DCSWA responded by designating Joseph Vasturia, its part-time Chairman, who also is a professional engineer.

Mr. Vasturia's deposition was taken on March 8, 1990. We have been provided only with excerpts from the transcript (pages 26, 31 and 58); and, as a result, we do not know how long the deposition lasted, what subjects were covered, and how knowledgeable Mr. Vasturia was about those subjects. Szarko, in his Motion to Compel, complains that Vasturia could not testify to the subjects mentioned in the Notice of Deposition. He seeks an Order requiring DCSWA to make another designation of a person who can testify on these subjects.

The transcript excerpt really deals only with the subject of groundwater management, however, and there is nothing to support Szarko's allegation that Mr. Vasturia was unable to testify on <u>any</u> of the 4 subjects noticed. The excerpt also falls pitifully short of proving Szarko's allegation that Mr. Vasturia was not knowledgeable on the subject of groundwater management. They prove only that Mr. Vasturia defers to DCSWA's professional consultants where details of the consultants' design are concerned. This is a natural and acceptable response to questions of this sort. The fact that Mr. Vasturia is a Professional Engineer does not alter the situation; his expertise may well be in fields distinct from groundwater management. Even if his expertise included that subject, it would still be understandable for him to prefer that DCSWA's consultants testify to details of their own work.

The comments of the Civil Procedural Rules Committee following Pa. R.C.P. 4007.1 state, with respect to subdivison (e), the following:

> If it develops that the designated persons reveal others whose testimony may be relevant, they can also be deposed. The procedure is not exclusive and the inquirer may resort to any other method of discovery and subpoena available.

Szarko's deposition of Mr. Vasturia has revealed others whose testimony may be relevant. Szarko may seek further discovery by whatever means are open to him.

3. DCSWA's Motion for Comprehensive Expert Discovery; Motion that Subpoenas for Thomas Earl and Richard Bodner either not be issued or be quashed

DCSWA filed this motion on May 9, 1990 after DCSWA and Szarko both failed in their attempts to depose each other's experts by ordinary notice of deposition and service of subpoena. The Board's rules of procedure at 25 Pa. Code §21.114 provide for the issuance of subpoenas by the Board upon request of a party. Such requests are routinely honored by the Board for discovery purposes, if discovery is still open, or for attendance at a hearing, if a hearing has been scheduled, without concern for the identity of the person to be named in the subpoena. The Board relies on the trustworthiness of legal counsel to request subpoenas only for those persons who properly may be subpoenaed to testify.

Expert witnesses may be deposed only with permission of the Board "upon cause shown": Pa. R.C.P. 4003.5(a)(2). To seek to depose an expert witness simply by requesting a subpoena, without filing a Motion with the Board, borders on subterfuge. DCSWA made such an attempt and secured a subpoena on March 20, 1990 to depose one of Szarko's expert witnesses, Thomas H. Cahill. When the Board was informed of this by Szarko's Motion to Quash, it issued an Order on April 16, 1990 quashing the subpoena.

On April 30, 1990 Szarko requested subpoenas to depose Thomas Earl and Richard Bodner as ordinary fact witnesses and not as experts. These subpoenas were prepared but, before they were placed in the mail, DCSWA notified the Board that the proposed deponents were expert witnesses of DCSWA. As a result, the subpoenas were never issued.

In his May 31, 1990 response to DCSWA's Motion, Szarko represents (1) that Earl has been providing engineering services for the Colebrookdale Landfill in the area of groundwater management since 1984, and (2) that Bodner has been providing engineering services for the landfill since 1984 and produced engineering drawings approved by DER as part of the contested permit issuance. Earl and Bodner, on the basis of these representations, may appropriately be deposed as fact witnesses: New Hanover Township et al. v. DER and New Hanover Corporation, 1989 EHB 31, but may not be deposed with regard to any expert opinions formed in anticipation of litigation.

We are releasing the subpoenas for Earl and Bodner, in accordance with the foregoing ruling, and denying the portion of DCSWA's Motion pertaining to them. Within 10 days after completing the depositions of both Earl and Bodner, Szarko shall file a supplemental response to the portion of DCSWA's Motion pertaining to expert discovery. Action on that portion of the Motion will be deferred until after that filing.

ORDER

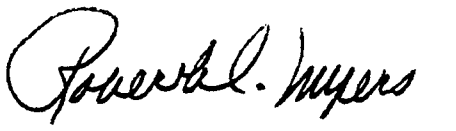
AND NOW, this 15th day of June 1990, it is ordered as follows:

1. DCSWA's Motion to Compel Concerning Szarko's Answers to DCSWA's 1st Set of Interrogatories, filed on March 29, 1990, is denied with leave to renew the Motion in accordance with the foregoing Opinion.

2. Szarko's Motions to Compel Discovery, filed on April 24, 1990, are denied.

3. DCSWA's Motion for Comprehensive Expert Discovery; Motion that Subpoenas for Thomas Earl and Richard Bodner either not be issued or be quashed, filed on May 9, 1990, is deferred in part and denied in part in accordance with the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 15, 1990

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M. DIANE SMIT
SECRETARY TO THE B

BETHENERGY MINES, INC.	:	
	:	
v.	:	**EHB Docket No. 90-050-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 18, 1990

OPINION AND ORDER SUR
PETITIONS FOR LEAVE TO INTERVENE

Synopsis

Petitions to intervene in the appeal of a Department of Environmental Resources (DER) compliance order, filed by two individuals and three environmental groups, are denied. The environmental groups have failed to show they have a direct, substantial, and immediate interest in the subject matter of the appeal. Although the individuals' interest in the appeal may be direct, this interest is adequately represented by DER and, additionally, intervention will result only in broadening the scope of the appeal.

OPINION

BethEnergy Mines, Inc. (BethEnergy) operates an underground bituminous coal mine in Cambria County pursuant to Coal Mining Activity Permit No. 11841301. On December 27, 1989, the Department of Environmental Resources (DER) issued a compliance order to BethEnergy, directing it to cease certain mining activities which DER claimed were adversely affecting streams in the

area.[1] The order provided for the resumption of mining activity upon certain action by BethEnergy, including the submission and approval of certain data. On January 26, 1990, BethEnergy appealed from this order at Docket No. 90-050-MJ.

The order was subsequently amended by DER's letters of January 11 and 29, 1990 and February 14, 1990. BethEnergy appealed each of these actions at Docket Nos. 90-058-MJ, 90-059-MJ, and 90-114-MJ. Upon the unopposed motions of BethEnergy, these appeals have been consolidated at No. 90-050-MJ, by orders of the Board dated March 1, 1990 and March 28, 1990.

On April 12, 1990, the Board received a petition for leave to intervene in this matter filed on behalf of the Kobans, Interested Citizens Action for Rights and Equity (ICARE), and Concern About Water Loss due to Underground Mining (CAWLM). BethEnergy filed objections in the form of an Answer and New Matter on April 23, 1990, and the petitioners responded on May 2, 1990. On May 9, 1990 the Board received a petition to intervene filed by the Sierra Club, to which BethEnergy filed Objections and New Matter.

On April 26, 1990, the Board ordered the parties and petitioners to file briefs on the question of intervention. Briefs have been filed by BethEnergy and the proposed intervenors. By letters of May 17 and 24, 1990, DER advised the Board it had no objections to intervention by the petitioners.

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[1]Prior to issuance of the compliance order, a civil action was filed in the Cambria County Court of Common Pleas by two of the petitioners herein, Samuel and Barbara Koban ("the Kobans"), against BethEnergy and DER, alleging that BethEnergy's mining activity had caused the dewatering of a stream flowing through the Kobans' property. The Kobans sought an injunction against BethEnergy's mining operation and an order of mandamus requiring DER to suspend BethEnergy's permit and take enforcement action. This matter is docketed at Civil Action No. 1989-402. A related action is docketed at 1988-1859.

Intervention is governed by 25 Pa.Code §21.62. The decision to grant intervention is discretionary with the Board. City of Harrisburg v. DER, 1988 EHB 946. The burden of proof is on the prospective intervenor to show that intervention should be granted. Id.

We will address the petitions of the Kobans and the environmental groups separately.

ICARE, CAWLM, Sierra Club

ICARE asserts that its members own property above BethEnergy's mines, and therefore, they are directly affected by DER's compliance order and have a stake in the outcome of this appeal. In addition, ICARE's membership is "interested in preserving the water quality and natural beauty of uncontaminated waters of the Commonwealth." Petitioner CAWLM is "a grass roots citizens organization which was formed and has as its primary goal the conservation and restoration of the Commonwealth's water sources from the adverse impacts of coal mining." All three of the groups claim an interest in this appeal because some or all of their individual members enjoy the recreational aspects of the streams running through the affected area. The petitioners also assert that these interests are not adequately represented by DER, and plan to present "in a general sense" testimony on history, uses, and conditions of the streams, subsidence damage, and expert testimony on hydrology and geology of the area.

In order to have standing to intervene, a prospective intervenor must establish a direct, substantial, and immediate interest in the subject matter of the proceeding. Franklin Township v. Commonwealth, DER, 500 Pa. 1, 452

A.2d 718 (1982). Furthermore, the petitioner must demonstrate that such interest is not adequately represented by any of the parties to the proceeding. City of Harrisburg.

In City of Harrisburg, five environmental groups petitioned to intervene in an appeal involving construction of a dam across the Susquehanna River. The groups claimed an interest in the proceeding because one of their stated purposes was to protect and conserve the Susquehanna River and Chesapeake Bay and because members of the groups used the Bay and River for recreational activities. The Board denied the petitions to intervene, holding, inter alia, that to the extent the groups were interested in water quality and the adverse effects of pollutant discharge on their recreational use of the River and Bay, their interests would be adequately represented by DER.

In the present case, the petitioners' general claim that some or all of their members enjoy the recreational aspects of the streams in the affected area fails to set forth an interest which is sufficiently direct, substantial, and immediate such as to merit intervention in this proceeding. Furthermore, to the extent the petitioners are interested in preserving the water quality and natural beauty of the streams, we believe these interests will be adequately represented by DER, and any evidence to be presented by the groups will simply be repetitive. As the appellant correctly points out in its brief, these groups are free to further advance their positions in an amicus curiae brief.

Kobans

The Kobans claim a direct interest in this matter, asserting that one of the streams which is the subject of DER's compliance order, "Roaring Run",

runs through a tract of land owned by them. They further claim an interest due to the related civil action which they have filed against BethEnergy and DER in the Court of Common Pleas of Cambria County. Finally, the Kobans argue that, like the environmental groups, they are interested in preserving the water quality and natural beauty of all the streams in question and enjoy their recreational aspects by fishing and wading. The Kobans argue that these interests are not adequately represented by DER. They plan to present much the same evidence as that offered by the environmental groups, as well as testimony on the history, use, and condition of Roaring Run, before and after mining.

Although the Kobans may have a direct, substantial, and immediate interest in the alleged effects of BethEnergy's mining operation on Roaring Run, this does not automatically entitle them to intervene. As previously stated, intervention will not be granted if the petitioners' interests are adequately represented by an existing party to the proceeding. City of Harrisburg. Nor will intervention be allowed where it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or confusion of issues. Keystone Sanitation Co. v. DER, 1987 EHB 22.

To the extent the Kobans are concerned about subsidence and the dewatering of Roaring Run which they allege has been caused by BethEnergy's mining operation, we find that these concerns are adequately represented by DER, as evidenced by the enforcement action taken by DER in this matter. Furthermore, as the appellant has pointed out in its brief, testimony which the Kobans plan to introduce on geology and hydrology, subsidence, and the history, use, and condition of Roaring Run is likely to be either repetitive of that to be presented by DER or purely anecdotal and non-technical, and will

not serve to benefit the trier of fact. Although the petitioners argue in their reply brief, filed on June 7, 1990, that "they have not yet indicated what evidence they seek to present," their Petition for Leave to Intervene recites the aforesaid subjects as those on which they plan to testify. In fact, had the petitioners not indicated the evidence sought to be presented, we could not have entertained their petitions to intervene for failure to comply with our rules which require a description of the evidence to be offered at hearing. 25 Pa.Code §21.62(d)(4).

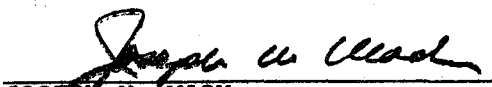
Finally, we believe that intervention by the Kobans is likely to result in a confusion of issues and overly broadening the scope of the original appeal. As we stated with the environmental groups, the Kobans are free to raise their arguments in an amicus curiae brief.

Accordingly, for the reasons set forth above, the Kobans' petition to intervene will be denied.

O R D E R

AND NOW, this 18th day of June, 1990, it is hereby ORDERED that the Petitions to Intervene filed by the Kobans, ICARE, CAWLM, and the Sierra Club are denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 18, 1990

cc: See next page

Docket No. 90-050-MJ

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M. DIANE SMITH
SECRETARY TO THE BO

CONSOL PENNSYLVANIA COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-284-MJ**
	:	**Issued:** June 19, 1990
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

An appeal by Consol Pennsylvania Coal Company ("CPCC") from a denial by the Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") of CPCC's application to amend its mining activities permit must be denied where CPCC fails to show an arbitrary, capricious or unreasonable interpretation by DER of the regulations dealing with setting effluent limitations for CPCC's treatment plant discharge and protecting the receiving stream in low-flow conditions. In setting effluent limitations, DER is not to consider the economic impact thereof on the discharger of the effluent, but must consider the impact on the Commonwealth and all of its citizens.

Background

By letter dated June 22, 1987, DER denied CPCC's request to amend its Mining Activities Permit 30841316 for the Bailey Mine in Richhill and Findley Townships in Greene and Washington Counties. The permit amendment sought from DER by CPCC would have eased the osmotic pressure discharge limitation in CPCC's permit. On July 20, 1987 CPCC appealed to this Board DER's refusal to amend the permit.

Thereafter, on October 15, 1987, CPCC filed its Pre-Hearing Memorandum with us and DER responded thereto on November 4, 1987 with a Motion for Summary Judgment. CPCC filed its Response To Motion For Summary Judgment and Cross-Motion for Summary Judgment with us on November 30, 1987. In turn, on December 24, 1987, DER filed its reply to CPCC's cross-motion. Both motions were denied by our Opinion and Order dated May 26, 1988, which found an unresolved factual dispute as a basis for denying DER's motion and insufficient factual support to allow us to grant CPCC's motion.

On June 21, 1988, therefore, DER filed its Pre-Hearing Memorandum with us. The appeal was transferred on October 26, 1989 from former Board Member William A. Roth, who had resigned in March of 1989, to Board Member Joseph N. Mack, who was joining the Board.

On December 5, 1989, Board Member Mack and counsel for each of the parties participated in a conference telephone call in which it was agreed the parties would submit this case to the Board for adjudication on a Joint Stipulation of Facts, Legal Issues and Exhibits, which the parties were to

file with us by January 5, 1990. CPCC's Brief was to be filed with us by February 5, 1990 and DER's Brief was due by February 20, 1990. These directions are set forth in our Order of December 6, 1990.

We received the Joint Stipulation of Facts and Issues on January 12, 1990. We received CPCC's brief on February 9, 1990 and, after granting DER a short continuance, received its brief on March 13, 1990.

In preparing this adjudication we have taken our Findings of Fact from those in the Joint Stipulation of Facts and Issues.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("Clean Streams Law"); the Pennsylvania Bituminous Coal Mine Act, the Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §701-101 et seq.; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S.§510-17 ("Administrative Code") and the rules and regulations promulgated thereunder. (JS-1)[1]

2. Consol Pennsylvania Coal Company ("CPCC") is a Delaware corporation with a business address of 450 Racetrack Road, Washington, PA 15301, whose business includes the mining of coal. (JS-2)

3. At all times material hereto, CPCC operated a mine in Richhill and Findley Townships, Greene and Washington Counties ("Bailey Mines"), pursuant to Mining Activity Permit No. 30841316, which was issued on August 18, 1985. (JS-3)

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[1] Each reference following a finding of fact to "JS_" is a reference to a particular paragraph of the Joint Stipulation of Facts and Issues submitted to us by the parties.

4. On or about April 14, 1986, CPCC submitted an application to amend Mining Activity Permit No. 30841316 to include, inter alia, a new discharge location referred to hereinafter as Outfall 009. (JS-4)

5. On or about October 3, 1986, the Department approved the request for an amendment to Mining Activity Permit No. 30841316 and imposed a monthly average effluent limitation of 60 milliosmoles per kilogram for osmotic pressure at Outfall 009. (JS-5)

6. In arriving at the effluent limitation of 60 milliosmoles per kilogram for osmotic pressure at Outfall 009, the Department performed a mass balance equation. Balancing the design stream flow known as the "Q (7-10) flow" with the discharge volume (supplied by CPCC) and the stream concentration of osmotic pressure (10% of the in-stream criteria of 50 milliosmoles per kilogram). This mass balance equation renders the allowable discharge concentration, which in this case equalled 60 milliosmoles per liter. (JS-6)

7. The discharge volume of Outfall 009 at the Bailey Mine is 3.3 times greater than the design stream flow. (JS-7)

8. CPCC did not appeal the permit conditions in the amendment to Mining Activity Permit No. 30841316 issued on October 3, 1986. (JS-8)

9. On or about January 5, 1987, CPCC requested a change in the permit limit pertaining to osmotic pressure at Outfall 009. The request sought approval to discharge water with significantly higher osmotic pressure levels at a reduced flow rate. Specifically, CPCC proposed to the Department a plan whereby the water from the West Bleeders would be pumped from the mine, treated to meet all parameters except osmotic pressure, and then discharged at Outfall 009 to Enlow Fork in metered volumes which would be limited to

variable amounts depending upon the volume of water flowing in Enlow Fork at that particular time. According to the proposal, water being discharged from Outfall 009 would have a high osmotic pressure, but the volume of the discharge would be controlled to ensure that osmotic pressure downstream from the discharge point would not exceed 50 milliosmoles per liter. (JS-9)

10. CPCC requested a change in the osmotic pressure limit because CPCC discovered that water infiltrating the mine in an area known as the "West Bleeders" contained a high amount of dissolved salts. This condition caused the water designated to be discharged from Outfall 009 to have very high osmotic pressure, far in excess of the 60 milliosmole limit in the permit. (JS-10)

11. By letter dated June 19, 1987, the Department denied CPCC's request on the basis that the regulations set forth in Chapter 93 prohibited the Department from granting the request. (JS-11)

12. CPCC appealed to the Environmental Hearing Board the Department's letter of June 19, 1987. (JS-11)

13. It is not economically desirable or feasible for CPCC to treat the water to be discharged from Outfall 009 to meet the limit for osmotic pressure set forth in Mining Activity Permit No. 30841316. (JS-13)

14. Section 93.1 of Department regulations, 25 Pa. Code §93.1, provides the following definitions relevant to this matter:

> Osmotic Pressure - The pressure which, when applied to a solution, will just prevent the passage of solvent — usually water — from an area of low solute concentration through a semipermeable membrane to an area of high solute concentration.
>
> Q(7-10) - The actual or estimated lowest 7 consecutive-day average flow that occurs once in 10 years for a stream with unregulated flow, or the estimated minimum flow for a stream with regulated flow.

> Water quality criteria - Levels of parameters or stream conditions that need to be maintained or attained to prevent or eliminate pollution.

(JS-14)

15. The design stream flow described in Paragraph 14 above is referred to as "Q (7-10) flow," and is used by the Department as the critical value of that stream to be protected in establishing effluent limitations.

(JS-15)

16. Section 93.5(a) of 25 Pa. Code directs the Department as follows when setting effluent limits in discharge permits:

> (a) Application of effluent limitations. The water quality criteria prescribed in this chapter for the various designated uses of the waters of this Commonwealth apply to receiving waters and are not to be necessarily deemed to constitute the effluent limit for a particular discharge, but rather one of the major factors to be considered in developing specific limitations on the discharge of pollutants. Where water quality criteria become the controlling factor in developing specific effluent limitations, the procedures set forth in §95.3 (relating to waste load allocations) will be employed.

(JS-18)

DISCUSSION

While the parties have stipulated as to factual matters and as to the respective contentions on each side of this appeal, (see Joint Stipulations Nos. 16 and 17), there are a number of preliminary issues upon which we must pass before sustaining either of the parties' contentions.

The first and easiest question is that of who bears the burden of proof in this appeal. Pursuant to 25 Pa. Code §21.101 (c) of our regulations, CPCC has this burden since it is appealing DER's refusal to amend CPCC's mining activities permit.

The second issue which is apparent in the briefs filed by both parties is the question of review of the economic consequences of DER's action.[2] CPCC states in its brief that it is not contending that DER must or should consider the economic consequences to CPCC of DER's decision. The brief then continues at length, however, about the way in which CPCC's economic situation, and perhaps that of both Washington and Greene Counties, could be severely affected if CPCC cannot find an economical way to treat and discharge the water which is causing it problems at CPCC's Bailey Mine.

In response to this CPCC warning about the economic impact of DER's decision, DER says this matter is out of its hands because it is not authorized to consider such factors in setting effluent limitations. As authority for its contention DER cites Mathies Coal Company v. Commonwealth, DER, __ Pa. ___, 559 A.2d 506 (1989). There, the court clearly stated that while DER must consider "other factors" under 25 Pa. Code §93.5 in issuing permits, these factors do not include the economic impact of the effluent limitation on a permittee such as CPCC. The court made it clear that any consideration of "economic impacts" which must be given by DER is the long range economic impact to the Commonwealth and all of its citizens. Accordingly, DER properly did not factor into its decision on these osmotic pressure limitations the economic impact thereof on CPCC.

The next issue for us to consider concerns the standards which we are to use in reviewing DER's actions. These standards are clear. We must determine whether DER manifestly abused its discretion, acted arbitrarily in

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[2]Both briefs do a good job of presenting the views of the respective parties in a favorable light. Counsel for each party deserves recognition for his or her efforts in this regard even when on any particular issue he or she may not have had a strong argument.

denying the requested permit modification, or violated the law. Pennsbury Village Condominium v. DER, 1977 EHB 225; Sheesley v. DER, 1982 EHB 85. We must make this review against the background of a presumption that DER has acted properly in denying CPCC's request. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1976). When DER's interpretation of its own regulations is at issue, as is the case here, we are constrained to give it weight, absent fraud, mistake, or a blatant abuse of discretion. Commonwealth, Pennsylvania Game Commission v. Commonwealth Department of Environmental Resources, 97 Pa. Cmwlth 78, 509 A.2d 877 (1986). DER's interpretation should not be disregarded, but must be given controlling weight, unless shown by CPCC to be clearly erroneous. Mathies Coal Company, supra.

This standard is critical because of the nature of CPCC's challenge. In a nutshell, CPCC is arguing that DER may depart from the Q(7-10) standard for determining stream flow (see 25 Pa. Code §93.5(b)), and allow a discharge which varies depending on the actual volume of the flow in the receiving stream at any given point in time. On page 4 of its brief CPCC says:

> There is no doubt that what the Department has done would comport with the requirements of 25 Pa. Code §93.5.... The company [CPCC] disagrees, however, with the assertion that what the Department has done is literally all the Department is allowed to do under the regulation.

Thus, it is clear CPCC wants us to compel DER to change its interpretation of its regulations so that the regulations would allow DER to do more than it has been willing to do, (i.e. - depart from the Q(7-10) standard) even though CPCC concedes DER's position comports with the requirements of the regulations. Clearly, from the cases cited above, we

cannot do what CPCC wants us to do. We cannot substitute CPCC's interpretation of these regulations for DER's interpretation, even if we assume CPCC's interpretation is equally reasonable, since CPCC has not shown us DER's interpretation is at all unreasonable. Absent such a showing under the cited cases, we cannot do what is requested.[3]

Since we may not substitute our discretion for that of DER, based on the facts before us, we conclude DER's denial of CPCC's request to amend its permit was proper.

CONCLUSIONS OF LAW

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

2. CPCC has the burden of proof in this appeal from DER's denial of CPCC application to amend CPCC's mining activities permit.

3. In setting effluent limitations for a permit DER should not consider the economic impact of its actions on the applicant.

4. The Environmental Hearing Board may not substitute its interpretation of DER administered regulations for that of DER absent bad faith, fraud, capricious action or abuse of power by DER in applying the regulations to CPCC.

5. DER did not abuse its discretion in denying CPCC's application to amend its permit as to the osmotic pressure effluent limitation.

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[3] Elsewhere in its brief CPCC says it is only seeking to have DER consider its proposal. As pointed out by DER's brief, CPCC's proposal was considered by DER but was rejected because of the way DER interprets the regulations. By asking us to order DER to "consider" its proposal, CPCC asks us to reinterpret these regulations which we will not do for the reasons outlined above.

O R D E R

AND NOW, this 19th day of June 1990, it is ordered that CPCC's appeal is dismissed, and DER's denial on June 22, 1987 of CPCC's request to amend Mining Activities Permit No. 30841316 is sustained.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 19, 1990

Board Chairman Maxine Woelfling did not participate in this decision by reason of a conflict arising from her previous position with the Department of Envirnomental Resources.

DATED: June 19, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Donna J. Morris, Esq.
Western Region
For Appellant:
Daniel E. Rogers , Esq.
Pittsburgh, PA

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M. DIANE SMIT
SECRETARY TO THE BO

CENTERVILLE BOROUGH SANITARY AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 87-532-MJ**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 19, 1990

OPINION AND ORDER
SUR MOTION TO DECLARE ISSUES MOOT

By Joseph N. Mack, Member

Synopsis

Where the Commonwealth Court has ordered compliance with a DER order which is the subject of an appeal before the Board and where the Appellants contend that the issues raised in the appeal are moot, the Board will treat Appellants' "Motion to Declare Issues Moot" as a motion to withdraw and will dismiss the appeal.

OPINION

This matter was initiated December 30, 1987 by the Centerville Borough Sanitary Authority ("CBSA") and Centerville Borough ("CB") filing appeals from a December 1, 1987 order of the Department of Environmental Resources ("DER" or "the Department") which directed the two municipal corporations, together with the Borough of Beallsville and West Pike Run Township, to proceed to implement a 201 Facility Plan. The appeal of CBSA was docketed at 87-532 and the appeal of CB was docketed at 87-533; the other two

municipal corporations did not file appeals. The appeals of CB and CBSA were consolidated by order of the Board at Docket No. 87-532 on February 25, 1988.

At the same time this appeal proceeding was in progress, DER filed a "Petition for Contempt and Enforcement of Administrative Order" in the Commonwealth Court, at No. 1280 C.D. 1988, against CB, CBSA, the Borough of Beallsville and West Pike Run Township and the officers and members of those municipal and quasi-municipal corporations in their official capacities. DER invoked the original jurisdiction of the Commonwealth Court under 42 Pa.C.S. §761(b).

The Commonwealth Court issued an order on July 1, 1988, ordering the municipal corporations to comply with the same order which is the subject of this appeal and setting a time table for compliance. The Commonwealth Court specifically retained jurisdiction over the matter and issued two subsequent orders on July 29, 1988 and July 12, 1989 modifying the earlier orders. In the latter order, the Court again held that it was retaining jurisdiction over the matter pending compliance with the conditions imposed therein and specifically reserved the right to impose such penalties as may be necessary and appropriate for contempt.

As indicated in DER counsel's letter of March 6, 1990 to this Board, CBSA, CB, and the other municipalities involved have already completed some of the directives of the Department's December 1987 order.

The aspect of this appeal before the Board at the present time is a one paragraph "Motion to Declare Issues Moot" filed by counsel for CBSA and CB on March 14, 1990 which asks us "to declare the issues in the above captioned case MOOT." By letter dated March 27, 1990, DER's counsel advised the Board that she felt the Department could not present a motion to dismiss the appeal

on grounds of mootness so long as the appellants continued to have outstanding obligations under the Department's order, but had no objection to the Board dismissing the case or to the appellants withdrawing the appeal.

A case is considered moot when a party has been deprived of the necessary stake in the outcome or when the Board is no longer able to grant effective relief. Commonwealth v. One 1978 Lincoln Mark V, 52 Pa.Cmwlth.353, 415 A.2d 1000 (1980); Kerry Coal Co. v. DER, 1988 EHB 755. We cannot agree that this matter is moot. This Board retains jurisdiction over the underlying validity of DER's order, and may grant meaningful relief as to obligations imposed by that order.

However, in light of Appellants' request, as well as the procedural status of this appeal and the Commonwealth Court proceeding, we will treat the motion as a request to withdraw the appeal and dismiss on that basis.

O R D E R

AND NOW, this 19th day of June, 1990, we shall treat Appellants' "Motion to Declare Issues Moot" as a motion to withdraw the appeal, and hereby order the appeal dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 19, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Donna J. Morris, Esq.
Western Region
For Appellant:
Oliver N. Hormell, Esq.
California, PA

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M. DIANE SMITH
SECRETARY TO THE BO

GEORGE W. YEAGLE	:	
	:	
v.	:	**EHB Docket No. 89-086-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 19, 1990**

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND TO LIMIT ISSUES

Synopsis

A motion for partial summary judgment and to limit issues filed by the Department of Environmental Resources is denied where the Appellant has not raised in his notice of appeal the issues upon which partial summary judgment is sought.

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 on property owned by Mr. Gary Lewis along Route 62 in Pine Grove Township, Warren County. If true, this act constituted a violation of DER's regulations at 25 Pa. Code §277.201 and of Sections 201(a) and 501(a) of the Solid Waste Management Act, (SWMA) 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 a motion for partial summary judgment and to limit issues filed by DER. In this motion, DER alleges that Yeagle has conceded in his answers to DER's requests for admissions that he disposed of the demolition waste on the Lewis site, and that he did not possess a solid waste permit authorizing this disposal. Accordingly, DER requests that we limit the issues to whether DER properly assessed the civil penalty against Yeagle under the standards set out in Section 605 of SWMA, 35 P.S. §6018.605. Yeagle did not respond to DER's motion.

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. Commonwealth, DER, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320, 1322 (1978), Ingram Coal Co., et al. v. DER, EHB Docket No. 88-291-F, April 17, 1990 (slip op. at 4).

In the instant case, we will deny DER's motion because Yeagle's notice of appeal only raises the issue of the propriety of the amount of the civil penalty, not the fact of the violation upon which the civil penalty is based. Since Yeagle did not contest the fact of the violation in his notice of appeal, this issue is not before the Board. See, 25 Pa. Code §21.51(e), NGK Metals Corp. v. DER, EHB Docket No. 90-056-MR (April 5, 1990). It is not appropriate for the Board to grant summary judgment as to issues which are not before it.

Therefore, DER is correct that the issues at the hearing should be limited to whether DER calculated the penalty properly under the standards in Section 605 of SWMA, 35 P.S. §6018.605. However, it is not necessary for us to grant DER's motion to achieve that result.

ORDER

AND NOW, this 19th day of June, 1990, it is ordered that DER's motion for partial summary judgment and to limit issues is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: June 19, 1990

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
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Western Region
For Appellant:
William A. Bevevino, Esq.
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M. DIANE SMIT
SECRETARY TO THE B

JAMES R. SABLE	:	
	:	
v.	:	**EHB Docket No. 86-686-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 22, 1990

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

Where DER shows a permittee has failed to reclaim the site he strip-mined, it has met its burden of proof as to its forfeiture of the permittee's surety bond.

Background

By letter dated November 21, 1986, DER notified James R. Sable ("Sable") that it was forfeiting his $17,300.00 surety bond posted for Surface Mining Permit 65830117 because of conditions at his surface coal mine located in Penn Township, Westmoreland County. On December 22, 1986, Sable appealed that DER forfeiture action to this Board. Thereafter, on January 8, 1987, we issued our Pre-Hearing Order No. 1, which assigned this case to former Board Member William A. Roth and directed that Sable file his Pre-Hearing Memorandum with us by March 24, 1987.

Sable then sought and received four extensions of the deadline for filing his Pre-Hearing Memorandum, but, when he missed the last extension, we issued him a Rule To Show Cause why his appeal should not be dismissed. Sable, who has appeared pro se throughout this proceeding, replied, causing former Board Member Roth to grant Sable yet another extension by Order dated April 12, 1988 and to warn Sable that the Rule To Show Cause might be made absolute if he did not timely file his Pre-Hearing Memorandum or otherwise terminate this appeal. Two further extensions were sought by Sable and we granted them. The last extension expired on December 30, 1988. On January 23, 1989, DER filed a Motion to Dismiss this appeal because of Sable's failure to file his Pre-Hearing Memorandum by December 30, 1988 as ordered. On February 2, 1989, former Board Member Roth issued an Order in which he deferred any ruling on DER's Motion and gave Sable until March 15, 1989 to file his Pre-Hearing Memorandum. On March 28, 1989, Sable filed his Pre-Hearing Memorandum. On April 21, 1989, DER filed its Pre-Hearing Memorandum.

Thereafter, on October 30, 1989, Mr. Roth having resigned from the Board, this matter was reassigned to incoming Board Member Richard S. Ehmann.

On December 12, 1989, after a conference call with the parties, we scheduled this case for trial on March 5 and 6 of 1990. On January 19, 1990, DER filed a supplement to its Pre-Hearing Memorandum. Sable filed a similar supplement with this Board on February 12, 1990.

On March 5, 1990, the parties filed a joint stipulation with us, and the hearing on the merits of this appeal was conducted. We received the transcript of the hearing on March 14, 1990. In response thereto, on March 14, 1990, we issued an Order directing DER to file its Post-Hearing Brief with us by April 13, 1990. Sable's Brief was to be filed with us by May 4, 1990.

On April 13, 1990, DER filed its Brief. No Post-Hearing Brief has been filed by Mr. Sable.[1] However, on May 25, 1990, we received a two page letter from Sable. Because he appears pro se, we will address the arguments set forth his letter.

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

FINDINGS OF FACT

1. The Department of Environmental Resources ("DER") is the agency of the Commonwealth of Pennsylvania with authority to administer and enforce the Clean Stream's Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S.
§691.1 et seq. ("Clean Streams Law"); the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("Surface Mining Act"); the Coal Refuse Disposal and Control Act, the Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 et seq. ("Coal Refuse Disposal Act"); Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"); and the regulations of the Environmental Quality Board adopted thereunder. (Stip. of Facts)[2]

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[1] On May 16, 1990, Mr. Sable telephoned the Board to indicate he had written a "report" which he thought he was directed to file "around May 15." He said he would type it and deliver it to the Board on May 17, 1990. He was advised that he had been ordered to file his Brief by May 5, 1990. He was further advised to file his Brief but we would not delay the beginning of the deliberative process by awaiting it.

[2] References in these Findings of Fact to Stip. of Facts are to the Stipulation of the parties filed with us on March 5, 1990, which is also Board Exhibit No. 1 in the Transcript. In that Stipulation, Mr. Sable agreed to
(footnote continued)

2. James R. Sable ("Sable") is a Pennsylvania business entity with offices and a place of business at 757 Thirteenth Street, Oakmont, Pennsylvania 15139. At all times relevant hereto, James R. Sable has been the owner of Sable and the person responsible for the day to day activities of the company. (Stip. of Facts)

3. At all times material hereto, Sable has been licensed to conduct the surface mining of bituminous coal in the Commonwealth pursuant to Surface Mining Operator's License No. 101524. (Stip. of Facts)

4. On or about October 26, 1981, in response to an application submitted by Sable, DER approved Special Reclamation Project 686 ("SRP 686"), which authorized Sable to mine coal at his Penn Township mine site. SRP 686 was valid for a period of twelve months from the date of issuance as per standard condition 4. (Stip. of Facts)

5. By letter dated January 26, 1983, Sable wrote to DER saying that he had not completed stripping the area covered by SRP 686 and, while the twelve month duration of SRP 686 had expired, he wished a six month extension of SRP 686 to June 30, 1983. (C-24)

6. By letter of February 4, 1983, DER told Sable it could not grant his request for an extension because SRP 686 had expired pursuant to standard condition 4. It then advised him that he should backfill and revegetate the site in order to apply for bond release. (C-3, and T-23)

(continued footnote)
specific statements contained in DER's Pre-Hearing Memorandum, and they are set forth verbatim in these Findings of Fact and referenced as "Stip. of Facts". References to DER's Exhibits are C-__. References to Sables's Exhibits are S-__. References to the transcript of the March 5, 1990 hearing are T-__.

7. At this point, Sable's choices concerning the mine site were to reclaim it or to apply for a regular surface mining permit for the site. (T-24)

8. On June 10, 1983, Sable filed an application with DER for a surface mining permit for this site. (T-26)

9. Sable was issued Surface Mining Permit (SMP) 65830117 on June 20, 1984. (T-33) On September 25, 1985 he was issued 65830116(C), which is identical to SMP 65830117 except for the permit number. The mine is known as the Bouquet Mine. (C-8, and T-41-43)

10. At the time SMP 65830116(C) was issued by DER, the area affected under SRP 686 had not been reclaimed; the area under SRP 686 was included within the area under SMP 65830116(C). (Stip. of Facts and T-33-34)

11. Sable took no appeal from the issuance of SMP 65830116(C). (T-142)

12. As a portion of his application for the surface mining permit, Sable posted with DER a $17,300.00 surety bond written by Fortune Assurance Company, Inc. The bond provides that it may be forfeit upon noncompliance by Sable with his reclamation obligations as to this mine site. (C-5, and T-43 and 46)

13. Subsequent to the posting of this bond, a $10,000.00 surety bond posted by Sable for SRP 686 was released by DER to Sable and his surety bonding company. (T-45-46, and C-22)

14. Sable did not appeal from the return of the $10,000.00 bond. (T-142-143)

15. At the time Sable applied for SMP 65830116(C), he was aware there was a Penn Township (Township) zoning ordinance which affected whether he could strip mine his mine site. (T-14)

16. Sable went to the Township to get approval for surface mining before applying to DER for a surface mining permit, but the Township representatives told him he should first get DER to issue him a permit. (T-141)

17. Subsequent to the issuance of SMP 65830116(C), the Township refused to grant Sable a zoning variance to allow him to engage in surface mining within the Township. However Penn Township did not prohibit Sable from completing reclamation.(Stip. of Facts)

18. Sable appealed the Township's refusal to grant him a zoning variance to the Court of Common Pleas of Westmoreland County, but his appeal was unsuccessful. (T-128 and T-144-145)

19. On March 11, 1985, DER Inspector Russell C. Dill ("Dill") mailed Compliance Order No. 85G121 to Sable the order cited Sable for violating 25 Pa. Code §87.14(d) as a result of remaining backfilling equipment and violating 25 Pa. Code §87.140 by failing to promptly reclaim the disturbed areas. (C-9 and T-69)

20. Sable took no appeal to the Board from that Order. (T-96 and T-143-144)

21. On April 10, 1985, Dill issued Compliance Order No. 85G189 to Sable, citing him for failure to monitor the ground and surface water at the site, contrary to 25 Pa. Code §87.116, and for failing to comply with Compliance Order 85G121. (C-10)

22. Sable took no appeal to the Board from that Order. (T-96 and T-143-144)

23. On August 14, 1985, DER Inspector Earl Fraley issued Compliance Order 85G573 to Sable, directing him to monitor the ground and surface water at the mine site as required by 25 Pa. Code §87.116. (C-12)

24. Sable did not appeal this Order to the Board. (T-96 and T-143-44)

25. In June of 1988, DER's Mine Conservation Inspector Harry Dumont was assigned the duty of conducting quarterly inspections of Sable's mine site. (T-66-67) Previously, he had twice been to the site with Inspector Dill. (T-65)

26. Since June of 1988, there has been no change in site conditions and all outstanding violations continue. (T-77)

27. Approximately two and one half acres are affected at the site. (T-68) There is an "approximately 25 foot highwall" and an "85 foot square open pit" on this affected area. (T-79-80 and C-17) Much of the rest of the two and one half acre area is spoil piles. (C-18-20, T-68 and T-80-82)

28. Sable admits the site is not backfilled. (T-129 and T-147) He is willing to do it if he can achieve a better financial position. He believes the cost of backfilling the site is $10,000.00. (T-129)

29. When DER issues a surface mining permit, it does not preempt any local zoning laws with which the miner must comply. (T-17-18)

DISCUSSION

Pursuant to Lucky Strike Coal Company et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440,547 A.2d 447(1988), a party such as Sable is deemed to have abandoned all arguments not raised in his Post-Hearing Brief. Since Sable filed no such Brief, we will not try to project what he might have said

in defense of his admitted failure to reclaim this mine site, but we will review his letter.

When a bond forfeiture occurs, it is DER which bears the burden of proof in appeals filed with us. James E. Martin et al. v. DER, 1988 EHB 1256, and King Coal Company v. DER, 1985 EHB 104. As a result, we must first look at what has occurred here to determine if DER acted properly as to this forfeiture action.

In examining this mine site and the forfeiture we keep before us the fact that Morcoal Company v. DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983), states that DER has a duty to forfeit Sable's surety bond if DER proves a violation on his mine site. Moreover, our role is limited in this case 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).

The evidence here shows no abuse of discretion. When Sable received SRP 686, it was valid for only one year. Under it, he mined or affected two or more acres of land. When the year expired, he had not finished mining the site and had not reclaimed it. After the SRP had already expired according to its own terms, he sought an extension of it from DER, but DER denied the request. At that time, Sable's options were to secure a surface mining permit for the site to allow him to continue mining or to reclaim the site.

Knowing this, Sable sought and received a surface mining permit. The permit was for an area larger than that affected under SRP 686 and included the unreclaimed area under SRP 686. Sable posted a bond under his new permit and DER released Sable's bond under SRP 686.

At the time Sable applied to DER for his surface mining permit, he knew that Penn Township had a zoning ordinance and that he would have to

obtain a variance from the Township before he could begin mining. The Township refused the variance, and he did not succeed in his appeal from that refusal when it was heard by the Common Pleas Court of Westmoreland County. That denial of the variance meant he could not conduct further mining on this site, but it was no bar to his completing reclamation. As Sable admitted, he has not backfilled the mine site. Despite the fact that mining occurred here in 1982, there is still an open pit and highwall which are not backfilled, graded, topsoiled and vegetated as required under the Surface Mining Act and the Clean Streams Law, and the regulations promulgated thereunder (collectively "SMCRA").

Finally, as recited above, there are three compliance orders issued by DER's inspectors to Sable as to this mine site which address his failure to monitor ground and surface water at his mine and failure to bring backfilling equipment back to the site and to reclaim it. All were issued to Sable and he neither appealed them to this Board nor complied therewith. They each thus establish violations at this mine site which warrant forfeiture under Morcoal, supra.

As a result, we have no hesitancy about sustaining DER's forfeiture action and dismissing this appeal, unless something in Sable's letter prevents this.

Unfortunately for Sable, nothing in his letter raises such a defense. Sable's main contention is that there is no surface mining permit until the miner has both DER's authorization to mine and the Township's zoning variance. He then argues that since he has no Township approval, the permit never became a reality, but is instead null and void, so that the bond never became effective and, in turn, DER cannot forfeit it. Sable then argues the only bond

which was effective was the bond for SRP 686 and DER gave "...up its rights..." on that bond. In support of this position, he cites Hilltown Township Board of Supervisors v. DER et al., 1988 EHB 1009.

Hilltown supra, deals with solid waste issues and zoning of solid waste facilities rather than with SMCRA issues. It is not on point. On point is City of Scranton v. DER, 1986 EHB 1223. In that case we found the municipal zoning issues to be separate and independent from the SMCRA permit issues. Sable's letter gives us no reason to reverse City of Scranton, supra or to distinguish his case from it. Accordingly, his surface mining permit is valid and he is obligated to comply with it.

The permit and his bond posted therewith are valid for another reason. Sable did not appeal from DER's permit issuance decision. He never challenged the permit's conditions, the bond amount, the release of the bond posted for SRP 686, the incorporation of the SRP 686 acreage within his surface mining permit, or any of the DER Compliance Orders issued to him. He may not now collaterally attack them in this forfeiture proceeding. 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; Fidelity & Deposit Company Of Maryland v. DER, 1989 EHB 751. As a result, Sable's challenge to the permit's validity and his argument that DER should not have incorporated the land under SRP 686 into the surface mining permit both fail.

Lastly, of the arguments we can consider (we cannot deal with arguments from Sable like "The historical precedence of a self-serving, I can do no wrong, State Agency."), Sable argues that there were no violations at his mine under SRP 686. Sable says that the violations came into existence when DER took 18 months to issue Sable a surface mining permit. While he

never says this explicitly, he seems to be implying that the violations are therefore DER's fault.

Of course, DER did not mine this site. It also did not forfeit his bonds until 1986, long after the permit was issued to Sable in 1984. Thus, even if DER did take a long time to issue Sable his permit, Sable had ample time in which to reclaim this site. Moreover, the amount of time DER took to issue this permit was not shown to be unreasonable. Sable offered us no evidence on the reasons it took so long, and, if he is defending against forfeiture on this basis, the burden of proof on this issue is his. American Casualty Company of Reading v. DER, 1981 EHB 1. Further, even if DER took all of this time but could have issued his permit sooner, that fact offers no defense since Sable mined this site and caused these violations in 1981 before he even applied for his permit. Finally, it should be noted that this ground for challenging the forfeiture by DER was not raised by Sable until the hearing on his appeal. It was not set forth in Sable's Notice of Appeal or his Pre-Hearing Memorandum. Thus this argument was raised in an "untimely" fashion and we will not consider it. ROBBI v DER, 1988 EHB 500.

Accordingly, since we cannot sustain Sable's appeal and we must sustain the bond forfeiture by DER, we enter the Order set forth below.

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.

3. The test for our review of DER's forfeiture of Sable's bond is whether DER abused its discretion in this forfeiture.

4. When DER proves a violation of SMCRA at Sable's mine site, it has a duty to forfeit Sable's bond.

5. At the time DER forfeited Sable's bond, Sable's mine site had not been reclaimed in any fashion.

O R D E R

AND NOW, THIS 22nd day of June, 1990, it is ordered that James R. Sable's appeal from DER's bond forfeiture is dismissed and the forfeiture is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 22, 1990

cc: **Bureau of Litigation**
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Oakmont, PA

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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: June 22, 1990**
and PENNSYLVANIA FISH COMMISSION, Intervenor		

OPINION AND ORDER SUR
APPLICATION FOR STAY, AND
MOTION TO DENY APPLICATION WITHOUT HEARING

By Terrance J. Fitzpatrick, Member

Synopsis

An application for stay filed by the Department of Environmental Resources (DER) is denied, and a motion to deny the application for stay without hearing filed by the City of Harrisburg (City) is granted, because DER's application fails on its face to state sufficient grounds to warrant a stay.

OPINION

The background of this proceeding has been described in previous opinions and will not be repeated here.[1] This Opinion and Order addresses the "Application for Stay" filed by DER on June 11, 1990. In this application, DER requests the Board to stay the effect of its order dated April 30, 1990 to the extent that this order requires DER to comply with

[1] See City of Harrisburg v. DER, 1989 EHB 365, 1989 EHB 373.

discovery requests and disclose information and communications which DER asserts are subject to the Attorney-Client and Attorney Work Product Privileges. DER states in its application that it will file two petitions for review in Commonwealth Court seeking to bring the issues surrounding these privileges before the Court. DER asserts that a stay is appropriate pending Commonwealth Court's ruling because it (DER) will be severely prejudiced if DER employees are compelled to divulge at depositions the communications which DER claims are privileged. DER asserts that by testifying on these matters, it will have waived its right to assert the privileges.

In response to DER's application, the City filed a "Motion to Deny Commonwealth's Application for Stay Without Hearing." In this motion, the City asserts that DER failed to demonstrate the factors which are necessary for the Board to enter a stay. These factors are:

1. Irreparable harm to the applicant,
2. The likelihood of the applicant prevailing on the merits, and
3. The likelihood of injury to the public or other parties.

Chambers Development Co., Inc. v. DER, 1988 EHB 68, 77, affirmed, 118 Pa. Commonwealth Ct. 97, 545 A. 2d 404 (1988), see also, Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983). Specifically, the City asserts that even if information which is ultimately found to be privileged is divulged at depositions, that this disclosure would not constitute a waiver of the privilege because the disclosure was not voluntary. Therefore, the privilege could still be asserted at the hearing. Finally, the City asserts that it will be harmed by a stay because it will be precluded from moving forward with discovery.

We will deny DER's application for a stay, and grant the City's

motion to deny the application without a hearing. DER's application is facially deficient in that it does not even recite the standards for granting a stay, let alone argue why those standards are met here.[2] To grant relief to DER, we would have to generate arguments regarding DER's prevailing on the merits and why a stay would not harm the City or the public.[3] Even if we could anticipate DER's arguments on these factors, this is not our function, and to do so would not be fair to the City.

Since DER has not stated sufficient grounds to satisfy the standards for granting a stay, we must deny its application. See Rushton Mining Co. v. DER, EHB Docket No. 85-213-F (March 20, 1990).

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[2] The Board's regulations provide that a petition for supersedeas may be denied without a hearing where the petitioner has failed to state with particularity the facts and law relied upon, and where the petitioner fails to state grounds sufficient for granting a supersedeas. 25 Pa. Code §21.77(c)(1), (2), & (4).

[3] DER has set out an argument why it would be irreparably harmed, though not in so many words. We will not address this argument because a showing on one factor does not warrant a stay. Chambers, 1988 EHB 68, 77, Carroll Township Authority v. DER, 1983 EHB 239, 240.

ORDER

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

1) DER's application for stay is denied.

2) The City's motion to deny Commonwealth's application for stay without a hearing is granted.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: June 22, 1990

cc: **Bureau of Litigation**
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M. DIANE SMIT
SECRETARY TO THE E

PALISADES RESIDENTS IN DEFENSE OF THE ENVIRONMENT (P.R.I.D.E.)	:	
v.	:	**EHB Docket No. 86-265-E**
	:	**Issued June 27, 1990**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and BUCKS COUNTY CRUSHED STONE, INC. Permittee	:	

OPINION AND ORDER
SUR PERMITTEES MOTION
FOR SUMMARY JUDGMENT

Synopsis

Where material factual disputes exist and the Motion fails to show that the movant is entitled to judgment as a matter of law, a Motion For Summary Judgment must be denied.

OPINION

On April 18, 1990, we issued our Opinion and Order Sur Appellee's Motion In Limine To Limit Issues which contains a summary of the background of this case until that Opinion and Order was issued. Rather than repeating the history here, we incorporate it from that Opinion. As we do so, we point out that a portion of P.R.I.D.E.'s original appeal was dismissed at P.R.I.D.E. v. DER et al., 1986 EHB 905, and that our Opinion and Order of April 18, 1990 granted in part the Motion To Limit Issues filed on behalf of the Department

of Environmental Resources ("DER"), so the number of matters remaining for us to adjudicate has been narrowed prior to our consideration of the present Motion For Summary Judgment filed on behalf of Bucks County Crushed Stone, Inc. ("Bucks").

It should also be pointed out that since the issuance of the aforementioned Opinion and Order dated April 18, 1990, this matter has been scheduled for hearing. Additionally, on June 15, 1990, we issued an Order denying P.R.I.D.E.'s Motion For Reconsideration of our April 18, 1990 Opinion and Order, having on June 14, 1990 also granted P.R.I.D.E.'s Motion for an Extension of Time to file its answer to Bucks' Motion For Summary Judgment.

As more fully set forth in our Opinion and Order of April 18, 1990, the scope of P.R.I.D.E.'s attack on DER's issuance of a mining permit to Bucks has been limited to four specific areas, i.e., noise, air pollution, bonding, and Article I, Section 27 of the Pennsylvania Constitution. Bucks, in its Motion, argues there are no issues of material fact as to any of these four areas and that it is entitled to judgment as a matter of law on each of them. P.R.I.D.E. has responded to Bucks' Motion, opposing same. DER did not file a formal response to Bucks' Motion, but wrote to us saying it did not oppose same.[1]

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[1] DER did file a Response to P.R.I.D.E.'s Answer. In the Response, DER made a large number of assertions as to where and when in the permitting process it considered issues such as noise, air pollution and bonding. DER failed to attach any affidavits to support its Response, however, and the Response itself is not verified. The Response's paragraph 9 even references an affidavit, but it was not included with the Response. DER's transmittal letter says its Brief and affidavit will be shipped to us separately. The affidavits should accompany its Response, especially in a case like this where DER knows we are under a time restraint (the scheduled hearing) in issuing our opinion on this motion. In light of the requirements for granting Summary
(footnote continued)

We will consider each of the portions of Bucks' Motion separately.

AIR POLLUTION

As to air pollution, Bucks points out correctly that in our Opinion and Order of April 18, 1990, we limited the issues which P.R.I.D.E. could raise regarding air pollution at the hearing on the merits of its appeal. Because P.R.I.D.E. failed to timely appeal air pollution Plan Approval No. 01-310-006B, we wrote in our Opinion that P.R.I.D.E. was barred from challenging the permit as to air pollution in relation to the stone crusher and screen operated by Bucks at the mine site, but we held P.R.I.D.E. could address other air pollution sources. Bucks now says we were provided with an incomplete copy of DER's Plan Approval No. 01-310-006B, from which we wrote our prior Opinion. Bucks then avers that the complete DER Plan Approval covers two other sources of air pollution at this mine site and, thus, P.R.I.D.E. is also barred from challenging fugitive dust type air pollution from roadways or stockpiles. Bucks thus concludes that no air pollution issues remain.

The response by P.R.I.D.E. as to this issue and the noise and reclamation issues, is at best less than helpful. It provides that these types of issues are considered by DER in issuing a mining permit. The response does not address the specifics of Bucks' contentions and is of no help regarding same.

As tempting as it might be to grant Bucks' Motion for Summary Judgment, considering P.R.I.D.E.'s inadequate response, we neverthless deny same at this time. Motions for summary judgment must be construed in favor of

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(continued footnote)
Judgment set forth in Pa. R.C.P. 1035, we will not give any weight to these unsupported assertions.

the non-moving party and must meet the standards therefor set forth in Pa. R.C.P. 1035. Robert C. Penoyer v. DER, 1987 EHB 131; Newlin Corporation et al. v. DER, 1988 EHB 976. Here, we have a copy of a Plan Approval attached as an Exhibit to Bucks' Motion, a verification from counsel for Bucks that the allegations in his Motion on Bucks' behalf are true and correct, and an affidavit from Bucks' Quarry Manager that Bucks has not been cited or fined for air pollution and that stockpiles and haul roads are essential to Bucks' operation. There is no affidavit that the only sources of air pollution at Bucks' site are those in the Plan Approval, nor is there any detailed affidavit that the allegedly complete Plan Approval attached in Exhibit C to Bucks' Motion is finally a complete copy of this DER Plan Approval.[2] What of dust from the rock quarrying activity itself? It is not mentioned by Bucks in any fashion. In short, based on the above and under Robert C. Penoyer, supra, we cannot grant summary judgment on this issue. The Motion also fails the test under Newlin Corporation, supra. See also Monessen, Inc. v. DER, Docket No. 88-486-E (Opinion and Order issued May 7, 1990).

In light of what we have said above, we will not, at this point, treat Bucks' Motion as a Motion To Limit Issues as to air pollution from stockpiles and haul roads. If Bucks wishes to make such a Motion, it may do so, and, hopefully, it will be instructed by what we have said above.

BONDING

In support of its Motion on this point, Bucks says to

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[2] The verification by Bucks' counsel is not an adequate affidavit under Pa. R.C.P. 1035. This is too critical an issue to decide against P.R.I.D.E. based on such a two sentence unsworn general verification. Arthur Richards, Jr., V.M.D. et al. v. DER et al., Docket No. 89-362-E (Opinion and Order issued April 10, 1990).

date, Appellant has made only conclusory legal allegations and P.R.I.D.E. lacks standing to challenge DER's estimation of the bond amount because DER's action is not adverse to P.R.I.D.E., since under the Noncoal Surface Mining Conservation and Reclamation Act, (NSMCRA), Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S.§3301 et seq., DER must reclaim the site if Bucks fails to do so. P.R.I.D.E.'s two allegations are that the permit must contain an adequate reclamation provision and that the bond required of Bucks by DER is inadequate. Contrary to Bucks' assertion, these allegations could be construed to be more than mere legal conclusions. For example, this may be an assertion of a factual dispute as to the way in which the final dollar amount was calculated. Alternatively, P.R.I.D.E. may be saying that DER failed to properly compute site restoration costs. P.R.I.D.E. may also be saying something entirely different. We do not know; however, asserting the allegations are mere legal conclusions does not make them so. Although, Bucks urges us to do so, we are also not prepared at this time to say that as a matter of law, P.R.I.D.E. lacks standing to raise bond amount issues in an appeal. We are also not prepared to rule solely on the basis of this Motion's allegations that DER has an absolute duty under NSMCRA to reclaim all non-coal surface mines. When a surface miner's business fails, or other problems confront the business, and that miner fails to reclaim a site, DER may have a duty to reclaim that site, but, if DER lacks the funds to do so, the Commonwealth and its citizens end up with another site for future reclamation-"when funds allow". But what has been true as to abandoned surface mines in the past need not happen with regard to existing noncoal surface mines, and adequate bonds help to insure this. Since P.R.I.D.E.'s members could be adversely affected if they were forced to live with an

adjacent abandoned and unreclaimed noncoal surface mine for several years, we will hear their evidence on this issue.

Bucks may raise this issue again in its Post-Hearing Brief if it wishes to do so, but, based solely upon the averments in Bucks' Motion For Summary Judgment, we will not deny P.R.I.D.E. the opportunity for a hearing thereon. Assuming P.R.I.D.E. has standing to raise this issue, Bucks' Motion fails to establish as a matter of law that Bucks is entitled to a judgment in its favor at this time. Accordingly, it must be denied. Newlin Corporation, supra.

NOISE POLLUTION

Thirdly, Bucks seeks Summary Judgment against P.R.I.D.E. as to noise pollution. Bucks says P.R.I.D.E. cannot carry its burden of proof without an expert witness and P.R.I.D.E. has failed to identify any expert whom it will call as its witness. In support of this contention, Bucks cites Setliff v. DER and Clarksburg Coal Co., 1986 EHB 296. Our opinion in that case was written at the conclusion of the hearing on the merits. It said that the pro se appellant's evidence was insufficient quantitatively and was insufficiently supported by expert testimony to enable the Board to say the appellant had met its burden of proof. Setliff, supra, does not say that an appellant cannot succeed in a challenge based on a noise nuisance theory absent supporting expert testimony.

Bucks' Motion also argues that P.R.I.D.E. has failed to stipulate any legal issue as to noise. This argument apparently references the "Stipulation Of The Parties" filed with the Board on May 21, 1990, wherein the parties stipulated their respective legal issues. More than one of the legal issues stated therein on P.R.I.D.E.'s behalf deals with the noise issues which our

Opinion of April 18, 1990 held would still be before us. Accordingly, we reject this argument by Bucks.

Finally, Bucks argues DER controlled noise by making references to the Township's zoning ordinance and Bucks' obligation to comply with that ordinance. Bucks contends this ordinance regulates noise and it has attached a copy of the ordinance to its Motion. Even if we ignore the adequacy of the factual support for Bucks' assertion and the problems with it vis a vis the requirements of Pa. R.C.P. 1035 discussed above, there is no evidence DER relied on this ordinance to regulate noise at this mine site. Indeed, the unsworn assertions in DER's Response suggest to us that this is not so. There is also a serious legal question for us, as raised in P.R.I.D.E.'s Answer to Bucks' Motion, with regard to whether DER could reasonably rely on a local ordinance as an adequate regulation of noise from a quarry. Thus, summary judgment is inappropriate on this issue, too. Newlin Corporation, supra.

ARTICLE I, SECTION 27

As to this subject matter area, Bucks did not create a separate subsection of its Brief and did not advance any argument as to why there should not be a factual hearing as to any issues thereunder on which P.R.I.D.E. has evidence to present. Instead, Bucks argues that P.R.I.D.E. views this subject matter area as one transforming the appeal "...into a review of the..." broad environmental implications "... of surface mines in Pennsylvania." In response to P.R.I.D.E.'s asserted view, Bucks argues that "...Article I Section 27 does not expand the authorities by which DER issued the Mining Permit." Rather, Bucks views this Section of the Constitution as providing a benchmark against which DER's permit issuance decision is measured.

Curiously, P.R.I.D.E.'s answer does not address this issue or Bucks' arguments at all. This omission by P.R.I.D.E. is of no consequence, however. The cases interpreting Article I, Section 27 start with Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86, (1973), aff'd., 468 Pa. 226, 361 A.2d 263, (1976).[3] They all hold that there is a three pronged test by which to evaluate this permit. Bucks' argument is thus correct as to a benchmark. However, this does not mean that there is no factual evidence which could be offered by P.R.I.D.E. Indeed, evidence of some type or a lack thereof is essential if we are to gauge DER's action against this benchmark. Bucks' Motion makes no assertions as to the nonexistance of factual disputes between it and P.R.I.D.E. on this issue. Thus, there is a need for us to deny the Motion as to this issue to get to the point where we can receive the evidence, if any, and decide this Article I, Section 27 question on its merits.

Accordingly, we enter the following Order:

ORDER

AND NOW, this 27th day of June, 1990, upon consideration of the Motion For Summary Judgment filed by Bucks, the Answer thereto filed by P.R.I.D.E., and the Response to P.R.I.D.E.'s answer filed by DER, it is ordered that the Motion For Summary Judgment is denied.

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[3] The Board would like to point out to counsel that proper and complete citations to case authority are always both appropriate and appreciated. Incomplete or inaccurate citations only reflect poorly on the lawyers who insert them in their pleadings and briefs.

ENVIORONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 27, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

BOROUGH OF DUNMORE	:	
	:	
v.	:	**EHB Docket No. 87-401-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 28, 1990**
and DELVECCHIO SANITATION DISPOSAL SERVICES, INC., Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss will be treated as a motion for judgment on the pleadings where the Appellant's notice of appeal does not, on its face, state grounds for reversal of the Department of Environmental Resources' (DER) issuance of a permit for a solid waste transfer facility. The allegation that the Permittee misstated the scope of the permit to Appellant does not constitute a basis for concluding that DER erred in granting the permit.

OPINION

This case involves an appeal by the Borough of Dunmore, Lackawanna County (Dunmore), objecting to DER's issuance of a solid waste permit to Delvecchio Sanitation Disposal Service, Inc. (Delvecchio). DER issued the permit pursuant to the Solid Waste Management Act, Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6018.101 et seq. (SWMA) for construction and

operation of a solid waste transfer station, to be located in the Borough of Dunmore. The permit, issued on August 21, 1987, limited the type of waste the facility could process to "waste streams common to municipal and commercial waste." (Notice of Appeal, Enclosure No. 1, page 3).[1]

Dunmore appealed the permit on September 21, 1987, objecting that the permit was too broad because it allowed residential waste to be processed in addition to commercial waste, and because it allowed Delvecchio to operate a transfer station within Dunmore's borough limits, contrary to Delvecchio's representations to the Borough Council and the Borough Planning Commission.

In August of 1988, Delvecchio applied to DER for a modification of the August 21, 1987 permit so as to authorize Delvecchio's facility to accept common household waste and similar types of putrescible waste. DER granted the modification on October 27, 1988. Although Dunmore submitted objections to DER during the comment period pending approval of the modification, Dunmore did not appeal the modification after it was approved.

Delvecchio has now filed a motion to dismiss the appeal, asserting that Dunmore failed to appeal DER's modification of the permit; therefore, the appeal of the original permit is moot. Dunmore has responded that it did not appeal the permit modification because it did not receive notice that the modification had been approved, and so the modification was invalid because Dunmore did not receive notice.

We will dismiss this appeal, although not for the reasons stated in Delvecchio's motion to dismiss. Our assessment of this appeal leads to the conclusion that Delvecchio is entitled to judgment because Dunmore's notice of

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[1] The permit went on to state at page three that these waste streams were solid metals, wood, rubber, paper, and glass.

appeal fails on its face to state a cause of action.[2] Judgment on the pleadings will be granted where the pleadings do not state a valid cause of action. Pa. R.C.P. 1034; Bensalem Township School District v. DER, 518 Pa. 581, 544 A.2d 1318 (1988); G. B. Mining Co. v. DER, 1988 EHB 1065, 1066. In considering judgment on the pleadings, any questions as to the facts must be resolved in favor of the non-moving party. G. B. Mining, at 1066.

Applying these principles to this case, it is clear that judgment on the pleadings is appropriate. In the notice of appeal, Dunmore set out its reasons for objecting to the permit issuance as follows:

> 1. The permit of August 27, 1987 allows the applicant to operate a "Solid waste disposal and transfer station." The Borough of Dunmore objects to the scope of the permit insofar as it appears to permit the applicant not only the right to operate a solid waste facility for commercial solid waste but to operate a solid waste processing facility for all types of solid waste including residential garbage. This permit is far more expansive than the representations made by the applicant, his engineers and his attorney when they appeared at Dunmore Planning Commission meetings and/or Dunmore Borough Council Caucuses and council meetings to present the proposal for consideration to Borough officials. At those meetings the applicant and his representatives clearly manifested an intent to limit the facility to commercial solid waste processing center only.
>
> 2. The Borough of Dunmore also objects to the fact that the permit allows the applicant to operate a "transfer station" within the corporate limits of the Borough. Once again, the representations made by the applicant and his agents at the time of the presentation referred to in Paragraph 1 above, clearly stated that the facility would not be a transfer station for solid waste storage and/or subsequent disposal. The permit, as issued, appears to allow the

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[2] An appeal may be disposed of upon an examination of the pleadings whether or not the parties have so moved. See, for example, Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303.

applicant to operate this type of facility.

3. Additional reasons will be supplied by the Borough of Dunmore in the form of copies of minutes of meetings, testimony of Borough officials, and correspondence submitted to the Borough by the applicant and his agents. Additional time is requested for the transmittal of these additional reasons.

Objections No. 1 and 2 fail to state a valid claim for relief because they lack any allegation that DER violated its duties under the SWMA. DER has the responsibility under the SWMA to issue, deny, or condition a solid waste permit. Bichler and Korgeski v. DER, 1989 EHB 36, 42. DER's only duty vis-a-vis Dunmore was to consider Dunmore's recommendations on the application, if any were received.[3] See, Section 504 of SWMA, 35 P.S. §6018.504, Bichler and Korgeski, Supra. In this case, no comments were received. Dunmore might argue that it did not submit comments because it was misled by Delvecchio as to the scope of the permit; however, even if we assume, arguendo, that a misstatement did occur here, it was Dunmore's responsibility under Section 504 of SWMA to review the application in deciding whether to submit comments.[4] The allegation that Delvecchio misstated the scope of the permit to Dunmore has nothing to do with DER's duties under the SWMA, and does not constitute a basis for reversing DER's grant of the permit.

Paragraph three of the notice of appeal (quoted above) adds nothing

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[3] Delvecchio avers and Dunmore admits that on April 29, 1987, DER sent copies of the application to Dunmore for comment. Moreover, DER notified Dunmore on June 22, 1987 that additional information had been received, and that the comment period was extended for an additional thirty days (Delvecchio's Motion to Dismiss, para. 4-6; Dunmore's Answer to Motion to Dismiss, para. 4-6).

[4] Section 504 states that "[a]pplications for a permit shall be reviewed by.... the host municipality." While we do not condone misstatements by applicants for permits, it is a municipality's responsibility to read the application if it wishes to play a meaningful role in the permitting process.

to change the course of this opinion. In essence, this objection appears simply to reiterate the grounds for objection stated in paragraphs one and two: that the permit goes beyond the scope of Delvecchio's representations to Dunmore. A generous interpretation of this objection might be to read it as an intent to amend the appeal. However, no such request has been made; nor would that request likely be granted, given the strict limitations on allowing amendment of appeals before this Board. See, NGK Metals Corporation v. DER, EHB Docket No. 90-056-MR, Order issued April 5, 1990 (amendment to notice of appeal is allowed only for good cause shown, in limited circumstances, such as the need for discovery to establish a claim); Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Commw. 78, 509 A.2d 877 (1986), aff'd. on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) (the Board need not allow amendment of appeal absent a showing of good cause); 25 Pa. Code §21.51(e).

In summary, based upon our review of the objections stated in the notice of appeal, we conclude that Dunmore failed to plead sufficient grounds for appealing DER's issuance of the solid waste permit. Therefore, we will grant judgment on the pleadings and dismiss Dunmore's appeal.

ORDER

AND NOW, this 28th day of June, 1990, judgment on the pleadings is granted in favor of Delvecchio Sanitation Disposal Service, Inc. and the Borough of Dunmore's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
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Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 28, 1990

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M. DIANE SMIT
SECRETARY TO THE B

GRAND CENTRAL SANITATION, INC.	:	
	:	
v.	:	**EHB Docket No. 89-615-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 28, 1990**

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

The Board dismisses an appeal for lack of jurisdiction. Failure to prepay a civil penalty assessed under Act 101 deprives the Board of jurisdiction over the matter and is grounds for dismissal.

OPINION

This case involves an appeal by Grand Central Sanitation, Inc. (Grand Central) from a one-hundred dollar ($100) civil penalty assessed on December 6, 1989 by the Department of Environmental Resources (DER) pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556 No. 101, 53 P.S. §4000.101 et seq. (Act 101). The assessment was based upon an alleged violation of Section 1101(e) of Act 101, 53 P.S. §4000.1101(e): failure to have proper signage on equipment transporting solid waste in connection with Grand Central's municipal waste landfill located in Pen Argyl, Northampton County. Grand Central filed its notice of appeal on

December 29, 1989, but did not submit prepayment of the civil penalty with the notice of appeal. On March 29, 1990, DER filed a motion for summary judgment. In this motion, DER asserts that Grand Central failed to perfect its appeal in that it did not prepay the assessment; therefore, this Board has no jurisdiction over the matter. Grand Central answered the motion for summary judgment on April 13, 1990, enclosing the prepayment with its response. Grand Central argues that this Board has not been deprived of jurisdiction because it is not unusual for appeals to be filed with the filing fees and other payments to follow, and that the delinquent payment operates to perfect a timely filed appeal.

Grand Central's arguments are wholly unpersuasive. The appeal was not perfected, and we will dismiss this matter for lack of jurisdiction.[1] Act 101, under which DER assessed the penalty, states in relevant part:

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

35 P.S. §4000.1704(b). The facts indicate that Grand Central did not submit prepayment of the penalty until April 13, 1990, when it responded to DER's motion for summary judgment, far beyond the 30-day statutory requirement. The plain language of Act 101 indicates that this lapse resulted in Grand

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[1] Although the motion before us is for summary judgment, the grounds are jurisdictional, and so we treat it as a motion to dismiss. See, 3 L Coal Company v. DER, 1988 EHB 16.

Central's waiver of its rights to contest the civil penalty. This Board has interpreted identical language--as found in both the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended 52 P.S. §1396.22, and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended 35 P.S. §691.605(b)(1)--to mean that nonpayment of the civil penalty assessment within the 30-day period is a failure to perfect the appeal, which deprives this Board of jurisdiction and is grounds for dismissal. 3 L Coal v. DER, 1988 EHB 16; Bane v. DER, 1988 EHB 54. Further, the Commonwealth Court has held that the prepayment requirement does not violate a citizen's right to appeal under Article V, Section 9 of the Pennsylvania Constitution. Boyle Land and Fuel Co. v. Commonwealth of Pennsylvania, 82 Pa. Commw. 452, 475 A.2d 928 (1984), aff'd, 507 Pa. 135, 488 A.2d 1109 (1985).[2]

In summary, Grand Central's failure to prepay the assessment within the 30-day statutory period constituted a failure to perfect the appeal. Accordingly, we dismiss the appeal for lack of jurisdiction.

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[2] Commonwealth Court has indicated, however, that the prepayment requirement may be unconstitutional as to an appellant who is financially unable to submit the prepayment. See Twelve Vein Coal Co. v. Commonwealth, DER, ___ Pa. Commonwealth Ct. ___, 561 A.2d 1317 (1989). In the present case, Grand Central does not allege that it was unable to submit the prepayment; therefore, Twelve Vein does not apply here.

ORDER

AND NOW, this 28th day of June, 1990, it is ordered that the appeal of Grand Central Sanitation, Inc. is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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Member

Richard S. Ehmann

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Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 28, 1990

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SECRETARY TO THE BO

ROBERT F. FINK	:	**EHB Docket No. 90-155-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 2, 1990

OPINION AND ORDER SUR
RESPONSE TO RULE TO SHOW CAUSE

By Maxine Woelfling, Chairman

Synopsis

An appeal will be dismissed for lack of jurisdiction where appellant failed to file its appeal with the Environmental Hearing Board within thirty (30) days after receiving notice of the action appealed from in accordance with 25 Pa.Code §21.52(a).

OPINION

This matter was initiated with the April 20, 1990, filing of a notice of appeal by Robert F. Fink (Fink) challenging a compliance order issued on March 1, 1990, by the Department of Environmental Resources (Department). The order directed Fink to, *inter alia*, cease dumping and remove all solid waste accumulating on the site of the Nichol Manufacturing building which is owned by Fink and leased to Nichol Manufacturing. The site is located in Porter Township, Huntingdon County. Fink also filed an application for supersedeas with his notice of appeal.

On April 24, 1990, this Board issued an order denying Fink's petition for supersedeas for failure to conform to 25 Pa.Code §21.77 and further issuing a rule upon Fink to show cause why his appeal should not be dismissed as untimely since it was not received by the Board until April 20, 1990, some 48 days after Fink received notice of the compliance order.

Fink filed a response to the rule on May 24, 1990, stating that he had filed a notice of appeal and application for supersedeas on March 30, 1990, with Edward A. Liggett at the Department's office in Altoona and the Office of Chief Counsel. Fink explained that upon learning that the Board did not receive a copy of these filings, a full and complete set of the filings was sent to the Board on April 16, 1990.[1]

For the following reasons, Fink's appeal will be dismissed.

It is well established, by both regulation and case law, that jurisdiction of the Board does not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party has received written notice of the Department's action. Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Furthermore, the timely filing of a notice of appeal with the Department, rather than the Board, does not confer jurisdiction upon the Board where the filing with the Board is untimely. Appalachian Industries, Inc. v. DER, 1987 EHB 325.

Here, Fink's own recitation of the facts is somewhat contradictory. In paragraphs one and two of his answer to the rule Fink contends copies of the notice of appeal and application for supersedeas were mailed to the

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[1] Fink further objected to the Board's order of April 24, 1990, contending that the order did not specify why his petition for supersedeas application failed to comply with 25 Pa.Code §21.77. In light of our disposition of the jurisdictional issue, we will not address Fink's objections to the denial of his petition for supersedeas.

Department's offices only. But, in paragraph five of his answer Fink states copies were served on the Department's Altoona office on March 30, 1990, and "at the same time mailed to the Office of Chief Counsel and mailed to the Board." Also, in a letter mailed to the Board accompanying the copies mailed on April 16, 1990, Fink's counsel states:

> I received a telephone call today from Carl Schultz, Esquire from the Office of Chief Counsel, Bureau of Litigation, advising me to send a completed set of papers to your office which had previously been submitted to the DER office in Altoona and to the Office of Chief Counsel.

At best, this recitation establishes that the notice of appeal may have been mailed to the Board, but there is no other evidence, such as a receipt of mailing, to substantiate this claim. Lancaster Press, Inc. v. DER, 1989 EHB 337. Consequently, because the appeal was not timely filed with the Board, we have no jurisdiction and must dismiss it.[2]

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[2] Fink did not petition the Board to allow his appeal *nunc pro tunc*. However, even if we treat his response to the Board's rule as such a petition, it does not set forth a sufficient basis for allowance of Fink's appeal. Lancaster Press, *supra*.

O R D E R

AND NOW, this 2nd day of July, 1990, it is ordered that the Board's rule of April 24, 1990, is made absolute and the appeal of Robert F. Fink at EHB Docket No. 90-155-W is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

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Member

Richard S. Ehmann

RICHARD S. EHMANN
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Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
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DATED: July 2, 1990

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M. DIANE SMI
SECRETARY TO THE

CONCERNED RESIDENTS OF THE YOUGH, INC. (CRY)	:	
v.	:	EHB Docket No. 89-133-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	Issued: July 3, 1990

OPINION AND ORDER SUR SECOND MOTION TO COMPEL DISCOVERY AND MOTION FOR ORDER TO SUPPLEMENT PRIOR RESPONSES

Synopsis

A motion to compel discovery is granted where the appellant's answers to various interrogatories are vague and non-specific. A motion for an order to supplement prior responses is also granted since, pursuant to Pa.R.C.P. 4007.4, a party is under a duty to supplement his responses with respect to the identity and location of persons having knowledge of discoverable matters and where he obtains information which indicates his prior response was incorrect or is no longer true.

OPINION

This action was commenced by the filing of a notice of appeal on May 10, 1989 by Concerned Residents of the Yough, Inc. (CRY) from the Department of Environmental Resources' (DER) approval of a closure and post-closure plan

for Mill Service, Inc. (Mill Service) for its hazardous waste facility designated as "Impoundment No. 5."

The instant matter arises out of a discovery dispute between Mill Service and CRY. On or about June 30, 1989, Mill Service served on CRY its First Set of Interrogatories and a Request for Production of Documents. CRY's Answers were filed with the Board on September 11, 1989. On October 3, 1989, Mill Service filed a Motion to Compel CRY to provide more specific answers to certain interrogatories and to produce all documents requested. No responsive pleading was filed by CRY except to request an extension in which to complete discovery. Nor was a ruling made on Mill Service's motion by the Board.

Following several extensions of the discovery deadline, granted to both sides, on May 31, 1990 Mill Service filed a Second Motion to Compel Discovery and Motion for Order to Supplement Prior Responses. The motion requested that CRY be ordered to (1) respond properly and completely to Mill Service's First Set of Interrogatories; (2) supplement its answers to Interrogatories Nos. 18, 18(f), 20, and 20(a)-(f); and (3) produce all documents identified in response to its supplemental answers to Nos. 18, 18(f), 20, and 20(a)-(f). CRY filed objections thereto on or about June 25, 1990, specifically addressing the request that CRY supplement its answers to Interrogatories Nos. 18, 18(f), 20, and 20(a)-(f).

Duty to supplement answers to Interrogatories No. 18, 18(f), 20, and 20(a)-(f) and produce documents related thereto

Interrogatories Nos. 18, 18(f), 20, and 20(a)-(f) request information concerning CRY's allegations that the impoundments operated by Mill Service "pose a substantial threat to the health, safety and welfare of the residents of Yukon" and that "(t)he citizens of Yukon suffer an inordinately high amount

of cancer, and particularly bladder cancer and related infirmities", as raised in paragraphs 21 and 23 of CRY's Notice of Appeal. CRY's answers to these questions do not identify with particularity any specific cases of health problems upon which it bases its allegations.

In its motion, Mill Service argues that it has reason to believe that CRY is aware of numerous individuals having knowledge of matters related to these allegations, and that CRY has a duty to supplement its prior answers. Mill Service's belief that CRY possesses additional information on this subject is based on allegations raised by CRY in a related action which it recently filed with the Court of Common Pleas of Westmoreland County. In response, CRY argues that the aforesaid civil action is a separate and broader action than the one at hand and that the individuals mentioned in the civil complaint have no pertinent knowledge related to this action. CRY also makes the rather confusing argument in paragraph 11 of its objections that "information sought concerning health reports, medical records, tests and names of individuals and real estate appraisals" is not relevant to CRY's allegation that the impoundment "poses a substantial threat to the health, safety and welfare of the residents of Yukon."

Pa.R.C.P. 4003.1 provides that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." As to CRY's claim that the individuals named in its civil complaint do not have information pertinent to this action, that complaint appears to involve the very same claims and allegations as this action, and therefore, it is conceivable that these individuals may have knowledge of matters discoverable in this action. Furthermore, information concerning "health reports, medical records, tests and names of individuals,

and real estate appraisals" directly relates to allegations made by CRY in its notice of appeal that the Mill Service impoundment has "devalued the properties of the residents of Yukon" (para. 49) and "caused sever(e) and substantial and continuing and permanent damage to the health of the residents of the community" (para. 50), and is clearly relevant. County of Westmoreland v. DER and Mill Service, Inc., 1987 EHB 633.

As to CRY's obligation to supplement its prior responses, Pa.R.C.P. 4007.4 requires a party to supplement its response "(1)...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" and "(2)...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...is no longer true."

Therefore, we hold that CRY has a duty to supplement its responses to Interrogatories Nos. 18, 18(f), 20, and 20(a)-(f) and to produce any documents identified therein which are within the possession, custody, or control of CRY, as required by Pa.R.C.P. 4009(a)(1). Furthermore, CRY is under a continuing obligation to supplement its responses as set forth above.

Duty to respond properly and completely to Mill Service's First Set of Interrogatories

In its first Motion to Compel, Mill Service requested that CRY be ordered to respond more specifically to certain interrogatories listed therein. We agree that CRY's answers to these interrogatories were, for the most part, vague and incomplete. When asked to provide the factual basis for various allegations, CRY responded with such generic answers as "numerous Departmental letters and documents" (Answer to Interrogatory No. 6(2)),

"groundwater monitoring reports" (Answers to Interrogatories Nos. 18(a), 18(d), 21(h), 28(c), 30(d)), and "health studies" (Answers to Interrogatories Nos. 18(f), 20(c), 42); or such non-responsive answers as "Anyone remotely familiar with the facts of the case...including all DER and Mill Service employees" (Answer to Interrogatory No. 11(b)). In addition, when requested to identify specific authority to support its claims, CRY failed to provide specific sections of the law on which it was relying or specific citations to cases (e.g. "recent decision in the Eastern District of Pennsylvania..." -- Answer to Interrogatory No. 5).

Interrogatories are to be answered fully and completely unless they are objected to. Pa.R.C.P. 4006(a)(2). CRY's responses are non-specific and fail to set forth with any particularity the information requested. The only interrogatory listed in Mill Service's Motion to Compel to which CRY has objected is No. 41(c). This interrogatory requests CRY to provide owners' names and addresses for all properties alleged to have been devalued by Mill Service's facility. CRY objects to this as being irrelevant. On the contrary, this information is relevant as CRY itself has raised the issue of property devaluation in paragraph 49 of its Notice of Appeal.

Therefore, we hold that CRY must provide complete and specific responses to those interrogatories listed in Mill Service's first Motion to Compel. However, with respect to Interrogatory No. 52, where Mill Service is requesting addresses for "any and all experts Appellant has consulted with regard to the factual matters related to this appeal," we hold that, pursuant to Pa.R.C.P. 4003.5(a)(3), CRY is obligated to provide information only with respect to experts expected to be called as a witness for trial.

O R D E R

AND NOW, this 3rd day of July, 1990, upon consideration of Mill Service's Second Motion to Compel Discovery and Motion for Order to Supplement Prior Responses, it is hereby ordered as follows:

1. On or before July 20, 1990, CRY shall serve upon Mill Service specific and complete responses to the interrogatories listed in Mill Service's first Motion to Compel, as provided herein.

2. On or before July 20, 1990, CRY shall file a supplement to its answers to Interrogatories Nos. 18, 18(f), 20, and 20(a)-(f), and shall produce all documents identified in its supplemental response as required by Pa.R.C.P. 4009(a)(1).

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 3, 1990

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CARTER FARM JOINT VENTURE :
:
v. : EHB Docket No. 88-251-MJ
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 6, 1990

OPINION AND ORDER SUR RENEWED AND AMENDED MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

The Board lacks jurisdiction to hear an appeal from an action of DER if the appeal is filed more than 30 days after the appellant has received written notice of such action. In determining the date on which such written notice was received, the appellant is bound by its statement in its notice of appeal.

OPINION

This action was initiated by Carter Farm Joint Venture ("Carter Farm") with the filing of a notice of appeal on June 23, 1988. The appeal sought review of an order issued by the Department of Environmental Resources ("DER" or "the Department") on May 19, 1988, directing the cessation of certain housing development activities in an area which DER alleged to be a wetland, and the submission of a plan for restoration of the alleged wetland area. The order was issued to five corporations -- Baldwin Brothers, Inc.,

Baldwin Builders, Inc., Baldwin General Contractors, Inc., Baldwin Gardens, Inc., and Downtown Properties, Inc. -- but was sent to only one address as follows: "Baldwin Brothers, Inc., Five West 10th Street, Erie, PA." (Joint Stipulation 1)

The parties' joint stipulation of facts, filed on May 21, 1990, states that the property which is the subject of the DER order is being developed by Carter Farm, which in turn is a joint venture comprised of all of the aforesaid corporations except Baldwin Brothers, Inc. ("Baldwin Brothers"). (Joint Stipulation 5)

The notice of appeal states that Carter Farm received the order on May 23, 1988, and recites its address as being "5 West 10th Street, Erie, PA." Since Carter Farm's appeal was filed more than 30 days after the date of receipt of the order set forth in the notice of appeal, the Board, on July 26, 1988, issued a Rule to Show Cause as to why the appeal should not be dismissed. Carter Farm responded on July 28, 1988, claiming that the DER order was sent to the wrong address and that the proper address of the four corporations comprising Carter Farm was "1002 State Street, Erie, Pa." Carter Farm claimed that it did not learn about the order until after May 23, 1988.

On August 3, 1988, Carter Farm filed a supplement to its Response to Rule to Show Cause which stated that a copy of the DER order was received and signed for by Tammy Miller, a clerical employee of Baldwin Brothers, on May 23, 1988. On May 24, 1988, the order was routed to the vice-president of Baldwin Brothers, who also serves as vice-president of two of the corporations comprising Carter Farm. The supplemental response claimed that it was at that time that Carter Farm and the four companies comprising the joint venture

received actual notice of the order. Upon consideration of the supplemental response, the Board discharged its Rule to Show Cause on August 5, 1988.

Prior to this, Carter Farm had filed a petition for supersedeas on July 13, 1988, and a supersedeas hearing was scheduled for August 12 and 15, 1988.

On August 10, 1988, DER filed a Motion to Dismiss, arguing that Carter Farm's appeal was untimely and disputing the claims made by Carter Farm in its responses to the Rule to Show Cause. From the record, it appears that the Board has never ruled on DER's motion.

A supersedeas hearing was held on August 12, 15, and 19 of 1988 before Former Board Member William A. Roth. Board Member Roth allowed the parties to introduce testimony relating to the timeliness of the appeal. However, no decision on this matter appears to have been reached at that time.

On October 27, 1989, this case was reassigned to Board Member Joseph N. Mack.

The matter now before the Board is a Renewed and Amended Motion to Dismiss filed by DER on or about March 26, 1990.

In its motion and supporting brief, DER argues that Carter Farm's notice of appeal states that DER's order was received on May 23, 1990, and, therefore, Carter Farm is bound by this date. DER further argues that the order was properly sent to "5 West 10th Street, Erie, PA", because this was the address provided by an officer of the corporations, and furthermore, that "5 West 10th Street" and "1002 State Street" refer to the same building. Finally, DER argues that the order was properly signed for and accepted by Tammy Miller as an agent of Carter Farm, citing the case of Beltrami v. DER, 1989 EHB 594 (the Board held that the appellant's clerk was acting within the

scope of her apparent authority when she signed for and received a certified mailing containing a civil penalty assessment from DER).

In its opposing brief, filed on April 13, 1990, and its brief on the jurisdictional issue, filed on or about May 22, 1990, Carter Farm argues that receipt of the order by Tammy Miller, an employee of Baldwin Brothers, did not constitute receipt by the four corporations for which she did not work. As a result, Carter Farm argues, the four corporations, which comprised the joint venture, did not receive notice until the following day when an officer of the corporations received the order. Carter Farm further argues that the confusion could have been avoided had DER sent copies of the order to each of the corporations cited, as opposed to sending it only to Baldwin Brothers at its mailing address. Finally, Carter Farm raises the argument that the Board's action of ruling on the supersedeas was in effect a ruling that jurisdiction was proper.

Jurisdiction of the Environmental Hearing Board cannot attach to an appeal from an action of DER unless the appeal is filed with the Board within thirty days of receipt of written notice of the action. 25 Pa.Code §21.52(a); Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). The question before us is whether Carter Farm's notice of appeal was filed within thirty days of its receipt of DER's order. We hold that it was not.

Carter Farm's notice of appeal clearly states that it received DER's order on May 23, 1988. We are bound by the plain language of Carter Farm's notice of appeal. Kayal v. DER, 1987 EHB 809; Borough of Lilly v. DER, 1987 EHB 972. Since the appeal was filed more than 30 days later, it is untimely.

As for Carter Farm's assertion that the order was sent to the wrong address, this was contradicted by the testimony of Gregory Baldwin at the hearing on the supersedeas. Mr. Baldwin, who serves as vice-president of Baldwin Brothers and two of the corporations comprising Carter Farm, testified that "5 West 10th Street" is more frequently given as the correct address for Carter Farm. (TR 318) Furthermore, Mr. Baldwin had advised DER in a January 1988 letter that the property in question was "owned by a number of Baldwin corporations, and the proper address is 5 West 10th Street, Erie, Pennsylvania." (TR 285-286)

Likewise, we cannot agree with Carter Farm's argument that service of the order on Tammy Miller did not constitute service on the companies comprising Carter Farm. Mr. Baldwin testified that Miss Miller can receive mail for all five of the corporations in question and has done so on occasion. (TR 275, 279) He further testified that at times there may be confusion with the mail and Tammy Miller is "like a drop all for everything." (TR 275) See Beltrami v. DER, supra.

Finally, Carter Farm argues that any question concerning timeliness of the appeal has already been resolved, in that Former Board Member Roth's action of ruling on the supersedeas was in effect a ruling that jurisdiction was proper. In other words, Carter Farm is claiming that in order for Former Board Member Roth to have reached a decision on the supersedeas matter, the Board must have already determined that it had jurisdiction to hear the appeal.

However, there is nothing in the record to indicate that a ruling was ever made on DER's Motion to Dismiss. In fact, as previously noted, Former Board Member Roth allowed the parties to introduce testimony at the

supersedeas hearing regarding timeliness of the appeal. The fact that a ruling was issued on the supersedeas does not by itself act as a denial of DER's Motion to Dismiss.

Although this matter would have been more appropriately resolved at the outset of the appeal, the question of jurisdiction may be raised at any stage of the proceeding. Fitzsimmons v. DER, 1986 EHB 1190 (Board granted DER's motion to dismiss for lack of jurisdiction, and held that DER was not estopped from raising this issue 17 months into the appeal.)

We must reach the conclusion, based on the facts before us, that Carter Farm's appeal was not filed in a timely manner, and therefore, DER's Renewed and Amended Motion to Dismiss is granted.

O R D E R

AND NOW, this 6th day of July, 1990, it is hereby ordered that the Department of Environmental Resources' Renewed and Amended Motion to Dismiss is granted, and the appeal of Carter Farm at Docket No. 88-251-MJ is dismissed for lack of jurisdiction.

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JOSEPH N. MACK
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DATED: July 6, 1990

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M. DIANE SMIT
SECRETARY TO THE E

JEK CONSTRUCTION COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 90-111-E**
	:	
	:	**Issued July 10, 1990**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR APPELLANT'S PETITION
FOR RECONSIDERATION

Synopsis

Where a portion of an Opinion dismissing an appeal could be misconstrued as saying the Board failed to consider exhibits offered in opposition to dismissal, reconsideration is granted for purposes of clarification as to the Board's review of the exhibits prior to dismissal of the appeal.

OPINION

On May 18, 1990 we issued our Opinion and Order Sur Motion To Dismiss in which we granted the Department of Environmental Resources' ("DER") Motion To Dismiss the appeal of JEK Construction Company, Inc. ("JEK"). Thereafter, on June 1, 1990, we received an eight page Petition For Reconsideration filed on JEK's behalf. The main thrust of JEK's Petition is that we failed to consider the affidavits and exhibits offered by JEK in opposition to DER's Motion To Dismiss. Upon reconsidering our Opinion and Order on the basis of

JEK's Petition, we are reaffirming same. In doing so, however, we wish to clarify our review of the pleadings, affidavits and exhibits offered by JEK in opposition to DER's Motion To Dismiss.

In our Opinion dismissing JEK's appeal, while evaluating whether to grant or deny DER's Motion, we discussed the arguments raised in JEK's Notice of Appeal. In a portion of this discussion we wrote:

> 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"). [Opinion at page 3]

In its Petition For Reconsideration, JEK correctly points out that the DER letter of December 28, 1989 was included as an Exhibit to an Affidavit filed in opposition to DER's Motion To Dismiss (Exhibit H to the undated Affidavit of Anthony Vitale, P.E. and James E. Vitale, Ph.D. given on behalf of JEK and filed with us on April 6, 1990). Unfortunately, JEK's counsel then makes the mistaken assertion in Paragraph 6 of JEK's Petition that, based on the aforesaid quote, the Board failed to find or consider this letter, and, thus, that perhaps the Board failed to consider JEK's Affidavits and the Exhibits thereto.

What we said in our Opinion as to JEK's reference to DER's letter of December 28, 1989 was true. In its specification of reasons for its appeal JEK referenced the letter but it failed to attach it as an Exhibit to the Notice of Appeal. The letter was attached to the aforesaid Affidavit. Contrary to JEK's suggestion, we thoroughly reviewed <u>all</u> of the Exhibits and this Affidavit before issuing our Opinion and Order of May 18, 1990. That review included DER's letter of December 28, 1989. We conducted such a review because such a motion must be construed in a light most favorable to the non-moving

party. Pengrove Coal Company v. DER, 1987 EHB 913. We have reviewed that letter yet again in the course of writing this Opinion and find nothing in it to cause us to change what we said in our Opinion and Order of May 18, 1990 in which we dismissed this appeal. Accordingly, we reaffirm our Opinion and Order of May 18, 1990.[1]

ORDER

AND NOW, this 10th day of July 1990, upon reconsideration in the instant proceeding of our Opinion and Order dated May 18, 1990, the Opinion and Order is affirmed as clarified herein and the appeal by JEK at the above docket number is dismissed.

---

[1] In paragraph 12 of JEK's Petition, JEK also misconstrued our statement on pages 12 and 13 of our Opinion that JEK could not collaterally attack DER's actions in coordinating issuance of a permit for rock underdrains to be located beneath a portion of a municipal solid waste disposal site with issuance of a municipal solid waste permit for that specific landfill site. JEK mistakenly asserts in Paragraph 12 that we were telling it that it could appeal from oral statements by DER's staff. We were not doing so. According to JEK's Notice of Appeal, "On October 13, 1989..." JEK was advised by letter from DER [Exhibit F to the aforementioned affidavit] that DER had completed its review of JEK's application for a permit for these rock underdrains, but that the permit was forwarded to the DER office which would review JEK's application for a municipal solid waste permit. The DER letter went on to say the rock underdrain permit would not be "...valid until a waste management permit is issued by [DER]." Our opinion stated JEK took no appeal from this letter of October 13, 1989, so that DER's decision could not be challenged collaterally in the instant proceeding. Our opinion on this point did not deal with oral representations by DER personnel, but with this letter. We reaffirm that position, also.

Finally, in Paragraph 17 of its Petition, JEK misunderstands our Opinion's observation that DER "faxed" a Reply Brief to us on April 12, 1990 and there was no objection thereto by JEK. JEK's counsel states he does not object to DER's use of a fax machine to meet a Board imposed deadline and that he always extends lawyerly courtesies to opposing counsel. We expect counsel will continue to extend such courtesies just as we expect courtesy of all attorneys appearing before us. We also do not object to "faxing" of this Brief. We did not expect to baffle JEK's counsel with our observation as to a lack of objection, however. JEK did not object to DER's filing of an unsolicited Reply Brief with accompanying letter and affidavit. It was in the absence of such an objection from JEK to this submission that we considered DER's Reply Brief in preparing this opinion. See 1 Pa. Code §35.191.

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JOSEPH N. MACK
Administrative Law Judge
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DATED: July 10, 1990

cc: Bureau of Litigation
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For the Commonwealth, DER:
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Western Region
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M. DIANE SMI
SECRETARY TO THE

MUSTANG COAL AND CONTRACTING CORPORATION	:	
	:	
v.	:	**EHB Docket No. 90-113-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 13, 1990**

OPINION AND ORDER
SUR MOTION TO STRIKE

Synopsis

The Department of Environmental Resources' (DER) Motion to Strike Appellant's Pre-Hearing Memorandum is granted where the document submitted does not fully meet any of the requirements of the Board's Pre-Hearing Order No. 1 and, further, does not inform the DER or the Board of Appellant's position.

OPINION

On March 13, 1990, Mustang Coal & Contracting Corporation (Mustang or Appellant) filed an appeal to this Board from a DER Compliance Order dated March 1, 1990 in connection with Mining Permit Number 17890106, issued to Mustang for a surface mine in Woodward Township, Clearfield County. The Compliance Order cited Mustang for allegedly conducting surface mining beyond the bonded area, in violation of §4(a) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198 as amended, 52 P.S. §1396.4.

The Board thereafter issued a Pre-Hearing Order No. 1 dated March 20, 1990. Pre-Hearing Order No. 1 required Mustang to file a Pre-Hearing Memorandum with the Board on or before June 4, 1990. This order required the following:

A. Statement of facts each party intends to prove.

B. Contentions of law and detailed citations to authorities including specific sections of statutes, regulations, etc. relied upon.

C. Description of any scientific tests relied upon by any party and summary of testimony of experts.

D. Order of witnesses.

E. List documents sought to be introduced into evidence, copies of which shall be attached...

(Emphasis added)

On June 5, 1990, the Board received a one and one-half page document purporting to be Mustang's "Pre-Hearing Memorandum." The memorandum does not set out any facts as required by Section A of Pre-Hearing Order No. 1, except to indicate that Mustang is "engaged in the business of mining coal under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("Clean Streams Law") and was authorized to continue to mine under Surface Mining Permit No. 17890106."

Its response to Section B of Pre-Hearing Order No. 1 is to state as follows: "Mustang Coal & Contracting Corp. did at all times mine in accordance with the laws and statutes of the Commonwealth of Pennsylvania and the Clean Streams Law." This is Mustang's complete response to a requirement that the appellant set out its "contentions of law and detailed citations to

authorities including specific sections of statutes, regulations, etc. relied upon."

As a response to Section C of the order, Mustang states that it "did mine and reclaim areas which Mustang was authorized to mine and reclaim as per surveys done on Wednesday, March 8, 1989, by Ronald Lobb Associates, and survey done on September 6, October 18, November 16, and December 12, 1989 by Hess & Fisher Engineers, Inc. Mustang Coal & Contracting Corp. did at all times mine within it's [sic] permit boundaries." There is no summary of expert testimony beyond this flat statement.

Mustang has complied with Section D by submitting an order of witnesses as required.

In response to Section E, Mustang states, "Copies of the deeds of Subject Properties and Adjoining Properties attached, Copies of Surveys are attached to this Memorandum." Attached to the memorandum are copies of the following: a deed, part of a tax map, part of a topographical map, a map prepared by Hess and Fisher Engineers, Inc., and a March 27, 1989 letter from Ronald Lobb Associates to John Varner at DER's Bureau of Mining & Reclamation Permit & Technical Services Section referencing "SMP 17823174-Chandler Op." and indicating an incomplete survey. There is no attempt to relate any of these documents to the case at issue. Some of them are documents introduced in another Mustang case at Docket No. 89-494 and deal with Surface Mining Permit No. 17823174, a different permit.

It has been and is the position of the Board that the purpose of the Pre-Hearing Memorandum is to "flesh out" the appeal and to tell the Board what evidence will be presented by the appellant. Mid Continent Insurance Co. v. Commonwealth of Pennsylvania, DER, 1989 EHB 1299. DER properly points out

that the paucity of information in Mustang's Pre-Hearing Memorandum makes it very difficult for DER to prepare its Pre-Hearing Memorandum and its case for trial. This Board has held that sanctions may be imposed under 25 Pa.Code §21.124 for a party's non-compliance with Pre-Hearing Order No. 1. Mid Continent Insurance, supra. We will in consideration of all of the above enter this order.

O R D E R

AND NOW, this 13th day of July, 1990, DER's Motion to Strike Appellant's Pre-Hearing Memorandum is granted and the document purporting to be Appellant's Pre-Hearing Memorandum is stricken. Appellant is directed to file a new Pre-Hearing Memorandum with this Board not later than August 1, 1990. This Pre-Hearing Memorandum shall comply fully with Pre-Hearing Order No. 1 as explained above. The Appellant shall be barred from offering any evidence or testimony not spelled out in its new Pre-Hearing Memorandum. The Appellant is specifically directed to paragraph 5 of Pre-Hearing Order No. 1 and is cautioned that appropriate sanctions will be invoked for failure to comply fully with Pre-Hearing Order No. 1 and this order.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 13, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

JAMES E. MARTIN	:	**EHB Docket No. 84-028-G**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 17, 1990

OPINION AND ORDER SUR
SUPPLEMENTAL APPLICATION FOR
AWARD OF ATTORNEYS FEES AND COSTS

By Maxine Woelfling, Chairman

Synopsis

The Board awards an appellant $4,889.37 in attorneys fees and costs under the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 *et seq.* (the Costs Act). Having previously determined appellant was the prevailing party and that the position of the Department of Environmental Resources (Department) was not substantially justified, the Board ordered appellant to submit additional information relating to his net worth and the amount of fees and costs. The Board holds that net worth must be determined as of the date of the adversary adjudication - i.e., the date of issuance of the compliance order - and that based on the minimal requirements of the Costs Act and the regulations adopted thereunder, appellant's statement of net worth established that he was eligible for an award of attorneys fees and costs. The Board then calculated the award based on the statutory compensation rates for attorneys and consultants.

OPINION

The matter presently before the Board stems from three appeals by James E. Martin of compliance orders relating to surface mining operations conducted by Martin under authority of Mine Drainage Permit Nos. 3574SM14 and 3578BC16. The procedural history of these appeals was detailed in James E. Martin v. DER, 1989 EHB 821, wherein the Board evaluated Martin's claim for attorneys fees and costs under the Costs Act. The Board rejected Martin's application for attorneys fees at Docket No. 83-121-G because the Department's adjudication was initiated prior to the effective date of the Costs Act and rejected his claim for attorneys fees at Docket No. 84-016-G because Martin was not the prevailing party. Although the Board determined that Martin was the prevailing party at Docket No. 84-028-G, it held that it could not, at that time, award fees and costs to Martin because he had failed to submit a statement of net worth in conformity with 4 Pa.Code §§2.6 and 2.7(c) and had failed to submit detailed contemporaneous records of time spent by his counsel on the appeal as required by 4 Pa.Code §2.5(b). Rather than reject Martin's application, the Board directed Martin to submit, on or before August 25, 1989, the necessary information to cure these deficiencies.

On August 25, 1989, in response to the Board's ruling, Martin submitted statements showing the net worth of Mr. Martin individually and Mr. and Mrs. Martin jointly (Ex. A); copies of all original itemized billings from counsel to Martin with an accompanying affidavit and calculation in support of the fees requested (Ex. B); and documents relating to billings for engineering consulting fees related to Martin's appeal. Finally, Martin certified that, with respect to Exhibit A, "the net worth shown for him

individually, and for he and his wife jointly, would be substantially unchanged dating back to the time of the original application for award of attorneys fees in this matter."

The Department responded to Martin's submission by letter dated September 25, 1989. The Department contended, *inter alia*, that since this adversary proceeding was commenced in 1984 when Martin appealed the Department's compliance order, Martin had to demonstrate his financial eligibility as of that time and that Martin had not done so because he failed to submit sufficient information for the Department to make this determination.[1]

Section 3(a) of the Costs Act provides that

> (a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

In order to receive an award, a party must, according to §3(b) of the Costs Act, submit an application which includes this information:

> (1) A showing that the applicant is a prevailing party and is eligible to receive an award under this section.

---

[1] On October 26, 1989, the Department sent a letter to this Board requesting that the Board review the Department's letter of September 25, 1989, and advise the parties whether the Board would require Martin to furnish additional information to the Department. The Board notified the Department in an October 30, 1989, letter that it would make its decision based upon the information Martin had submitted on August 25, 1989. The Board, and not the Department, makes a determination as to whether an award of attorneys fees is appropriate.

(2) A clear statement of the total amount sought, including:

(i) an itemized list of fees from any attorney, agent or expert witness representing or appearing in behalf of the party;

(ii) the actual time expended by such agent or expert witness; and

(iii) the rate at which the fees and other expenses were computed.

(3) An allegation that the position of the Commonwealth agency was not substantially justified.

"Party" is defined in §2 of the Costs Act as:

A party, as defined in 2 Pa.C.S. §101, which is an individual, partnership, corporation, association or public or private organization other than an agency. the term does not include:

(1) Any individual whose net worth exceeded $500,000 at the time the adversary adjudication was initiated and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $2,000,000 at the time the adversary adjudication was initiated.

(2) Any sole owner of an unincorporated business, or any partnership, corporation, association or organization having more than 250 employees at the time the adversary adjudication was initiated.

(3) Any party represented by counsel paid, directly or indirectly, in whole or in part, by an appropriation, grant, subsidy or loan made by the state, local or federal government.

(emphasis added)

See also, 4 Pa.Code §2.6(d). Martin has sought his award under the criteria articulated in subsection (1) of the definition of party. Consistent with the requirements of the Costs Act and 4 Pa.Code §2.6(c), Martin was required to

submit a statement of his net worth at the time of the initiation of the adversary adjudication - i.e, December 28, 1983, the date of issuance of the compliance order appealed at Docket No. 84-028-G.[2]

Paragraph 4 of Appellant's Supplemental Submittal of Attorneys Fees and Costs states:

> With respect to Exhibit "A" (the statements of net worth), Martin further certifies that the net worth shown for him individually, and for he and his wife jointly, would be substantively unchanged dating back to the time of the original application for award of attorneys' fees in this matter.
>
> (emphasis added)

The original application for award of attorneys fees was filed by Martin on May 12, 1986; Paragraph 4 of that application stated

> Appellant is an individual whose net worth is now and was at the time each adversary adjudication was initiated by the Department less than Five Hundred Thousand ($500,000.00) Dollars.
>
> (emphasis added)

Taking these two statements together, we must conclude that Martin's submittals relate to his net worth at the time the Department initiated the adversary adjudication.

Next, we must determine whether Martin's supplemental statement of net worth was in accordance with 4 Pa.Code §2.6(c). That regulation states:

> (c) Each applicant shall provide a statement showing the net worth of the applicant. The statement may be in any form convenient to the applicant that provides full disclosure of assets and liabilities and is sufficient to determine eligibility under this subchapter. The net worth

---

[2] The Department appears to contend that the date Martin filed his notice of appeal is the operative date. However, the order, and not the notice of appeal, is the adversary adjudication.

> statement shall be made available only to the adjudicative officer and the Commonwealth agency except when an appeal is taken, in which case the net worth statement shall be included in the record of the proceeding in which an award is sought.
>
> (emphasis added)

Thus, our first task is to ascertain whether Martin's submittal establishes a net worth of less than $500,000.

The only indication of how net worth is to be calculated under the Costs Act is in 4 Pa.Code §2.6(c), which prescribes that the net worth statement "may be in any form convenient to the applicant that provides full disclosure of assets and liabilities sufficient to determine eligibility..." (emphasis added). The findings and purposes of the Costs Act are articulated in §1:

> (a) The General Assembly finds that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable action of administrative agencies because of the expense involved in securing the vindication of their rights in administrative and review proceedings.
>
> (b) The General Assembly further finds that because of the greater resources and expertise of the Commonwealth, the standard for an award of fees against the Commonwealth agencies should be different from the standard governing an award against a private litigant in certain situations.
>
> (c) It is therefore the intent of the General Assembly to:
>
> (1) Diminish the deterrent effect of seeking review of or defending against administrative agency action by providing in specified situations an award of attorney's fees, expert witness fees and other costs against the Commonwealth.
>
> (2) Deter the administrative agencies of this Commonwealth from initiating substantially

> unwarranted actions against individuals, partnerships, corporations, associations and other nonpublic entities.
>
> (emphasis added)

Interpreting the statement of net worth requirement under the Costs Act in light of these statutory purposes leads us to a conclusion that the type of information which would satisfy 4 Pa.Code §2.6(c) is rather simple and straightforward.

Martin has submitted a notarized statement setting forth a recitation of the assets and liabilities of James E. Martin, individual, and the assets and liabilities of James E. and Mary E. Martin, husband and wife. Martin has individual liabilities of $3,913,564.62, with only $5,000 in assets to offset them.[3] The Martins jointly have assets of $635,757 and liabilities of $408,211, leaving a net worth of $227,546.

The Department argues that it is not possible to determine Martin's net worth for 1984,[4] without certain other financial documentation, including *inter alia*, 1984 tax returns, a copy or face value of investment instruments, a valuation of his personal residence, the 1984 value of two partnership shares held by Martin, and a valuation of his personal property and business and personal vehicles. The Department also asserts that Martin's statement of net worth should have been attested to by a certified accountant.

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[3] This asset is 1.729 acres of land in Boggs Township, Armstrong County. It has a handwritten notation of "-$5,000" after it in Martin's statement of net worth.

[4] As we have previously explained in Footnote 2, 1983 was the year the order was issued and, therefore, when the adversary adjudication was initiated against Martin.

What the Department urges - essentially a detailed financial audit - is inconsistent with §1 of the Costs Act in that the private litigant is again placed in a disadvantageous position by having to secure professional services at its expense to prepare and submit such information. That was never the intent of the Costs Act. These concerns were evident in the rulemaking proceeding for the regulations implementing the Costs Act. The preamble to the proposed regulations declared at 13 Pa.B. 3320 (Oct. 29, 1983) that

> The regulations provide that the eligibility for prevailing party awards based on the amount of assets held or persons employed shall be determined based on detailed exhibits prepared by the applicant and submitted to the adjudicative officer.

Consistent with this declaration, the proposed 4 Pa.Code §2.6(c) at 13 Pa.B 3322 (Oct. 29, 1983) provided:

> Each applicant shall provide a detailed exhibit showing the net worth of the applicant. The exhibit must provide full disclosure of assets and liabilities and be sufficient to determine eligibility under this subchapter. Net worth exhibits shall be included in the record of the proceeding in which an award is sought.

However, on November 3, 1983, these proposals were disapproved by the Independent Regulatory Review Commission (IRRC)[5] because the detailed informational requirements of the proposed regulations were inconsistent with the purpose of the Costs Act. The final regulations, including 4 Pa.Code §2.6(c), were revised in response to the concerns expressed by IRRC, 14 Pa.B.

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[5] IRRC reviewed the proposed regulations pursuant to its mandate in the Regulatory Review Act, the Act of June 25, 1982, P.L. 633, as amended, 71 P.S.§745.1 *et seq.*

1707 (May 19, 1984), and eliminated detailed requirements relating to net worth. Thus, the interpretation urged by the Department is inconsistent with the regulation at 4 Pa.Code §2.6(c).

Turning now to Martin's statement of net worth, he has indicated individual liabilities in excess of $3 million and assets of approximately $5000. Even aggregating this with his net worth jointly with Mrs. Martin, it does not require a degree in higher mathematics to determine that his net worth is less than $500,000.[6] Consequently, we conclude that Martin meets the net worth requirements of the Costs Act.[7]

Next, we must calculate the amount of the award. Counsel for Martin, in compliance with the Board's order, submitted detailed, contemporaneous invoices, with notations as to what time was to be attributed to Docket No. 84-028-G, as Martin had related matters pending at Docket Nos. 83-121-G and 84-016-G, and where it was impossible to attribute the time to any one of the three docket numbers, time was divided by three. Counsel also summarized the

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[6] The Department asserts in its September 22, 1989, letter that it has additional information regarding Martin's financial condition which it acquired as a result of Martin's assertions that he could not pre-pay civil penalty assessments in appeals docketed at Nos. 88-365-W through 88-373-W. Obviously, that information is not of record here and relates to a different period of time. Also, all of the Department's assertions relate to 1984 valuations of debts and assets, which are not relevant because the adversary adjudication at issue here was initiated in 1983. Furthermore, for the reasons set forth in the succeeding footnote, we do not believe that our task here is to engage in a detailed audit of Martin's financial condition.

[7] In doing so, however, we must emphasize that it is our view that the Costs Act does not mandate us to perform a detailed financial investigation; indeed, we must assess eligibility on the basis of the applicant's statement, for reopening the record is only authorized where additional information on fees and expenses and their reasonableness and necessity is required to reach a determination. 4 Pa.Code §2.14. Protracted litigation concerning eligibility for fee awards was never the intent of the statute. See §3(c) of the Costs Act.

attorneys fees related to Docket No. 84-028-G as $4,465.50 (68.7 hours at $65/hour) plus expenses of $161.56, for a total of $4,627.06. Since these fees are well within the allowable rates in the Costs Act,[8] we hold that Martin is entitled to an award of $4,627.06 in attorneys fees.

The statute also authorizes the award of expenses for the services of expert witnesses necessary for the preparation of a party's case. Martin's supplemental submittal contains an invoice from H. F. Scott, consulting engineer. That invoice does not differentiate among the three Martin appeals pending before the Board, but the supplemental submittal includes a statement from Martin that nine hours of the consultant's time were attributable to Docket No. 84-028-G. Rather than rely on Martin's representations, we will divide the number of consultant hours billed by three, since the matters were consolidated. The consultant billed 18 hours of his time at $40 per hour, so we will allow six hours for Docket No. 84-028-G. But, as for calculating the amount of the award attributable to expenses for expert witnesses, §2 of the Costs Act requires us to calculate it at a rate not to exceed "the highest rate of compensation for expert witnesses paid by the agency involved." The statement of policy for implementation of the Costs Act states at 4 Pa.Code §2.17 that "If a rate of compensation for expert witnesses has not been established by an agency, the rate should not exceed Step H of Pay Range 53 of the Commonwealth's Standard Pay Schedule S-1." Taking official notice of the Official Commonwealth Pay Schedules pursuant to 25 Pa.Code §21.109, we find

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[8] The definition of "fees and expenses" in §2 of the Costs Act, 71 P.S. §2032, generally limits attorneys fees to a rate of $75 per hour. Martin has sought a rate of $65 per hour and we will not consider a higher rate.

that the appropriate rate of compensation is $29.41 per hour.[9] Multiplying that rate by six hours leads to a total of $217.64 for expert witness fees. The consultant also claimed $134 in associated expenses, a $614.40 service charge and $70 for updating his bill. We will disallow the service charge and charge for updating the bill, for there is no authority for awarding such costs. This leaves $134 in expenses, which when divided by three, comes to $44.67 for expenses.

Finally, §3(c) of the Costs Act requires the Board to "include written findings and conclusions and the reasons or basis therefor" in reaching a determination on an award of attorneys fees and costs. The basis for our decision on Martin's request has been set forth in this opinion and our opinion at 1989 EHB 821. The following findings are taken from the two opinions.

FINDINGS

1. James E. Martin is the prevailing party in this matter.

2. The position of the Department as it related to both that portion of the order relating to backfilling and that portion of the order relating to violations of 25 Pa.Code §87.97(a) was not substantially justified.

3. James E. Martin's net worth did not exceed $500,000 at the time the Department issued the compliance order which was adjudicated by the Board at 1986 EHB 313.

4. Martin's counsel devoted 68.7 hours to this matter and charged $65 per hour for his services.

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[9] The Commonwealth pay schedules were substantially revised approximately two years ago, subsequent to the adoption of the regulations and policies implementing the Costs Act. However, the regulations and policies have not been amended.

5. Martin's counsel had expenses of $161.56 associated with this matter.

6. In calculating his bill, Martin's consulting engineer failed to differentiate among the three appeals consolidated for hearing; therefore, the amount of hours and expenses will be divided by three.

7. The rate of compensation for Martin's consultant shall, in accordance with 4 Pa.Code §2.17, be $29.41 per hour.

8. Martin's consultant devoted six hours to this matter.

9. Martin's consultant had associated expenses of $134 for the three matters consolidated for hearing.

10. Neither party unduly or unreasonably protracted the resolution of the compliance order in controversy.

11. Martin is entitled to an award of $4,889.37, calculated as follows:

a) $4,465.50 for attorneys fees;

b) $161.56 for the expenses of Martin's counsel;

c) $217.64 for consultant fees; and

d) $44.67 for consultant expenses.

12. This award does not exceed the statutory maximum of $10,000.

O R D E R

AND NOW, this 17th day of July, 1990, it is ordered that James E. Martin's petition for attorneys fees is granted and the Department of Environmental Resources shall, within 30 days, pay $4,889.37 to Martin.

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: July 17, 1990

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Zelda Curtiss, Esq.
Western Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA

bl

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BC

ALOE COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 86-633-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 17, 1990

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

Aloe Coal Company ("Aloe") has standing to appeal a surface mining bond forfeiture by the Commonwealth of Pennsylvania Department of Environmental Resources ("DER"), where Aloe's role is not that of the surface miner but, rather, is guarantor to the surety company which issued these bonds.

Aloe has failed to prove DER negligent in its investigation of the relationship between Black Carbon Fuels, Inc. ("BCF") and General Mines, Inc. ("General") and its owners and officers at the time DER issued BCF its permit. Aloe has also failed to show that, even if DER's investigation was inadequate to the point that a proper investigation would have caused DER to deny BCF's permit application, this inadequacy creates a defense to

forfeiture for a surety which 1) did not assume that role until many months after DER issued the surface mining permit and 2) failed to produce any evidence of fraudulent concealment thereof by DER.

Background

On November 14, 1986, Aloe filed a Notice of Appeal with this Board challenging the DER's October 9, 1986 forfeiture of two surety bonds posted by Aetna Casualty and Surety Company ("Aetna") for BCF's surface coal mine. Aloe was guarantor of the forfeited bonds. The bonds were declared forfeited after BCF failed to reclaim the mine site located in Smith Township, Washington County.

There is a long and confused procedural history of DER's unsuccessful requests for summary judgment in this case which is set forth at length in Board Chairman Woelfling's Opinion and Order thereon issued on June 30, 1989. (Aloe Coal Company v. DER, 1989 EHB 757). Rather than repeating it, we incorporate that recitation of the appeal's procedural history herein by reference.

After denying this motion, we scheduled this matter for a hearing on October 6, 1989. On September 27, 1989, the parties filed a Joint Motion To Submit Case On Stipulated Facts. We cancelled the hearing on this matter and granted this Motion in our Order of October 5, 1989. Thereafter, the parties filed their stipulation and respective briefs. On April 2, 1990, this matter was reassigned to Board Member Richard S. Ehmann.

Aloe's Brief concedes the fact that BCF failed to reclaim the mine site. Aloe raises only one issue in its Brief. It says DER is precluded from forfeiture of the bonds under the principle that the surety is discharged of its obligation to DER where DER acts prejudicially to the surety's rights,

and, in turn, the guarantor of the surety (Aloe) is likewise discharged. Specifically Aloe urges a connection existed between BCF's officers and officers of General, and DER was negligent in its investigation of this connection and the fact that DER had previously forfeited surface mining bonds of General, so that DER should have refused to issue the authorizations to mine for which the Aetna bonds were posted. Since a party is deemed to have abandoned the contentions not raised in its Post-Hearing Brief (Lucky Strike Coal Company et al. v. Commonwealth, DER, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988)), this is the sole issue for us to address at this time.

FINDINGS OF FACT

1. The Appellee is DER, which is the agency of the Commonwealth authorized to enforce and administer the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"); the Administrative Code, Act of April 9, 1929, P.L 177, as amended, 71 P.S. §510-17 ("Administrative Code") and the Rules and Regulations adopted thereunder.

2. The Appellant is Aloe, a Pennsylvania corporation. (Aloe's Notice of Appeal)

3. BCF operated a surface mine on the Toth Farm in Smith Township, Washington County ("Toth mine site") under authorization of Mining Permit No. 63840103 (Stipulation No. 1).

4. DER issued Surface Mining Permit No. 63840103 ("SMP") to BCF on January 1, 1985, allowing BCF to begin mining activity on 19.2 acres of the 27

acres covered by the permit. BCF submitted the application for the SMP to the Department on April 30, 1984. A copy of Mining Permit No. 63840103 is attached as Exhibit No. 1 (Stipulation No. 2).[1]

5. The Department issued Mining Permit No. 63840103 pursuant to BCF's submission of a surety bond issued by Seaboard Surety Company, Bond No. 947166, in the amount of $33,800.00. A copy of Bond No. 947166 is attached as Exhibit No. 2. (Stipulation No. 3)

6. On October 15, 1985, BCF submitted an additional surety bond written by Aetna, Bond No. 3S100189919BCA ("Aetna Bond No. 1"), in the amount of $11,000.00 in order to upgrade 5.5 acres from support area to mining area. DER accepted this bond, and issued authorization to mine No. 63840103-01(C) on November 1, 1985 to reflect the upgrading of the 5.5 acres. A copy of Aetna Bond No. 1 is attached as Exhibit No. 3. A copy of Authorization to Mine No. 63840103-01(C) is attached as Exhibit No. 4. (Stipulation No. 4)

7. On or about October 15, 1985, BCF submitted to DER a surety bond issued by Aetna, Bond No. 3S100201806BCA ("Aetna Bond No. 2"), in the amount of $33,800.00 as a replacement for Seaboard Surety Company Bond No. 947166. (Stipulation No. 5)

8. On January 13, 1986, DER accepted the replacement bond and issued Authorization to Mine No. 63840103-01(C)2, noting that Aetna Bond No. 2

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[1]The facts in the Joint Stipulation of Facts filed by the parties comprise the basis for most of our findings of fact. Where an Exhibit is referenced herein as attached, the reference is to an Exhibit attached to the Joint Stipulation of Facts. In that document, Aloe and DER agreed that the exhibits attached thereto were authentic and that the Board could rely thereon.

replaced the Seaboard Surety Company Bond. A copy of Aetna Bond No. 2 is attached as Exhibit No. 5. A copy of Authorization to Mine No. 63840103-01(C)2 is attached as Exhibit No. 6. (Stipulation No. 6)

9. Aloe was the guarantor of both Aetna Bonds Nos. 1 and 2. (Stipulation No. 7)

10. Aetna Surety Bonds Nos. 1 and 2 were signed on behalf of BCF by Ruth E. Sobotka as President; Sobotka's signature on each bond was witnessed by Michael Berresford, Vice-President of BCF. (Stipulation No. 8)

11. BCF's application for a surface mining operator's license renewal, signed on October 10, 1985, listed Ruth Ellen Sobotka as the President of BCF and Michael B. Berresford as the Vice-President of BCF. DER initially received the license application on October 16, 1985. A copy of this application is attached as Exhibit No. 7. (Stipulation No. 9)

12. Section 10 of the License Application (Exhibit No. 7) required the applicant to identify any mining operations in which any of the owners or officers which were identified in Section 8 are or had been involved. The response to this Section in BCF's License Renewal Application was "N/A." (Stipulation No. 10)

13. Under Section 3.5 of its application for a surface mining permit for the Toth Mine Site, BCF was required to:

> Identify any State or Federal mining permit or bond in the last five year period prior to the date of submission of this application that the applicant or any related party had suspended, revoked or forfeited. (Note: Any related party is any partner, associate, officer, parent corporation, subsidiary corporation, affiliate or persons under common control with the applicant, contractor or subcontractor.)

BCF responded to Section 3.5 as follows: "The applicant has not previously

conducted surface mining operations." A copy of Module 3 of the permit application, containing Section 3.5, and BCF's responses thereto is attached as Exhibit No. 8. (Stipulation No. 11)

14. Under Section 3.2 of its application for a surface mining permit for the Toth Mine Site, BCF listed Barbara J. Petracca as the President and Secretary-Treasurer of the corporation (Exhibit No. 8). (Stipulation No. 12)

15. An application to exceed weight and size limits submitted by BCF to PennDOT was signed on March 8, 1985 by Lloyd Berresford, Vice-President. A copy of this application is attached as Exhibit No. 9. (Stipulation No. 13)

16. A letter from the federal Mine Safety and Health Administration, dated February 26, 1985 and addressed to Barbara J. Petracca, President, Black Carbon Fuels, Inc., noted a courtesy copy was sent to "L. Berresford, Superintendent." A copy of this letter is attached as Exhibit No. 10. (Stipulation No. 14)

17. Inspection reports from the Mine Safety and Health Administration state that they were served to "Thomas Berresford (Mine Foreman)." Copies of these reports are attached as Exhibit No. 11. (Stipulation No. 15)

18. A letter from the Mine Safety and Health Administration, dated March 4, 1985, was sent to Lloyd Berresford, Superintendent, Black Carbon Fuel, Inc. A copy of this letter is attached as Exhibit No. 12. (Stipulation No. 16)

19. Lloyd W. Berresford, Jr. sent several letters containing royalty checks from BCF to Edward J. and Olga K. Toth, the owners of the Toth Farm. Copies of these letters are attached as Exhibit No. 13. (Stipulation No. 17)

20. An invoice from Walter N. Heine Associates, dated November 6, 1985, was sent to Lloyd W. Berresford, Jr., Lo-Mar Enterprises, Inc. and/or Barbara

J. Petracca, President, Black Carbon Fuels, Inc. A copy of this invoice is attached as Exhibit No. 14. (Stipulation No. 18)

21. DER had no knowledge of, nor did it ever see, any of the documents referred to in Findings of Fact 14 through 19 until the parties commenced preparation of this set of Stipulations in October of 1989. (Stipulation No. 19)

22. Lloyd W. Berresford was the President of General. (Stipulation No. 20)

23. General was the permittee of a surface coal mining operation located in Darlington Township, Beaver County, which operated under Mine Drainage Permit No. 31765MI2 and Mining Permit No. 1710-1 (the "Darlington Mine"). (Stipulation No. 21)

24. An August 21, 1978 DER inspection report of the Darlington Mine lists James and Michael Berresford under "Company Officials Contacted" and lists "Superintendent" under "Title." A copy of the report is attached as Exhibit No. 15. (Stipulation No. 22)

25. DER inspection reports of the Darlington Mine, dated June 28, 1977, September 19, 1977 and November 11, 1977, identified Mike Berresford under "Company Official Contacted" and list his title as "Foreman." Copies of these reports are attached as Exhibit No. 16. (Stipulation No. 23)

26. On June 4, 1979, DER declared the bonds for the Darlington Mine forfeited because General had abandoned the mine and failed to timely reclaim it. (Stipulation No. 24)

27. Violations at the Darlington Mine were outstanding from September 1978 until at least 1985. (Stipulation No. 25)

28. On September 30, 1979, DER issued a Cessation Order to General because it was mining coal without a license at the Darlington Mine. A copy of the Cessation Order is attached as Exhibit No. 17. (Stipulation No. 26)

29. An application for a surface mining operator's license submitted to DER by General in January 1977 identified Ruth E. Berresford as the Secretary-Treasurer of General. A copy of this application is attached as Exhibit No. 18. (Stipulation No. 27)

30. Aloe contends that Ruth E. Sobotka is the married name of Ruth E. Berresford. However, DER's files list both Ruth F. Berresford and Ruth E. Berresford as the Secretary/Treasurer of General and Ruth E. Sobotka as the Assistant Secretary and President of BCF. Documents received by DER on or about November 6, 1989 from the United States Bankruptcy Court, N.D. Ohio, confirm that Ruth E. Berresford was also, or formerly, known as Ruth E. Sobotka. A copy of the Bankruptcy Court document is attached as Exhibit No. 19. (Stipulation No. 28)

31. Section 10 of BCF's application for a surface mining operator's license renewal for 1986 required BCF to identify any mining operations in which any of its owners or officers are or had been involved. BCF did not identify General in Section 10 of its application to renew its Surface Mining Operator's License (Exhibit No. 7). (Stipulation No. 29)

32. Section 3.5 of the original application for the Toth Mine SMP required BCF to:

> Identify any State or Federal mining permit or bond in the last five year period prior to the date of submission of this application that the applicant or any related party had suspended, revoked or forfeited. (Note: Any related party is any partner, associate, officer, parent corporation, subsidiary corporation, affiliate or persons under common control with the applicant, contractor or subcontractor.)

BCF did not identify General under Section 3.5 of its application for a Surface Mining Permit for the Toth Mine site (Exhibit No. 8). (Stipulation No. 30)

33. On December 11, 1985, DER received a letter dated December 10, 1985 from Elizabeth P. Muth of Aetna stating that Aetna wished to be relieved of its liability for Aetna Bond No. 2 and requesting that the Department return the bond. A copy of this letter is attached as Exhibit No. 20. (Stipulation No. 32)

34. Subsequent to Aetna's request, BCF submitted an amended Surety Bond Endorsement to DER. The amendments were initialed by Ruth Sobotka, Principal, and by Paul E. Cruciani, Surety, and were dated December 16, 1985. BCF instructed DER not to return Aetna Bond No. 2. (Stipulation No. 33)

35. A chronology of the events surrounding the submission and acceptance of Aetna Bond No. 2 is contained in a memo drafted by John Paone, Mining Permit Compliance Specialist for DER. The memo is attached as Exhibit No. 21. (Stipulation No. 34)

36. On January 13, 1986, DER accepted Aetna Bond No. 2 as a replacement bond. (Stipulation No. 35)

37. BCF operated the Toth mine site from January 1985 until sometime in April 1986. (Stipulation No. 36)

38. Following an inspection at the Toth mine site on May 5, 1986, DER issued and mailed Compliance Order No. 86G286 to BCF, which noted that BCF was violating Special Condition No. 6 of the SMP by having more than one pit open at any one time. DER ordered BCF to backfill one of the open pits by May 8,

1986. DER mailed Compliance Order No. 86G286 to BCF because no one was present at the site to accept the order. A copy of Compliance Order No. 86G286 is attached as Exhibit No. 22. (Stipulation No. 37)

39. After a follow-up inspection of the Toth mine site on May 8, 1986, the DER issued Compliance Order No. 86G289, which cited BCF's failure to comply with Compliance Order No. 86G286, in violation of Section 18.6 of the Surface Mining Act and Section 601 of the Clean Streams Law. Compliance Order No. 86G289, which was mailed to BCF on May 8, 1986, prohibited BCF from conducting mining activity at the Toth mine site until the violations noted in Compliance Order No. 86G286 had been corrected. DER mailed Compliance Order No. 86G289 to BCF because no one was present at the site to accept the order. A copy of Compliance Order No. 86G289 is attached as Exhibit No. 23. (Stipulation No. 38)

40. Following an inspection on June 4, 1986, DER issued Compliance Order No. 86G344, mailed to BCF on June 6, 1986, which noted that BCF had caused or allowed water to accumulate in the mine pits, thereby creating an unsafe condition in violation of Section 4.2(a) of the SMCRA, 52 P.S. §1396.4b(a). DER ordered BCF to immediately begin pumping the accumulated water from the pit to an approved treatment pond, where the water was to be treated so that it would conform with the effluent limits set forth in 25 Pa.Code §87.102. DER set June 30, 1986 as the required abatement date. DER mailed Compliance Order No. 86G344 to BCF because there was no one present at the site to accept the order. A copy of Compliance Order No. 86G344 is attached as Exhibit No. 24. (Stipulation No. 39)

41. After a follow-up inspection on July 2, 1986, DER issued and mailed Compliance Order No. 86G395 to BCF, citing BCF for failure to comply with

Compliance Order No. 86G344; failure to regrade and backfill concurrent with mining, in violation of 25 Pa.Code §87.141(c)(1); and failure to properly handle acid- and toxic-forming spoil, in violation of 25 Pa.Code §87.110. DER prohibited BCF from performing further mining activity at the Toth mine site until the violations noted in Compliance Order 86G344 were corrected and confirmed by the Department. DER also ordered BCF to commence backfilling and to proceed in a continuous manner until backfilling was in current status, and to prevent water from coming into contact with acid- and toxic-forming spoil. The required abatement date was July 10, 1986. DER mailed Compliance Order No. 86G395 to BCF because no one was present at the site to accept the order. A copy of Compliance Order 86G395 is attached as Exhibit No. 25. (Stipulation No. 40)

42. To date, BCF has not complied with DER's Compliance Orders Nos. 86G286, 86G289, 86G344, and 86G395. (Stipulation No. 41)

43. On August 15, 1986, DER advised BCF of its intent to forfeit the surety bonds posted for the Toth mine site. (Stipulation No. 42)

44. On October 9, 1986, DER declared forfeited Aetna Bond No. 1, in the amount of $11,000.00, and Aetna Bond No. 2, in the amount of $33,800.00, as a result of BCF's failure to abate the violations noted in DER's compliance orders. (Stipulation No. 43)

45. Aloe filed the present appeal from the October 9, 1986 bond forfeiture. (Stipulation No. 44)

46. On January 9, 1987, DER filed a Complaint in Equity in Commonwealth Court seeking reclamation of the Toth mine site. The Complaint named the corporate permittee, BCF, and three officers, Michael B. Berresford, Barbara J. Petracca, and Ruth E. Sobotka, as defendants. (Stipulation No. 45)

47. On July 7, 1987, the Chief Clerk of the Court entered judgment by Default against Defendant BCF. A copy of the court's Judgment by Default is attached as Exhibit No. 26. (Stipulation No. 46)

48. On July 24, 1987, the Chief Clerk of the Commonwealth Court entered Judgment by Default against Defendant Barbara J. Petracca. A copy of the Court's Judgment by Default is attached as Exhibit No. 27. (Stipulation No. 47)

49. On October 1, 1987, Commonwealth Court ordered Defendants BCF and Petracca to commence reclamation work at the Toth mine site. A copy of the Court's Order is attached as Exhibit No. 28. (Stipulation No. 48)

50. On May 2, 1988, the Commonwealth Court found that no reclamation work or improvements had been performed at the Toth mine site. The Court held BCF and Petracca in contempt of its October 1, 1987 order, imposed a penalty of $10,000.00 for their wilful contempt of the Court's order, and imposed an additional fine of $100.00 per day if BCF and Petracca did not meet a schedule of remedial action. A copy of the Court's decision is attached as Exhibit No. 29. (Stipulation No. 49)

51. On April 24, 1989, DER filed a Motion for Summary Judgment against Defendant Michael B. Berresford with the Commonwealth Court. (Stipulation No. 50)

52. On June 16, 1989, the Commonwealth Court granted DER's Motion for Summary Judgment against Defendant Michael B. Berresford, finding that no reclamation work had been conducted at the Toth mine site between May 1986 and the present date; that Berresford and BCF removed all equipment from the Toth mine site in July 1986, thereby abandoning it; and that the conditions of the Toth mine site created a public nuisance. The Court held Michael B.

Berresford personally liable for the abandonment of the Toth mine site and ordered him to begin reclamation of the site within 20 days. A copy of the Court's Opinion and Order is attached as Exhibit No. 30. (Stipulation No. 51)

53. The conditions at the Toth mine site which constituted public nuisances included the following:

a. A mine pit in which 25 feet of water had accumulated;

b. A high wall of 35 to 40 feet, of which 15 to 20 feet was above the water level in the pit;

c. An accumulation of garbage and other refuse which had been disposed at the site by unknown persons; and

d. Acid- and toxic-forming spoil material was left in piles on the site, where it would come into contact with rain and surface run-off. (Stipulation No. 52)

54. The Toth mine site is situated in a residential area, surrounded by more than twenty private homes within 300 feet of the permit area; the mine pit and highwall were only 50 feet from the nearest home. (Stipulation No. 53)

55. There was open access to the Toth mine site; no fences or other barriers prevented access by the public to the dangerous nuisance conditions at the site. (Stipulation No. 54)

56. Because of the dangers to the public posed by the nuisance conditions at the Toth mine site, DER awarded a contract on October 18, 1988 for the reclamation of the Toth mine site. Notice to proceed with the project was issued on November 18, 1988 and actual reclamation work began in February 9, 1989. The total contract price was $374,936.00. (Stipulation No. 55)

57. DER anticipates the reclamation work at the Toth mine site will be completed by the end of November 1989. (Stipulation No. 56)[2]

DISCUSSION

The first issue which we face in this matter is whether Aloe has a right to bring this appeal.[3] This issue was raised by DER in its Motion for Summary Judgment. A surety's right to appeal a bond forfeiture is questioned by Commonwealth Court in a footnote in Ohio Farmers Insurance Company v.Commonwealth, DER, 73 Pa.Cmwlth. 18, 457 A.2d 1004 (1983). In Board Chairman Woelfling's Opinion denying DER's Motion For Summary Judgment, she held that Aloe meets the test for having a sufficiently direct, immediate, and substantial interest in the DER action to appeal. Del-Aware Unlimited, Inc. v.DER et al., 1986 EHB 21. We concur and adopt in full her decision on DER's Motion.

The second issue before us, which neither party has addressed, concerns which party has the burden of proof in this appeal. It was DER's burden to show that BCF had failed to reclaim its mine sites. Rockwood Insurance Company v. DER, 1981 EHB 424. Here, Aloe's brief stipulates that BCF failed to reclaim its sites but asserts DER's negligence bars collection from the surety. With this stipulation, DER's burden was met. Aloe's assertion that DER negligence bars collection constitutes an affirmative

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[2]A footnote to DER's brief indicates the site reclamation work has been completed.

[3]There is no record of any appeal by BCF or Aetna from this bond forfeiture.

defense and, as to such defenses, the burden is Aloe's pursuant to 25 Pa.Code §21.101. Ohio Farmers Insurance Co. v. DER, 1981 EHB 384; American Casualty Company of Reading v. DER, 1981 EHB 1.

Aloe's contentions are based upon the statutory requirements of SMCRA and CSL, and rules and regulations promulgated thereunder. Under Section 315 of the CSL, 35 P.S. §691.315, and 4(d) of SMCRA, 52 P.S. §1396.4(d), DER can require surface miners to post bonds to assure compliance with these and other acts regulating various aspects of surface mining. Pursuant to Section 4(h) of SMCRA, 52 P.S. §1396.4(h), DER shall forfeit these bonds for noncompliance with this act in any respect for which the bond was posted.

Under Sections 3.1(b) and 3.1(d) of SMCRA, 52 P.S. §§1396.3a(b) and 1396.3a(d), DER must not issue a mining license or permit to an applicant if it finds a person, partner, associate officer, parent corporation, or subsidiary corporation, contractor or subcontractor is in noncompliance with the act, or with a permit, order, decree or assessment, or has had its bonds forfeited or shows an inability or lack of intent to comply with the act. To secure this information, DER's regulations require a permit applicant to submit to DER information about the applicant's "compliance history" and the compliance history of the classes of parties identified above who are "related" to it. See 25 Pa.Code §§87.14, 87.16, 87.17 and 86.37. Nothing in the acts or the regulations promulgated thereunder prohibits issuance of licenses or permits to an applicant solely because he or she is related to such a person by blood or marriage.

Aloe's contention is not that DER did not try to fulfill its obligation under these acts and regulations. Aloe and DER stipulated to facts

showing DER did make inquiries of BCF about "compliance history" matters and BCF gave DER responses. In retrospect, it is apparent that BCF's responses were false and misleading. Aloe contends more should have been done by DER which, if done, would have caused denial of this permit. Aloe urges DER should have discovered the connection between the Berresford family, BCF and General, and that its negligent failure to do so bars recovery on the bonds by DER.

We now turn to this defense itself. Aloe's theory is based on the premise that, as guarantor to Aetna, Aloe stands in Aetna's shoes as to assertion of defenses against DER collection from Aetna. DER does not dispute the validity of this premise.

Aloe's argument fails for three reasons, however. First, even if DER was negligent, this does not constitute a defense to forfeiture of these bonds. DER issued BCF the SMP on January 1, 1985. Aetna posted surety bond No. 1 on November 1, 1985 and surety bond No. 2 on January 13, 1986. Thus, at the time of DER's alleged negligence in investigating the interrelationship of BCF and General and its owners and officers, Aetna, and therefore, Aloe, was not in the picture. Aetna became surety for BCF eleven months after the permit was issued. The stipulated facts incorporated herein as our Findings of Fact do not show any inquiry of DER as to BCF by Aetna prior to Aetna agreeing to serve as BCF surety.

Under City of Harrisburg v. Guiles, 192 Pa. 191, 44 A. 48 (1899), this failure is crucial. In City of Harrisburg, supra, Harrisburg sued Guiles' sureties to recover on the surety bond, based on Guiles' failure to properly perform as Harrisburg's tax collector. The sureties defended, arguing Harrisburg knew Guiles had not properly done his duties in prior years

but had failed to disclose this to the sureties at the time they agreed to serve as such and, thus, Harrisburg should not be able to collect on the bond. The lower court held for Harrisburg, citing the sureties' independent obligation to inquire as to Guiles' activities before undertaking that contract and the sureties' duty of reasonable care of their own interests both before and after entering into the obligation. On appeal, the Supreme Court affirmed, saying as long as there was no fraudulent concealment of Guiles' negligence, the failure to disclose Guiles' negligence was not a ground to relieve the sureties of their obligation (cited with approval in Ohio Farmers Insurance Co. v. Commonwealth, DER, supra).

Here, there is no evidence that Aetna made any inquiry to DER about BCF, so DER had no duty to disclose information. Accordingly, DER's failure to give better information to Aetna does not release Aetna or Aloe. Even assuming DER's investigation was inadequate, that inadequacy does not give rise to any duty to Aetna or defense for Aloe. After all, Aetna had its own independent duty to investigate BCF before it took on this surety contract. Indeed, Aetna may have done so and as a result may have asked Aloe to be guarantor for BCF, or it may have failed to do so. In any case, absent inquiry by Aetna to DER and concealment of BCF's record by DER in order to cause Aetna to agree to post these surety bonds, DER had no disclosure duty.

The second reason Aloe does not prevail is that it has not pointed out any case where negligence of a party such as DER, which occurs before the surety undertakes the surety contract, would bar pursuit of the surety's obligation. Our own research has also failed to disclose any cases with such a holding. The case we found where such duty is imposed only imposes this duty on a creditor for negligence arising after the surety contract exists.

Commonwealth ex rel. Reno v. Daugharthy, 54 Dauphin 405 (1943). We are not surprised that apparently no such case law exists since, as mentioned above, the surety has a duty to inquire of its principal, as part of its duty to manage its own affairs with reasonable care, both before and after entering into the surety contract.[4] Here, it is alleged DER was negligent in investigating BCF prior to issuing BCF the SMP on January 1, 1985. DER did not accept the first Aetna surety bond until November 1, 1985. It accepted the second Aetna surety bond on January 13, 1986. Thus, DER's alleged negligence predated Aetna's involvement with BCF.

Finally, Aloe's argument fails because it has not shown any DER negligence. Aloe correctly points out that in 1977 Mike Berresford was listed as Foreman on DER's inspection reports of General's mine site. In 1978, the names James Berresford and Michael Berresford appear on an inspection report for the General mine site with the indication that one of the two men told DER's inspector that he was superintendent of the mine site. This is the only evidence of Michael Berresford's personal involvement with General. Of course, it is clear that he is vice-president of BCF.

BCF's president is Ruth Ellen Sobotka. She was involved with General as its secretary-treasurer under her married name of Ruth E. Berresford. The fact that these two names apply to the same person only became known to DER in 1989, long after this appeal began.

There is clear evidence of involvement of members of the Berresford clan in both General and BCF on the record before us. With the exception of

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[4]It should be noted that our prior decisions as to these bonds make DER much more than a creditor vis a vis the surface miner who posts these bonds. However, these decisions do not grant a surety greater rights as against DER.

the information outlined above, it is either information developed after DER's forfeiture of the Bonds involved in this appeal, or is data which was not provided to DER at the time it issued BCF its permit or when it accepted each of Aetna's two bonds. When BCF applied for this permit, BCF failed to identify General or any of the Berresfords when asked:

> Identify any State or Federal mining permit or bond in the last five year period prior to the date of submission of this application that the applicant or any related party had suspended, revoked or forfeited. (Note: Any related party is any partner, associate, officer, parent corporation, subsidiary corporation, affiliate or persons under common control with the applicant, contractor or subcontractor.)

While we can see that there were letters in the posession of third persons and other federal and state agencies showing Lloyd Berresford's involvement in BCF from 1985 on, the stipulated facts show that DER was unaware of them. We can and do conclude DER was hoodwinked by the Berresfords as to their ownership and operation of General and BCF. But we have not been shown that DER was negligent. Nothing in the information provided to DER by BCF would prompt further investigation of BCF's relationship to either General or to the other Berresfords. For DER to go beyond asking the question posed immediately above, there had to be some small basis to induce it to do so. The evidence which shows that the first names of General's Ruth E. Berresford and BCF's Ruth E. Sobotka are the same or that Michael Berresford's name appeared as a foreman of the General's mine is not sufficient to do so or to show negligence on DER's part. According to Exhibit No. 30 (Commonwealth Court's Opinion and Order of June 16, 1989 in Commonwealth, DER v. Black Carbon Fuels, Inc. et al., No. 86 C.D. 1987) Michael Berresford did not become involved in BCF until 1984. The passage of five years between DER's 1976 to 1979 dealings with

General and its 1984 and more recent dealings with BCF clearly weighs against suggesting that DER should have recognized this connection. Even if Michael Berresford was a superintendent of General's mine in 1979 (not clearly established in Exhibit 16), this does not show DER negligence in 1985. Bills of attainder or corruption-of-the-blood are not favored legal concepts in today's world, so Michael Berresford's familial relationship to Lloyd Berresford is not enough by itself to find DER negligent in its investigation of BCF as of the time it issued BCF that permit. As DER's Brief points out, having a relative with a negative compliance history, standing alone, "...does not prevent an applicant from obtaining a surface mining permit." The fact that a connection was found between BCF and General after things went wrong is hindsight. This hindsight is not enough to require that in the future DER contact every consultant, surface land owner and state or federal agency as to each permit application it receives. In short, this evidence only shows BCF's deception. Much more would be needed for us to find this is a successful affirmative defense by Aloe.

Since Aloe has offered no adequate defense to DER's forfeiture of these two Aetna bonds, we enter the Order set forth below, sustaining forfeiture.

CONCLUSIONS OF LAW

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

2. Aloe, as guarantor to the surety bonding company, has standing to bring this appeal from DER's forfeiture of surety bonds posted by Aetna for BCF's mine site.

3. Since Aloe is raising an affirmative defense to DER's forfeiture of these surety bonds and concedes that BCF failed to reclaim its mine sites, the burden of proof is on Aloe.

4. As guarantor to Aetna on the surety bonds Aetna issued, Aloe stands in Aetna's shoes as to defenses which can be raised as to forfeiture.

5. The general principle of surety law, that a surety will be discharged from liability whenever the creditor/obligee acts prejudicially to the surety's rights, does not create a defense to forfeiture for Aloe in this case. The reason for this is because:

a) DER's alleged actions occurred prior to Aloe's undertaking the surety contract for BCF;

b) DER's only duty to Aetna at the commencement of the surety relationship was to not fraudulently conceal information on BCF from Aetna when, and if, it was sought by Aetna; and

c) Aloe has failed to show that DER did not conduct a reasonable investigation as to BCF and the suspension, revocation or forfeiture of a related party's bonds or permits prior to permit issuance.

O R D E R

AND NOW, this 17th day of July, 1990, it is ordered that Aloe's appeal is dismissed and DER's forfeiture of Aetna's surety bonds Nos. 3S100189919BCA and 3S100201806BCA is sustained.

ENVIRONMENTAL HEARING BOARD

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JOSEPH N. MACK
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DATED: July 17, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

DEL-AWARE UNLIMITED, INC.	:	
	:	
V.	:	**EHB Docket No. 87-037-M**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 17, 1990**
and NESHAMINY WATER RESOURCES AUTHORITY,	:	
Permittee and PHILADELPHIA ELECTRIC	:	
COMPANY, Permittee-Intervenor and	:	
NORTH PENN AND NORTH WALES WATER	:	
AUTHORITIES, Intervenors	:	

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

By Robert D. Myers, Member

Syllabus:

A non-profit corporation challenged an erosion study performed by DER as the result of a Board remand in an earlier case. The Board holds that (1) the appellant has standing to make the challenge by virtue of its representation of members owning land bordering the two streams; (2) the erosion study was conducted by competent personnel using adequate data and appropriate techniques, without unreasonable time restraints, and free of the influence of DER officials; (3) the erosion study produced a legally sufficient quantification of environmental harm; (4) new conditions added to two encroachment permits represent a valid response to the second prong of the so-called Payne test; (5) the weighing of benefits against the environmental harm was a valid response to the third prong of the Payne test; (6) DER's conclusion that the benefits outweigh the environmental harm was an

appropriate exercise of discretion; and (7) DER's action complied fully with the Board's remand.

Procedural History

These consolidated appeals relate to the Point Pleasant Diversion Project (Project) whereby water from the Delaware River will be diverted into the North Branch, Neshaminy Creek (North Branch) and into the East Branch, Perkiomen Creek (East Branch). The elements of the Project are described in great detail in Del-Aware Unlimited, Inc. v. DER, 1984 EHB 178 (generally referred to as Del-Aware I), an Adjudication that, for the most part, affirmed the actions of the Department of Environmental Resources (DER) in issuing permits associated with the Project. This Adjudication was affirmed by Commonwealth Court, 96 Pa. Cmwlth. 361, 508 A.2d 348 (1986); the Supreme Court refused to hear an appeal, 523 A.2d 1132 (1986).

The Del-Aware I Adjudication remanded to DER two of the permits (ENC 09-77, an outfall structure and related facilities in the East Branch, and ENC 09-81, inter alia, an outfall structure and related facilities in the North Branch) for further review on certain issues. DER acted on the remanded issues on December 30, 1986 when it issued Orders granting six-month time extensions on the two remanded permits. Del-Aware Unlimited Inc. (Del-Aware) filed appeals from these Orders (Appealed Orders) on January 26, 1987, docketed at 87-037 and 87-039. By a Board Order of May 27, 1987, the two appeals were consolidated at 87-037. Philadelphia Electric Company (PECO), the recipient of ENC 09-77, and North Penn and North Wales Water Authorities (NP/NW)[1] were allowed to intervene.

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[1] Neshaminy Water Resources Authority (NWRA), the recipient of ENC 09-81, automatically became a party to the appeal docketed at 87-037 but deferred to footnote continued

After a series of Board decisions[2] served to focus the issues, hearings were held in Harrisburg on 10 days during the spring and summer of 1989 before Administrative Law Judge Robert D. Myers, a Member of the Board. Del-Aware filed its post-hearing brief on November 6, 1989; PECO and NP/NW filed theirs on December 18 and December 27, 1989, respectively. DER and NWRA did not file briefs. The record consists of the pleadings, a hearing transcript of 2,282 pages and 49 exhibits.

Issue

In the Del-Aware I Adjudication, the Board concluded that:

> [I]f and when flows in the East Branch exceed 2.0 fps in its upper reaches, substantial erosion of the bed and bank facing the wetted perimeter of the stream occurs....[This] holds with equal force to the North Branch....1984 EHB 178 at 291.

In Conclusion of Law No. 10, the Board held:

> In order to comply with the second and third of the three Payne[3] standards, DER should have required NWRA and PECO to cease discharges if and when the flow velocities of the respective creeks

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continued footnote
NP/NW in response to the decision in Daniel J. Sullivan et al. v. County of Bucks et al., Court of Common Pleas of Bucks County, Nos. 83-8358 and 84-3273 (1985), affirmed 92 Pa. Cmwlth. 213, 499 A.2d 678 (1985), allocatur denied, 532 A.2d 21 (1986), which held, inter alia, that NP/NW were third party beneficiaries with respect to this Permit. On February 12, 1988, DER transferred to NP/NW the portion of the Permit pertaining to the outfall structure in the North Branch.

[2] Reported at 1987 EHB 351, 1987 EHB 600, 1988 EHB 344, 1988 EHB 431, 1988 EHB 828 and 1988 EHB 850.

[3] The standards were set by Commonwealth Court in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), exceptions dismissed, 14 Pa. Cmwlth. 491, 323 A.2d 407 (1974), affirmed, 486 Pa. 226, 361 A.2d 263 (1976), to measure compliance with Article I, Section 27, of the Pennsylvania Constitution. The second and third standards are: (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? 312 A.2d 86 at 94.

> below their outfalls exceed 2.0 fps, or, in the alternative, DER should have quantified the damage to the receiving streams caused by velocities above 2.0 fps and determined that the benefits derived from the project would clearly outweigh this environmental harm.
>
> 1984 EHB 178 at 331.

The sole issue is whether DER's decision on remand, as reflected in the time extensions issued on December 30, 1986, comports with the mandate of Del-Aware I (see 1988 EHB 850 at 854).

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

Findings of Fact

1. Del-Aware is a Pennsylvania non-profit corporation with its principal office at 6 Stockton Avenue, New Hope, PA. 18938.

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §691.1 et seq., and the rules and regulations adopted pursuant to said Act.

3. PECO is a Pennsylvania public utility corporation with its principal office at 2301 Market Street, Philadelphia, PA.

4. NWRA is a Pennsylvania municipality authority with its principal office at 2875 Old York Road, P.O. Box 378, Jamison, PA.

5. NP/NW are Pennsylvania municipality authorities, the former having its principal office at 200 North Chestnut Street, Lansdale, PA., and the latter having its principal office at 200 West Walnut Street, P.O. Box 1339, North Wales, PA.

6. Mark Dornstreich, an owner of land bordering the East Branch, and David E. Windholz, an owner of land bordering the North Branch, are

members of Del-Aware and desire to have Del-Aware represent their interests in these consolidated appeals (N.T. 6, 55-57, 85-125, 408-420; Del-Aware Ex. No. 58).

7. In response to the Board's remand, DER officials met in June 1984 to discuss what was necessary to comply with the directives of Del-Aware I (N.T. 127-129, 743, 906-907, 2016-2017; Del. Ex. No. 31).

8. Personnel in DER's Bureau of Water Projects and Bureau of Topographic and Geologic Survey were assigned to do field studies of the North Branch and the East Branch (N.T. 131, 251, 257, 742-743, 2017).

9. In performing the field studies, DER personnel

(a) decided that areas within the first two miles downstream from the discharge points would be the most critical areas for potential erosion on both streams and, therefore, selected the following areas for analysis:

East Branch

Reach No.	Length (Ft.)	Location
P-1	1610	Begins near proposed outfall about 900 ft. upstream of Elephant Road Bridge
P-2	483	Begins at U.S.G.S. gaging station weir downstream of Bucks Road Bridge
P-3	1120	Begins about 500 ft. upstream of the Pa. Rt. 313 bridge.

North Branch

Reach No.	Length (Ft.)	Location
N-1	1054	Begins about 50 ft. downstream of the Pa. Rt. 413 bridge. Proposed outfall is located just upstream of the bridge.
N-2	464	Begins about 500 ft. upstream of Township Road T-398 (about 3,000 ft. downstream of reach N-1).

N-3	529	Begins about 100 ft. downstream of Township Road T-420 (about 5,500 ft. downstream of reach N-2).

(N.T. 771-775; Del-Aware Ex. No. 9, p. 2, and No. 15);

(b) using topographic survey, obtained cross-sections of the stream channel in each reach at intervals averaging between 150 feet and 200 feet and at points where the channel geometry or invert slope changed (N.T. 264-265; Del-Aware Ex. No. 9, p. 4 and No. 15);

(c) recorded the geologic makeup of the beds and banks of the stream in each reach (N.T. 747-748; Del-Aware Ex. No. 15); and

(d) obtained soil samples of the bed and banks of the stream in each reach (N.T. 745-746, 774-775; Del-Aware Ex. No. 9, p. 5 and No. 15).

10. Each of the 22 soil samples obtained in the field was subjected to a DER laboratory analysis, including a size analysis (N.T. 766-768; Del-Aware Ex. No. 9, p. 6, and Nos. 14 and 16).

11. Computer modeling of the six reaches was accomplished by use of the HEC-2 Program, developed by the U.S. Army Corps of Engineers as a means of calculating the depth and velocity of flows in a stream channel (N.T. 252-254; Del-Aware Ex. No. 9, p. 4).

12. The field studies performed by DER personnel provided the following basic data needed for the HEC-2 Program's hydraulic analysis:

(a) cross-sectional configuration of the channel;

(b) distance and slope between each cross-section and the next one downstream; and

(c) a friction factor (expressed as Manning's n) determined by the use of engineering judgment and experience;

(N.T. 253-257; Del-Aware Ex. No. 9, pp. 4 and 5).

13. Discharge values modeled by DER using the HEC-2 Program are shown on the following chart:

Reach No.	Median Flow (cfs) (a)	Minimum Flow (cfs) (b)	Pump Flows		Total Flows Used		Flood Flows	
			Full Rate (cfs) (c)	Half Rate (cfs) (c)	Full Rate (cfs) (d)	Half Rate (cfs) (d)	1-Yr. (cfs) (a)	5-Yr. (cfs) (a)
P-1	1.35	--	54.2	27.1	55.6	28.5	112	467
P-2	3.24	--	54.2	27.1	57.4	30.3	238	993
P-3	5.13	--	54.2	27.1	59.3	32.2	338	1409
N-1	--	9.14	77.1	34.4	77.1	43.5	98	409
N-2	--	9.14	77.1	34.4	77.1	43.5	165	686
N-3	--	9.14	77.1	34.4	77.1	43.5	210	876

(a) obtained from report entitled "Investigation of the Effect of Proposed Pumpages on Stream Flows of East Branch Perkiomen Creek and North Branch Neshaminy Creek" by E.H. Bourquard Associates, Inc., July 8, 1970

(b) conservation flows required to meet permit conditions

(c) Half Rate flows for P-1, P-2 and P-3 based upon average consumptive use by one unit at the Limerick Electric Generating Plant; Full Rate flows based on average consumptive use by two units at Limerick. Full Rate flows for N-1, N-2 and N-3 based on maximum rate of pumping authorized by permit; Half Rate flows based on maximum rate under Phase I

(d) Totals modeled by HEC-2 Program

(Del-Aware Ex. No. 9, pp. 2-4).

14. When DER personnel attempted to use the HEC-2 Program to model the low flow for each stream (designated as Median Flow on the foregoing chart), the computer was unable to handle it because the low flow did not reach the stream banks. As a result, a decision was made to use as a substitute a flow of 10 cubic feet per second (cfs) which would reach the stream banks (N.T. 265-266, 310-312, 2047-2048; Del-Aware Ex. No. 9, pp. 4-5).

15. Using the HEC-2 Program, DER personnel prepared profiles for each reach of each stream showing the slope of the channel and the depth and

velocity of low flows (10 cfs), half rate flows and full rate flows (Del-Aware Ex. No. 9, Plates Nos. 2-10).

16. Results of each soil size analysis were plotted by DER personnel to obtain gradation curves reflecting the fineness/coarseness of the soil sample (Del-Aware Ex. No. 9, p. 6 and Plates Nos. 14-35).

17. DER personnel considered three procedures for determining the stability of the stream bed and banks. The Allowable Velocity approach and the Tractive Stress approach were taken from the U.S. Soil Conservation Service's manual for design of open channels. The Initiating Flow approach was taken from the U.S. Bureau of Reclamation's manual for design of small dams (Del-Aware Ex. No. 9, p. 6).

18. The Tractive Stress approach ultimately was used for all soil sample sites because it employed more of the detailed information from the hydraulic analysis and soil analysis (Del-Aware Ex. No. 9, p. 6).

19. Tractive stress is the tangential pull of flowing water on the wetted channel boundary. The Tractive Stress approach compares the Actual Tractive Stress with the Allowable Tractive Stress (the stress needed to begin movement of material within the channel). If less, the channel is considered stable; if more, the channel is considered unstable (Del-Aware Ex. No. 9, p. 7).

20. Using the Tractive Stress approach, DER personnel

(a) computed the Allowable Tractive Stress for each soil sampling site;

(b) computed the Actual Tractive Stress for each soil sampling site at low flow (10 cfs), half rate flow and full rate flow;

(c) determined that the stream bed was stable in every reach of both streams at each of the three levels of flow measured;

(d) determined that the left bank of the East Branch was unstable at all three flow levels in Reach P-1, but was stable at all three flow levels in Reaches P-2 and P-3;

(e) determined that the right bank of the East Branch was unstable at all three flow levels at two locations in Reach P-1, but was stable at all three flow levels at a third location in Reach P-1 and in Reaches P-2 and P-3;

(f) determined that the left bank of the North Branch was

(1) stable at low flow (10 cfs) in Reach N-1, but unstable at the two higher levels,

(2) stable at all three levels of flow in Reach N-2, and

(3) unstable at all three levels of flow in Reach N-3;

(g) determined that the right bank of the North Branch was

(1) stable at low flow (10 cfs) in Reach N-1, but unstable at the two higher levels,

(2) stable at all three levels of flow in Reach N-2, and

(3) unstable at all three levels of flow in Reach N-3; and

(h) computed the Actual Tractive Stress for each soil sampling site at flows associated with one-year floods

(Del-Aware Ex. No. 9, p. 7 and Plates Nos. 12 and 13).

21. Each of the 8 soil sampling sites determined to be unstable at one or more flow levels was further analyzed to measure the extent to which eroded material would settle back out or be transported downstream. A graph developed by F. Hjulstrom was used to determine the maximum particle size which could be expected to erode at each site for computed velocities at half rate flows and full rate flows. Following a computation of the maximum particle size that could be transported at the lowest velocity downstream from

the site, DER personnel were able to calculate the percentage of the soil sample that would settle out (Del-Aware Ex. No. 9, pp. 6-7 and Plates Nos. 36 and 37).

22. On the basis of the sedimentation study described above, DER concluded that the soils at only one sampling site (on the left bank of the East Branch in Reach N-1) would settle out significantly - 21% of the sample at half rate flow and 32% of the sample at full rate flow. The settlement from other samples ranged from 0% to 7% (Del-Aware Ex. No. 9, p. 8 and Plates Nos. 36 and 37).

23. On the basis of the foregoing analysis, DER personnel concluded

(a) that the proposed discharges would have no adverse effect upon the stability of the two stream beds;

(b) that the proposed discharges would have no adverse effect upon the stability of the following stream banks:

(1) East Branch - right bank at station 0+00 in Reach P-1; left and right banks in Reaches P-2 and P-3,

(2) North Branch - left and right banks in Reach N-2;

(c) that the following stream banks, which are unstable at low flow (10 cfs), would become more unstable at half rate and full rate flows:

(1) East Branch - left bank at station 0+00, right bank at station 5+00 and left and right banks at station 11+00 in Reach P-1,

(2) North Branch - left and right banks in Reach N-3;

(d) that the increase in instability of the stream banks identified in (c), caused by the proposed discharges, is less than that caused by one-year flood flows;

(e) that the left and right banks in Reach N-1 of the North Branch, which are stable at low flow (10 cfs), would become slightly unstable at half rate flow and more unstable at full rate flow;

(f) that the increase in instability of the stream banks identified in (e), caused by the proposed discharges, is less than that caused by one-year flood flows;

(g) that the amount of increased erosion the proposed discharges would create at sites identified in (c) and (e) cannot be determined; and

(h) that eroded soils from all sites identified in (c) and (e) would be expected to remain in suspension and be transported downstream, except for soils from the left bank at station 0+00 in Reach P-1 of the East Branch, a significant portion of which would be expected to settle out within that Reach

(Del-Aware Ex. No. 9, pp. 8-10 and Plates Nos. 12, 13, 36 and 37).

24. DER's report containing its analysis and conclusions on the stability of the beds and banks of the two streams (Report) was finalized in April 1985 (N.T. 2079-2080; Del-Aware Ex. No. 9).

25. Initially, it was hoped by some DER officials that some preliminary conclusions would be available by July 15, 1984 when DER's Timothy Weston, Associate Deputy Secretary for Resources management, was scheduled to testify in the Sullivan case (referred to in footnote no. 1), but it soon became apparent that more time would be needed (N.T. 744, 2042-2043).

26. The DER personnel who were in charge of performing the erosion study were engineers and geologists, but none of them had ever been involved in a study to determine the effects of diverting water into natural channels (N.T. 126, 218, 251-252, 741).

27. The erosion study of the East Branch and North Branch was the most extensive erosion study performed by DER up to that time (N.T. 2048).

28. DER personnel were given adequate time to perform the erosion study and were not influenced in their professional judgments by any predilections that might have been held by DER officials (N.T. 218-219, 396, 770-771, 886-887, 2020-2021, 2032-2036).

29. The Report and the recommendations of DER personnel formed the basis underlying the December 30, 1986 issuance by DER Acting Secretary John P. Krill of the Appealed Orders (N.T. 828-830; PECO Ex. No. 5; NP/NW Ex. No. 6).

30. DER's Appealed Order with respect to permit ENC 09-77, pertaining to the East Branch,

(a) noted that providing cooling water for Limerick was, in fact, a phased operation serving only one unit initially and two units subsequently;

(b) stated that discharges into the East Branch to serve one unit would not exceed the half rate flow analyzed in the Report, and that discharges to serve two units would not exceed the full rate flow analyzed in the Report;

(c) concluded that the potential increase in erosion and sedimentation during the first phase would not be significant since the differences in tractive force at low flow (10 cfs) versus half rate flow were small, particularly when compared to the tractive force at the one-year flood flow;

(d) concluded that any erosion experienced during the first phase could be mitigated by installation of an energy dissipator at the discharge point (as required by the permit) and by implementation of stream bank stabilization measures (such as riprap and vegetation);

(e) determined that, since the precise location of stream bank erosion cannot be accurately predicted without further experience and observation, conditions should be inserted in the permit requiring a staged start-up period, the monitoring of erosion impacts and the stabilizing of affected areas;

(f) concluded that experience gained during the first phase would provide information necessary to evaluate more accurately the erosive impact of the full rate flow and to design appropriate mitigation measures;

(g) concluded that, to the extent stream bank erosion is not avoided, reduced or controlled by the new conditions to be inserted in the permit, the benefits to be derived from the project (including but not limited to the supplying of needed water to Limerick, the augmenting of downstream flows for aquatic habitat, and other uses) outweigh the environmental impact of stream bank erosion;

(h) inserted into the permit new conditions that

(1) required a staged start-up of discharges, the maintenance of minimum flows and the avoidance of rapid fluctuations,

(2) required constant monitoring of stream banks and the submission of reports to DER,

(3) required the prompt implementation of stabilization measures when erosion occurs,

(4) reserved the right to halt the discharges until conditions are corrected, and

(5) required submission and approval of an erosion control plan prior to beginning the second phase of the operation

(N.T. 850, 852, 855-869, 876-883, 889-892; PECO Ex. No. 5).

31. DER's Appealed Order with respect to permit ENC 09-81, pertaining to the North Branch,

(a) noted that providing water supply to Bucks and Montgomery Counties was, in fact, a phased operation;

(b) stated that discharges into the North Branch during the first phase would not exceed the half rate flow analyzed in DER's report;

(c) concluded that the potential increase in erosion and sedimentation during the first phase would not be significant since the differences in tractive force at low flow (10 cfs) versus half rate flow were small, particularly when compared to the tractive force at the one-year flood flow;

(d) concluded that any erosion experienced during the first phase could be mitigated by installation of an energy dissipator at the discharge point and by implementation of stream bank stabilization measures (such as riprap and vegetation);

(e) determined that, since the precise location of stream bank erosion cannot be accurately predicted without further experience and observation, conditions should be inserted in the permit requiring a staged start-up period, the monitoring of erosion impacts and the stabilizing of affected areas;

(f) concluded that experience gained during the first phase would provide information necessary to evaluate more accurately the erosive impact of the full rate flow and to design appropriate mitigation measures;

(g) concluded that, to the extent stream bank erosion is not avoided, reduced or controlled by the new conditions to be inserted in the permit, the benefits to be derived from the project (including but not limited to the supplying of needed water to Bucks and Montgomery Counties, the

augmenting of downstream flows for aquatic habitat, and other uses) outweigh the environmental impact of stream bank erosion;

(h) inserted into the permit new conditions that

(1) required a staged start-up of discharges,

(2) required constant monitoring of stream banks and the submission of reports to DER,

(3) required the prompt implementation of stabilization measures when erosion occurs,

(4) reserved the right to halt the discharges until conditions are corrected, and

(5) required submission and approval of an erosion control plan prior to beginning the second phase of the operation

(N.T. 850, 852, 855-869, 876-883, 889-892; NP/NW Ex. No. 6).

32. On behalf of PECO, the firm of Tippetts-Abbett-McCarthy-Stratton (TAMS), engineers, architects and planners headquartered in New York City, performed a study of the East Branch in July 1984 from the point of the proposed discharge to a point slightly more than one mile downstream. This study area included all of Reaches P-1 and P-2 analyzed by DER and about 3,500 feet of stream between those two reaches (Del-Aware Ex. No. 9, p. 2 and Plate No. 1; PECO Ex. No. 14, Figure No. 1).

33. TAMS, under the direction of Armando Balloffet, a hydraulics engineer, surveyed 17 cross-sections and took 10 soil samples (2 from the bed and 8 from the banks) which were analyzed by TAMS's in-house laboratory (PECO Ex. No. 14, pp. 1, 4-7).

34. TAMS used the HEC-2 Program for its hydraulic analysis. The friction factors employed, after considering the nature of the materials in the stream channel and the actual velocities previously measured by TAMS

personnel, were .03 for the bed, .035 for the banks and .10 for the flood plain (N.T. 1117, 1120-1122; PECO Ex. No. 14, pp. 2, 3-4, 8).

35. The flow levels used by TAMS in the HEC-2 Program were provided by PECO and were the following:

29.3 cfs - average consumptive use of one unit at Limerick (27.0 cfs) plus median stream flow (2.3 cfs)
35.3 cfs - maximum consumptive use of one unit at Limerick (33.0 cfs) plus median stream flow (2.3 cfs)
56.3 cfs - average consumptive use of two units at Limerick (54.0 cfs) plus median stream flow (2.3 cfs)
67.3 cfs - maximum consumptive use of two units at Limerick (65.0 cfs) plus median stream flow (2.3 cfs)
73.3 cfs - maximum consumptive use of two units at Limerick (65.0 cfs) increased to allow for instream losses of approx. 10% plus median stream flow (2.3 cfs)
112.0 cfs- one-year flood at Elephant Road Bridge
238.0 cfs- one-year flood at Bucks Road Bridge

(N.T. 1118-1120; PECO Ex. No. 14, pp. 8-9).

36. Using the results produced by the HEC-2 Program and the analyses performed on the soil samples, TAMS assessed the stability of the bed and banks of the East Branch by comparing the flow velocities in the stream to the maximum flow velocities soils of a similar nature have been able to withstand in tests reported in engineering literature (N.T. 1122-1125, 1131-1133, 1135-1138, 1169-1176, 1557-1576; PECO Ex. No. 14, pp. 5-7, 14-16, Tables 1 and 2, Figures 2 to 6).

37. TAMS concluded that

(a) the bed of the stream would not be subject to erosion at the flow levels measured;

(b) the banks of the stream contain cohesive soils that can withstand velocities of 5-6 feet per second (fps) without erosion;

(c) the velocities likely to be generated by a flow level of 73.3 cfs (the maximum flow during the second phase of operations) fall within this 5-6 fps range;

(d) the banks, if erodible, are only very slightly erodible; and

(e) any erosion caused by the discharge could be mitigated by placing riprap on the banks

(N.T. 1142-1143, 1154-1161; PECO Ex. No. 14, pp. 14-16).

38. On behalf of NP/NW, Simons and Associates, Inc. (Simons), engineers headquartered in Fort Collins, Colorado, in association with Gannett Fleming Water Resources Engineers, Inc. (Gannett Fleming), headquartered in Harrisburg, Pennsylvania, performed a study of the North Branch in 1988 (N.T. 1689-1691, 1898, 1906-1908, 1715-1716; NP/NW Ex. No. 10, p. 2-1).

39. After site visits to the North Branch, Simons, under the direction of Daryl B. Simons, a hydraulics engineer, concluded that Reaches N-1, N-2 and N-3, as previously established by DER, were representative of the uppermost portions of the North Branch basin (N.T. 1693-1694; NP/NW Ex. No. 10, p. 2-2).

40. To gain a broader perspective of the stream from the point of proposed discharge to Lake Galena, Simons elected to add two more reaches to the study. Reach N-4, located about 3000 feet downstream from Reach N-3, is 1098 feet long and is considered by Simons representative of the middle portion of the drainage basin. Reach N-5, located about 6500 feet downstream from Reach N-4 and immediately upstream from Lake Galena, is 848 feet long and is considered by Simons representative of the lower portion of the basin. The 5 reaches cover about 24,000 feet of stream channel (N.T. 1692-1694; NP/NW Ex. No. 10, pp. 2-2, 2-3 and 3-2, Figure 3-1).

41. Simons adopted the cross-sections surveyed by DER in Reaches N-1, N-2 and N-3 and had Gannett Fleming survey 9 cross-sections in Reach N-4 and 7 cross-sections in Reach N-5 (N.T. 1715; NP/NW Ex. No. 10, pp. 2-1 and 3-2, Appendix A).

42. Simons took 19 soil samplings of the stream banks at selected locations along the 24,000 feet of stream channel studied. These samplings were taken to Gannett Fleming's in-house laboratory for size and plasticity analysis (N.T. 1710; NP/NW Ex. No. 10, pp. 2-1, 4-5 and 4-6).

43. Because of the size of the particles, samplings of the stream bed in each reach were done by the photo-grid method. A 2-foot by 2-foot grid with 0.1 foot-spaced lines was placed over the bed area. Photographs then were taken from a vertical angle and analyzed later in Simons' office (N.T. 1711-1712; NP/NW Ex. No. 10, pp. 4-5 and 4-6 and Figure 4.1).

44. Simons used the HEC-2 Program for its hydraulic analysis; but after extensive consideration, decided to use a higher friction factor than those used by DER and TAMS. A higher friction factor tends to give lower velocities and a lower potential for erosion (N.T. 1725; NP/NW Ex. No. 10, pp. 3-2 to 3-5, Table 3.2).

45. Gannett Fleming conducted a hydrologic analysis to determine estimated flows and diversion flows which were then used by Simons in the HEC-2 Program. The flows used are shown on the following chart:

	Estimated Flood Flows					Average Annual Diversion Conditions				Maximum Daily Diversion Conditions			
cation	1-Year (cfs)	5-Year (cfs)	10-Year (cfs)	25-Year (cfs)	50-Year (cfs)	Year 1990 (cfs)	Year 2000 (cfs)	Year 2010 (cfs)	Ultimate Capacity (cfs)	Year 1990 (cfs)	Year 2000 (cfs)	Year 2010 (cfs)	Ultimate Capacity (cfs)
l	50	200	274	378	474	32	43	51	52	48	64	76	77
2	81	301	408	560	698	32	43	51	52	48	64	76	77
3	130	440	583	794	981	32	43	51	52	48	64	76	77
4	160	541	715	969	1195	32	43	51	52	48	64	76	77
5	200	662	871	1176	1446	32	43	51	52	48	64	76	77

(N.T. 1717-1723, 1906-1910; NP/NW Ex. No. 10, pp. 3-5 to 3-7, Table 3.3, Appendix B and Table B.1).

46. Using the results produced by the HEC-2 Program and the analyses performed on the solid samples, Simons assessed the stability of the bed and banks of the North Branch at the maximum possible diversion flow of 77 cfs (N.T. 1734-1735, 1742-1746; NP/NW Ex. No. 10, pp. 4-1 to 4-14 and Appendix C).

47. Simons concluded that

(a) the North Branch is a stable stream with a bed of coarse material and banks that are somewhat cohesive and well vegetated;

(b) velocities are quite low, even at the maximum diversion flow (77 cfs);

(c) no significant erosion of the bed material will occur at the maximum diversion flow (77 cfs);

(d) the diversion flows will tend to clean out the existing stream bed and reclaim areas currently choked with grasses;

(e) significant erosion of the stream banks is not anticipated because of low velocities, erosion-resistant soils and low, well-vegetated banks;

(f) the exit velocity of the diverted water, being significantly higher than the stream can handle without erosion, must be reduced by a transition consisting of riprap
(NP/NW Ex. No. 10, pp. 5-1 to 5-4).

48. Simons, having made an effort to estimate the amount of potential erosion and to assess its impact on downstream areas, also concluded that

(a) stream channels are shaped primarily by bankfull flows which are generally associated with one-year floods;

(b) the ultimate average annual diversion flow (52 cfs) is approximately bankfull in Reach N-1 and the maximum diversion flow (77 cfs) exceeds bankfull in Reach N-1;

(c) the diversion flows will be less than bankfull in all other reaches;

(d) stream bank erosion could amount eventually to 10% in Reach N-1 in order to accommodate the maximum diversion flow;

(e) this erosion could involve 6535 cubic feet (0.15 acre-feet) of stream bank material;

(f) the eroded material will be transported in suspension to Lake Galena where it will be deposited;

(g) the amount of sediment that will be transported to Lake Galena as a result of cleaning out the existing stream bed (see 47(d)) will be 0.33 acre-feet;

(h) Lake Galena has a capacity of 6539 acre-feet and was designed to accommodate 366 acre-feet of sediment storage;

(i) the likely 100-year sediment accumulation in Lake Galena, without considering the diversion, is 240 acre-feet;

(j) the contribution of a total of 0.48 acre-feet of sediment by reason of the discharge is very small and insignificant; and

(k) after the channel widening process in Reach N-1 has been completed, the stream banks will become stable once again (N.T. 1746-1759; NP/NW Ex. No. 10, pp. 4-4 to 4-5, 4-11 to 4-13, 5-3 to 5-4; NP/NW Ex. No. 16).

49. Erosion in a stream channel is the movement of particles in the bed or banks by the force of water (N.T. 1744).

50. Despite advances in science and technology, it is not possible to calculate in advance the precise locations and precise amounts of erosion that will occur along the bed and banks of a stream by the introduction of diverted water (N.T. 987-989, 1129-1131, 1516, 1527; Del-Aware Ex. No. 9, pp. 9-10).

51. Reasonable predictions can be made, however, using scientific data with professional skill and judgment (N.T. 1522-1524, 1815-1819).

52. Because of the impracticality of measuring cross-sections and sampling soils for every inch of channel length, it is reasonable to use "representative" cross-sections and soil samplings (Del-Aware Ex. No. 9, p. 2; NP/NW Ex. No. 10, p. 3-1).

53. The HEC-2 Program is a standard-step tool used extensively in hydraulic analysis of streams throughout the United States. It was an appropriate tool to use in making hydraulic analyses of the East Branch and the North Branch (N.T. 252-255, 606-608, 807-808, 921, 1117, 1725; NP/NW Ex. No. 10, p. 3-2; PECO Ex. No. 14, p. 8).

54. The Tractive Stress approach, whereby the force necessary to move the particles present in the bed and banks of a stream is compared to the force generated by the water in the stream, is an appropriate and recognized method of assessing the stability of the bed and banks (Del-Aware Ex. No. 9, p. 6).

55. The friction factor used by DER in the HEC-2 Program, 0.30, was appropriate. While the use of somewhat higher factors might have been justifiable, they would have tended to show a lower potential for erosion (N.T. 718, 1120-1122; Del-Aware Ex. No. 9, p. 5; PECO Ex. No. 14, p. 2; NP/NW Ex. No. 10, pp. 3-2 to 3-5).

56. The HEC-2 Program does not take into account viscosity or sediment content, but changes in viscosity or sediment content of the water in

the East Branch and North Branch, caused by the introduction of diverted water, will be too small to have any impact on the conclusions reached by DER, TAMS and Simons (N.T. 141-142, 260, 356-357, 614-617, 1192, 1875-1876, 2091, 2093).

57. The HEC-2 Program assumes a steady state flow of water rather than a fluctuating flow which tends to increase erosion (N.T. 552-553, 1207, 1829).

58. Factors tending to cause fluctuations in the East Branch are

(a) the use of the diversion water as a supplemental, rather than the principal, source of cooling water for the Limerick units;

(b) limitations on the use of Schuylkill River water, the principal source of cooling water, based on temperature, dissolved oxygen and flow levels - that can influence the availability of Schuylkill River water on a daily basis in the spring and fall;

(c) shutdowns of the units at Limerick for planned or unplanned repairs, maintenance and re-fueling;

(d) variations in the powering of the units at Limerick;

(e) weather conditions affecting evaporation from the cooling towers at Limerick; and

(f) rainstorms superimposing their flows on diversion flows (N.T. 522-525, 1596, 1602-1603, 1608-1613, 1618, 1631-1632, 1635-1636).

59. Factors tending to lessen fluctuations in the East Branch are

(a) PECO's plan to operate the Limerick units at full power day in and day out;

(b) restricted pumping capacity at the Bradshaw Reservoir, coupled with the lack of water storage facilities at Limerick, making it

impossible for PECO to pump its total daily requirement in less than a 24-hour period; and

(c) conditions inserted in permit ENC 09-77, requiring a staged start-up of the diversion, setting minimum and maximum flow levels, and providing for automatic shutdown of the Bradshaw pumps when rainstorms of a certain magnitude occur

(N.T. 1593-1594, 1599-1600, 1636; PECO Ex. No. 5).

60. Fluctuations in the diversion flow in the East Branch will cause changes in water depth no more than one foot (N.T. 708-709; Del-Aware Ex. No. 9, Plate Nos. 2, 3, 4 and 8; PECO Ex. No. 14, Table 2).

61. Factors tending to cause fluctuations in the North Branch are

(a) rainstorms superimposing their flows on diversion flows;

(b) regulations governing the water level in Lake Galena;

(c) variations in the natural flows of Pine Run and the North Branch;

(d) conditions inserted in permit ENC 09-81 requiring NP/NW to maintain flows in the North Branch downstream of the Chalfont Treatment Plant;

(e) shutdowns of the pumps for planned or unplanned repairs and maintenance;

(f) control systems which fail to maintain a constant flow because of breakdowns, malfunctions, operator errors or management decisions; and

(g) the freedom of NP/NW to vary the diversion flow rate within a 24-hour period (so long as the maximum flow rate is not exceeded) and pump its daily requirement in fewer than 24 hours

(N.T. 563-575, 1838-1839, 1960-1961, 1970, 1977-1978, 1982-1983, 2004-2006; NP/NW Ex. Nos. 7 and 10, p. 4-14).

62. Factors tending to lessen fluctuations in the North Branch are

(a) NP/NW's plan to maintain the diversion flow at as constant a level as possible;

(b) conditions inserted in permit ENC 09-81 requiring gradual adjustments in the diversion flow to eliminate rapid fluctuations;

(c) conditions inserted in permit ENC 09-81, requiring a staged start-up of the diversion; and

(d) a control system that will enable NP/NW to adjust the diversion flows to account for weather changes and other circumstances impacting on the overall system

(N.T. 1910-1913, 1929-1932, 1933-1934, 1946-1951, 2006; NP/NW Ex. Nos. 6 and 7).

63. Fluctuations in the diversion flow in the North Branch will cause changes in water depth of no more than one foot (Del-Aware Ex. No. 9, Plate Nos. 5, 6, 7, 9 and 10; NP/NW Ex. No. 10, Tables 3.4 through 3.8).

64. Fluctuations in the diversion flows in the East Branch and North Branch will have a minimal impact on erosion, because of the limited bank areas exposed to the fluctuations and because of the cohesiveness of the bank materials in the exposed areas (N.T. 1211-1255, 1864-1870; NP/NW Ex. No. 10, p. 4-14).

65. The East Branch and North Branch both are flashy streams in their upper reaches, sometimes having little or no flow and other times having flood flows of considerable magnitude (N.T. 15-19, 62-65, 72, 1105-1106, 1158, 1458-1459, 1696; Del-Aware Ex. No. 60-1 to 60-11; PECO Ex. No. 14, p. 2 and photographs; NP/NW Ex. No. 10, Figures 2.1 to 2.4).

66. Stream channel geometry is shaped primarily by bankfull flows that occur on a frequency of about once per year (N.T. 633-634, 778-779, 1162, 1533, 1745, 2233, 2239, 2271-2272; NP/NW Ex. No. 10, pp. 4-4 and 4-5).

67. With the exception of Reach N-1, the diversion flows in both streams will be less than the one-year flood flows in those streams (Del-Aware Ex. No. 9, p. 4; PECO Ex. No. 14, pp. 8-9; NP/NW Ex. No. 10, Table 3.3).

68. No erosion of the stream beds in the East Branch and North Branch will occur as a result of the diversion flows but some cleaning out of the stream beds will take place with the higher flows (Del-Aware Ex. No. 9, pp. 8-10; PECO Ex. No. 14, pp. 15-16; NP/NW Ex. No. 10, pp. 5-1 to 5-4).

69. Some stream bank erosion will occur as a result of diversion flows primarily in Reach P-1 in the East Branch and Reach N-1 in the North Branch (Del-Aware Ex. No. 9, pp. 8-10; PECO Ex. No. 14, pp. 15-16; NP/NW Ex. No. 10, pp. 5-1 to 5-4).

70. Stream bank erosion in Reaches P-1 and N-1 will cause minor channel enlargement under the maximum diversion flow conditions (Del-Aware Ex. No. 9, pp. 8-10; PECO Ex. No. 14, pp. 15-16; NP/NW Ex. No. 10, pp. 5-1 to 5-4).

71. Eroded particles will be transported downstream. On the North Branch, they will settle out in Lake Galena (Del-Aware Ex. No. 9, pp. 8-10; PECO Ex. No. 14, pp. 15-16; NP/NW Ex. No. 10, pp. 5-1 to 5-4).

72. The impact of these eroded particles on Lake Galena will be negligible (NP/NW Ex. No. 10, pp. 5-1 to 5-4).

73. The erosion potential will be mitigated by the installation of energy dissipators at the discharge points on both streams and by the placement of riprap to help stabilize vulnerable stream banks in the upper reaches. These mitigating measures are required by conditions of permits ENC

09-77 and ENC 09-81 (N.T. 794, 1020, 1160-1161, 1776-1795, 2278-2279; PECO Ex. Nos. 5 and 14, pp. 15-16; NP/NW Ex. Nos. 6 and 10, pp. 5-1 to 5-4).

74. Benefits of the Project are the following:

(a) East Branch

(1) providing needed supplemental cooling water for PECO's Limerick Electric Generating Plant; and

(2) augmenting existing flows to create a flowing stream throughout the year;

(b) North Branch

(1) fulfilling the need for a public water supply for portions of Bucks and Montgomery Counties; and

(2) augmenting existing flows to create a flowing stream throughout the year

(N.T. 850-869, 877, 889-892, 2021-2031; PECO Ex. No. 5; NP/NW Ex. No. 6).

DISCUSSION

As a third-party appellant from DER's issuance of time extensions with respect to permits ENC 09-77 and ENC 09-81, and DER's actions on remanded issues pertaining to these permits, Del-Aware has the burden of proving, by a preponderance of evidence, that DER violated the law or abused its discretion: 25 Pa. Code §21.101(a) and (c).

Del-Aware's arguments can be characterized as follows: (1) DER's study was invalid, (2) PECO's and NP/NW's studies cannot remedy DER's deficiencies, and (3) DER's balancing test was invalid. Before dealing with these contentions, it is necessary to dispose of NP/NW's challenge to Del-Aware's standing to maintain the appeal originally docketed at 87-037 and which relates to permit ENC 09-81.

Del-Aware's Standing

The Board held in an Opinion and Order issued May 27, 1987 that Del-Aware had shown representational standing to file this appeal by reason of allegations concerning its member David Windholz who owns real estate bordering the North Branch (1987 EHB 351 at 361 and 382). Standing is a jurisdictional matter, however, and can be raised at any time. After NP/NW raised the issue in its pre-hearing memorandum, Del-Aware was required to prove its allegations at the hearing. Evidence on this subject was presented during the first and second days of hearings - March 1 and 2, 1989. After the parties stipulated that David Windholz (possibly with his wife) continues to own the riparian land along the North Branch, the only remaining dispute concerned his membership in Del-Aware.

Frederick R. Duke, former Executive Director of Del-Aware, testified that the organization has three membership levels - (1) those who are on the mailing list, (2) those who donate money to Del-Aware, and (3) those who pay dues of $20 annually. Windholz was listed as a member in the third category for 1988 and, to the best of Duke's recollections, was in that category for the two or three years preceding 1988. Windholz himself produced a cancelled check, dated March 1, 1988, evidencing payment of his dues, and stated that he was still a member as of March 2, 1989.

On the basis of this evidence, the presiding Administrative Law Judge made a provisional ruling that Del-Aware had established standing. That ruling is now affirmed by the Board en banc. While Windholz produced documentary proof of his payment of dues only once, he considered himself to have been a member in 1987 and to still be a member in 1989. He acknowledged that his wife handled the payment of dues and that he did not know whether dues had, in fact, been paid at any time other than March 1, 1988.

The testimony of Duke and Windholz, taken together, is sufficient to establish that, at the time of filing the appeal and at the time of hearing, Windholz was a member of Del-Aware. Whether he was a dues paying member during all of that time is uncertain; but, if he was not, he certainly qualified for another level of membership. That, coupled with his stated desire to have Del-Aware represent his interest in this proceeding, is sufficient to prove the relationship that necessarily underlies representational standing.

DER's Study

Del-Aware claims that DER's erosion study was "fraudulent and invalid" because it was conducted under unreasonable time constraints, by inexperienced personnel, using inadequate data, and influenced by the bias of R. Timothy Weston (Weston). Evidence to support this claim is totally lacking. Del-Aware seizes the evidence that, initially, DER officials had hoped to be in possession of some preliminary conclusions by July 15, 1984 when Weston was scheduled to testify in the Sullivan case, but rejects all other evidence. That other evidence reveals that preliminary conclusions were not available by July 15, 1984, and that the study continued until the Report was finalized in April 1985. None of the half-dozen or so present or former DER employees called as witnesses testified to any lack of time to do the study properly. The time invested by DER personnel in doing the field work, the laboratory work, the calculations and the Report compares favorably with that consumed by TAMS and Simons.[4] While the figures are less evident, it

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[4] DER's field work took 4 days; TAMS and Simons each spent about 6 days in the field. DER's Report was not completed for 9 months; TAMS' was put together in 3 weeks, Simons' in 4 months. Direct comparisons cannot be made, obviously, without knowing the number of persons involved or the training and experience they possessed.

appears that DER personnel spent as much or more time studying the erosion potential of these two streams than any of the other experts, including those presented by Del-Aware.

DER's personnel had never before studied the effects of diverting water into natural channels but all of them were professionally competent to do the various segments of the study. John P. Wilshusen, who had partial responsibility for the field work, is a geologist with both bachelor's and master's degrees in that subject. David P. Lambert, the other person in responsible charge of the field work, is a civil engineer. Lambert serves as Chief of the Division of Project Development in DER's Bureau of Water Projects. It was his six years of experience in this Division that prompted his superiors to give him the task of analyzing the field and laboratory data to arrive at the final conclusions of the Report. His prior work had involved flood protection projects - including channel construction, bank protection and channel relocations (diverting water from a natural channel to a man-made channel). In performing this prior work, he had calculated water levels and water velocities using the HEC-2 Program.

The only deficiency Del-Aware can point to in the expertise of these DER employees is the absence of any prior experience in performing the precise kind of study involved here - quantifying erosion caused by the diversion of water from one natural channel into another natural channel. Given Lambert's prior experience in channel relocations, it was incumbent upon Del-Aware to establish that there is some significant difference between diverting water into a natural channel and diverting water into a man-made channel that would disqualify Lambert from performing the study. Del-Aware presented no such evidence. The only evidence touching on the subject came from Armando Balloffet and Daryl B. Simons, persons who have spent their lifetimes in this

field and who both stated that there is no difference - the principles are the same.

DER's cross-sections were not detailed enough to permit the HEC-2 Program to calculate water depths and velocities at low flow levels in the East Branch and North Branch. At these flow levels, the water does not cover the entire stream bed but runs in one or more rivulets. In order to measure the impact of the diversion flows upon the stream banks, DER decided to use, as a surrogate low flow, a flow of 10 cfs which would cover the entire stream bed and touch the banks. Del-Aware criticizes this decision as being technically faulty and deliberately misleading. Evidence to back up the criticism is lacking, however.

DER's purpose in this portion of the study was to assess the relative impact of the diversion flows on the stability of the stream banks.[5] To accomplish this, DER had to compare the stability of the stream banks minus the diversion flows to the stability of the stream banks with the diversion flows. Since the low flows in both streams did not reach the banks, DER chose a flow that did (10 cfs) and used that for its comparison. There is nothing technically wrong with this approach, given DER's purpose. Nor is it misleading. DER stated the following on pages 4-5 of the Report:

> An additional discharge of 10 cfs for each reach was also modeled as a basis for comparing pumped flows to low flows. The value of the low flow was selected at 10 cfs in order to better facilitate the use of the computer model. Flows lower than 10 cfs would be too small for the computer to analyze accurately. The flow width at smaller discharges would not extend across the full width of the stream to both banks at all locations. This would not allow comparison of

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[5] DER also was studying the stream beds, of course; but, since the study found no bed erosion at any of the flow levels measured by DER, it follows that it would also have found none at the true low flows, which would have had even lower velocities. All parties agreed that the stream beds are "armored."

> bank erosion at low flow against bank erosion with pumped flows.

It is difficult to imagine how DER could have been more candid in explaining how it performed the study. Anyone reading this language was given distinct notice that the low flow value reflected in the Report did not represent the actual low flows present in the streams but a surrogate chosen to facilitate the comparison of stream bank stability. Del-Aware contends that, since the above language was not put into the Appealed Orders, these Orders are misleading. However, both Appealed Orders contain paragraphs making specific reference to the Report and incorporating it "herein by reference." This practice has a long history of acceptance (see, for example, Pa. R.C.P. 1019(g)) and effectively made the Report an integral part of the Appealed Orders: In re. Kretz' Estate, 410 Pa. 590, 189 A.2d 239 (1963).

Del-Aware makes the grave charge that Weston was biased in favor of the Project and used his official position to influence DER employees to produce a favorable report. Although given wide latitude during the hearing, Del-Aware was unable to produce even a shred of evidence to support its charge. The witnesses who testified on this subject all agreed that Weston made no effort to force a specific result.

The most curious of Del-Aware's arguments is that DER's study fails to comply with the Board's remand instructions, because it did not "quantify" the erosion that would occur. As already noted, DER concluded that the highest pumped discharges would cause greater instability of the stream banks in the uppermost reaches of the East Branch and the North Branch. The Report then states at pages 4 and 5:

> However, the amount of the increased erosion cannot be determined....Although the stability or instability of soil at a particular site can be determined, a prediction of the amount of soil loss cannot be made....The conclusions of these investigations, therefore, are limited to

whether the soils are stable, and do not attempt to define the degree of stability or instability.

These statements were incorporated into the Appealed Orders. Consistent with the position that the precise amount and precise location of erosion could not be determined in advance, DER inserted new conditions in the permits requiring (1) close monitoring of erosion impacts during the first phase and (2) submission and approval of an erosion control plan prior to starting the second phase.

Del-Aware's criticism of this approach is curious because Del-Aware's experts, Jonathan T. Phillippe, Edwin L. Beemer and John K. Adams (to a lesser extent), all agreed with DER that the amounts and locations of erosion could not be precisely quantified in advance (N.T. 594-600, 987-988, 1516). If that be true, by what standard is DER's study defective? Del-Aware seems to be arguing that, since the Board directed quantification in its remand, DER was required to quantify precisely even if that is impossible. This disingenuous argument places DER on the losing end if it fails to quantify precisely or if it attempts to perform that impossible task. We are not persuaded by such syllogisms.

We find nothing in Payne v. Kassab, supra, that imposes mathematical certainty on the quantifying of environmental harm. Instead, our review of DER's decisions in this area "must be realistic and not merely legalistic," 312 A.2d 86 at 94. Applying that guideline, we hold that environmental harm is adequately quantified if it is measured with as much accuracy as is reasonably possible from a practical standpoint.

The hydraulic analysis, bed and bank stability analysis, and sedimentation analysis performed by DER enabled DER to determine that the overall threat of erosion is not great, is confined essentially to the uppermost reach of each stream, and is more likely to occur during the second

phase than during the first phase. Having fixed the relative magnitude of the problem, DER elected to postpone a more finite determination of location and amount until the data gathered during the first phase is available. Based on our interpretation of what is required by Payne v. Kassab, supra, we conclude that DER's erosion study produced a legally sufficient quantification of environmental harm.

PECO's and NP/NW's Studies

Convinced of the shortcomings of DER's attempt to quantify erosion, Del-Aware argues that the deficiencies cannot be supplied by PECO's and NP/NW's studies. Since we have found DER's quantification to be satisfactory, this argument has no relevance.

PECO's and NP/NW's studies corroborate DER's findings and conclusions even though TAMS and Simons used slightly different factors and techniques and focused on longer reaches of the two streams. These experts agreed with DER that (1) no erosion of the stream beds is likely to occur, (2) the overall threat of erosion to the stream banks is not great, (3) the flows expected to be generated during the second phase pose the greater danger to the stream banks, (4) the areas most likely to be affected by stream bank erosion are in the uppermost reaches of each stream, and (5) the likelihood of erosion can be minimized by the use of stream bank stabilization materials.

Simons went one step beyond and made an estimate of the cubic feet of North Branch stream bank material likely to be washed away at the maximum discharge (during phase two) and the impact upon Lake Galena. Curiously, Del-Aware makes no comment on this estimate in its post-hearing brief even though it can be viewed as an attempt to quantify erosion with the kind of specificity Del-Aware argues is necessary under Payne v. Kassab, supra.

The fact that Simons undertook to estimate the amount of erosion that might occur during phase two does not impair the validity of DER's study. Conceivably, DER could have made an estimate also. Convinced that such an exercise would produce a more accurate result if performed with the first phase data in hand, DER elected to defer the calculation until phase two was ready to commence. Since the erosion threat is considered to be greater during phase two, a prediction of locations and amounts with as much accuracy as possible should be made before that phase begins. Deferring the prediction until the phase one "real world" data is available will enhance the accuracy of the prediction. We view this deferral as being consistent with DER's careful, step-by-step approach which, in our opinion, is appropriate under the circumstances.

DER's Balancing of Benefits Versus Harm

In the Appealed Orders, DER imposed new conditions designed to eliminate or minimize erosion. These included a staged start-up of discharges, the maintenance of minimum flows, avoidance of rapid fluctuations, constant monitoring of stream banks and prompt implementation of bank stabilization measures. These conditions represented DER's response to the second inquiry prescribed in Payne v. Kassab, supra. DER went on to conclude that, to the extent stream bank erosion is not avoided, reduced or controlled by these new permit conditions, the benefits to be derived from the Project outweigh the environmental harm caused by the stream bank erosion. Benefits specifically mentioned by DER were the providing of needed cooling water to Limerick (East Branch), the providing of needed water supplies to Montgomery and Bucks Counties (North Branch), and the augmentation of

downstream flows for aquatic habitat and other uses (both streams). This conclusion was DER's response to the third inquiry prescribed in Payne v. Kassab, supra.

Del-Aware contends that DER's balancing was invalid but cites only one reason - because the erosion study was invalid. We have already decided that it was not. Del-Aware proceeds to recite the testimony of its experts to the effect that erosion will occur; but that is not the point at issue here. All parties agree that erosion will occur. The question is whether the environmental harm caused by that erosion will so clearly outweigh the benefits to be derived from the Project that "to proceed further would be an abuse of discretion," 312 A.2d 86 at 94. Del-Aware offers absolutely no analysis to guide us in answering this pivotal question.

It is clear from the record that DER's Acting Secretary John P. Krill, who performed the balancing, was satisfied that (1) the threat of erosion was not great; (2) the threat would be reduced by conditions inserted in the permits requiring a staged start-up of discharges, maintenance of minimum flows, avoidance of rapid fluctuations, constant monitoring and prompt implementation of stabilization measures; and (3) the experience gained during the first phase would enable DER to impose effective measures to minimize erosion damage during the second phase. These highly relevant factors evidence the kind of careful, deliberate approach to the controlled development of resources approved in Payne v. Kassab, supra.

The benefit side of the scale contains the items specifically mentioned by DER in the Appealed Orders. The need for the additional water at Limerick and in Montgomery and Bucks Counties was established in Del-Aware I and was considered by Acting Secretary Krill to be a serious need, outweighing the environmental harm likely to result. On the basis of the record, we

cannot label this conclusion an abuse of discretion. To the contrary, it represents a highly appropriate exercise of discretion in an area "piled high with difficulty."[6]

Del-Aware argues that it should have been permitted to re-litigate the need for the additional water. This was the subject of an Opinion and Order issued in this proceeding on September 30, 1988, holding that Del-Aware was precluded from re-litigating need. A few months later, Commonwealth Court affirmed this Board's holding in Del-Aware III, applying the same preclusion rules to the same issue: Del-Aware Unlimited, Inc. v. Commonwealth, Dept. of Environmental Resources, 121 Pa. Cmwlth. 582, 551 A.2d 1117 (1988), Allocatur denied April 12, 1990. We see no reason to revise our September 30, 1988 ruling and expressly affirm it.

CONCLUSIONS OF LAW

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

2. Del-Aware has the burden of proving, by a preponderance of the evidence, that DER violated the law or abused its discretion in issuing the Appealed Orders.

3. Del-Aware has standing to maintain these appeals by virtue of its representation of its members Mark Dormstreich and David Windholz.

4. DER's erosion study was conducted by competent personnel using adequate data and appropriate techniques. They were not placed under unreasonable time restraints and were not influenced by the predilections of DER officials.

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[6] Borrowed from Abraham Lincoln's Second Annual Message to Congress, December 1, 1862.

5. DER's use of a surrogate low flow with which to compare the impact of the diversion flows on the stability of the banks was reasonable since the actual low flows did not reach the banks.

6. DER's use of the surrogate low flow was adequately disclosed in the Report and in the Appealed Orders which incorporated the Report by reference.

7. Payne v. Kassab, supra, does not require that environmental harm be quantified with mathematical certainty.

8. Environmental harm is adequately quantified if it is measured with as much accuracy as is reasonably possible from a practical standpoint.

9. DER's erosion study was scientifically valid and legally sufficient to support the conclusions that the overall threat of erosion is not great, is confined essentially to the uppermost reach of each stream, and is more likely to occur during the second phase than during the first phase.

10. DER's erosion study produced a legally sufficient quantification of environmental harm under the circumstances present in these appeals.

11. DER's conclusion that the monitoring done during the first phase will provide the necessary data to enable DER (a) to predict more accurately the amount and location of the erosion likely to occur during the second phase and (b) to impose specific conditions to eliminate or minimize the erosion threat, was reasonable.

12. PECO's erosion study, conducted by TAMS, and NP/NW's erosion study, conducted by Simons, corroborate DER's findings and conclusions.

13. The fact that Simons estimated the cubic feet of stream bank material likely to erode in the North Branch during phase two does not impair the validity of DER's erosion study which preferred to postpone any such calculation until the end of phase one.

14. The new conditions added to permits ENC 09-77 and ENC 09-81 by the Appealed Orders and which are designed to eliminate or minimize erosion are a legally valid response to the second inquiry prescribed by Payne v. Kassab, supra.

15. The weighing of the benefits of the Project against the environmental harm to be caused by stream bank erosion, as performed by DER's Acting Secretary Krill, was a legally valid response to the third inquiry prescribed by Payne v. Kassab, supra.

16. DER's conclusion that the benefits outweigh the environmental harm was an appropriate exercise of its discretion.

17. Del-Aware was properly precluded from re-litigating the question of whether there was a need for the Project.

18. DER's decision on this remanded issue, as reflected in the Appealed Orders, comports with the mandate set forth in Conclusion of Law No. 10 in Del-Aware I (1984 EHB 178 at 331).

ORDER

AND NOW, this 17th day of July, it is ordered that these consolidated appeals, filed by Del-Aware Unlimited, Inc. on January 26, 1987, are dismissed.

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

Board Chairman Maxine Woelfling did not participate in this decision.

DATED: July 17, 1990

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M. DIANE SMIT
SECRETARY TO THE BO

INQUIRING VOICES UNLIMITED, INC. AND SUGAR GROVE TOWNSHIP	:	
v.	:	**EHB Docket No. 85-548-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MERCER COUNTY COMMISSIONERS, Permittee	:	**Issued: July 18, 1990**

OPINION AND ORDER

By the Board

Synopsis

In an appeal from the extension of a dam construction permit, the sole issue is whether the Department of Environmental Resources ("DER") had "good cause" to grant the extension. Where the Appellants fail to raise this issue, the appeal will be dismissed. The Appellants are precluded from raising issues concerning the original issuance of the permit, as this is beyond the scope of the instant appeal.

OPINION

This matter involves an appeal filed on December 23, 1985 by Inquiring Voices Unlimited, Inc. and Sugar Grove Township (hereinafter

collectively referred to as "the Appellants") from DER's November 22, 1985, extension or renewal[1] of a permit for the construction of a flood control dam in Mercer County.

On January 5, 1983, DER issued a permit (Permit No. DAM 43-57) to the County Commissioners of Mercer County ("the Permittee") to construct a flood control dam on the waters of Crooked Creek in the Little Shenango River Watershed, designated as DAM PA 488 (U.S. Army Corps of Engineers No.). This permit was for the period from January 5, 1983 to December 31, 1984. On December 19, 1984, the permit was extended for a one-year period to the end of December 1985. On November 22, 1985 the commissioners received a second extension to December 31, 1986, which is the subject of this appeal. DER granted additional extensions thereafter through 1988.

This appeal came to hearing on March 14 and 15, 1988 before former Board Member William A. Roth. At the hearing, the history of the series of extensions indicating that the permit was extended on December 19, 1984 for one year, on November 22, 1985 for one year, on December 17, 1986 for one year, and on December 1, 1987 for one year was made a matter of record (TR 281). It also became clear from the transcript that there had not been an appeal from any of the extensions after the original appeal (TR 281 and 282). It is not clear from the record whether the Appellants had ever appealed the original issuance of the permit.

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[1]It is not clear whether the permit was "extended" or "renewed", as the record refers to it both as an "extension" (TR 281-282) and as a "renewal" (TR 282) (An August 8, 1988 letter from Appellants' counsel which accompanied Appellants' Post-Hearing Memorandum also refers to it as a "permit reissuance".) We will refer to it herein as an extension, as this is the term used by DER in its November 22, 1985 letter, which is the subject of this appeal. Moreover, whether this was a permit "renewal" or "extension" does not affect the Board's conclusion in this matter.

In reviewing matters over which DER exercises authority, the Board's role is limited to determining if DER has abused its discretion or has arbitrarily exercised its powers. Del-AWARE Unlimited v. DER, 1987 EHB 351, aff'd. 121 Pa.Cmwlth. 582, 551 A.2d 1117 (1988).

The standard which DER must follow in granting an extension of a dam construction permit, such as that involved in this case, is "good cause." Del-AWARE Unlimited v. DER, 1986 EHB 919, 939-940. See also Del-AWARE Unlimited v. DER, 1988 EHB 1097, 1105. In making this determination, DER should consider whether failure to complete the construction project within the originally permitted time period is due to the fault of the permittee, for such reasons as lack of diligence, lack of proper planning, etc. Del-AWARE, 1986 EHB at 939-940.

Therefore, the sole issue on the merits is whether DER did not have good cause to grant the November 25, 1985 extension of the Permittee's dam construction permit. However, the Appellants have failed to raise this issue. Instead, their allegations center around the 1983 issuance of the permit, contending that issuance of the permit was contrary to state and local law and that the proposed dam will result in environmental harm. Clearly, Appellants are attempting to litigate issues pertaining not to the November 1985 extension, but to the original issuance of the permit, which issues are beyond the scope of this appeal.

The 1988 Del-AWARE case is similar in that it involved an appeal from DER's issuance of permits extending various construction completion dates. In that case, the appellants were attempting to litigate a number of issues which had been decided in earlier appeals. The Board held that the appellants were precluded from raising these issues and that the only issue potentially

involved in the appeal was whether DER had good cause to extend the construction completion date of the permit in question. Since the appellants had not raised this issue, the Board ruled there were no further issues to be litigated. In the present case, the Appellants have not alleged that DER did not have good cause to extend the Permittee's construction completion date, and as a result, there are no issues to be litigated.

Moreover, the extension which is the subject of this appeal has long since expired (December 1986), and the Appellants have not filed an appeal from any subsequent extensions.[2]

In conclusion, since the Appellants have not alleged that DER did not have good cause to grant the November 25, 1985 extension to the Permittee, and furthermore, since the extension which is the subject of this appeal has expired and Appellants have not challenged any subsequent extensions, this appeal is moot and must be dismissed.

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[2]Appellants' Post-Hearing Brief and cover letter, filed with the Board on or about August 8, 1988, suggest that the appeal is moot since the term of the permit extension has expired. (Appellants' Post-Hearing Memorandum, Proposed Finding of Fact No. 3)

O R D E R

AND NOW, this 18th day of July, 1990, it is ordered that the appeal of Inquiring Voices Unlimited, Inc. and Sugar Grove Township, docketed at 85-548-MJ, 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

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

DATED: July 18, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

MUNICIPAL AUTHORITY OF BUFFALO TOWNSHIP	:	
	:	
V.	:	**EHB Docket No. 88-041-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 20, 1990**

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

A Motion to Dismiss will be granted and an appeal dismissed when it seeks to litigate a letter of DER which cannot be construed as an appealable order.

ORDER

Municipal Authority of Buffalo Township (Authority) and Buffalo Township (Township), Butler County, Pennsylvania (collectively, Appellants), filed a Notice of Appeal on February 18, 1988 from a January 12, 1988 letter of the Department of Environmental Resources (DER). DER's letter responded to a December 17, 1987 letter, addressed to DER Secretary Arthur A. Davis, from Cecil C. Furer, Board Secretary of the Authority.

In his letter, Mr. Furer recited some of the history of the Authority's efforts to provide municipal sewerage service to the Ekastown Road area of the Township. He related how the Authority had held numerous meetings with other municipal bodies, seeking agreement to transport sewage from the Ekastown Road area to the treatment plant of the Upper Allegheny Joint

Sanitary Authority (Upper Allegheny). To reach that plant, the Authority would have to run trunk lines through Harrison Township and Fawn Township in neighboring Allegheny County. Fawn Township became the problem, refusing to allow the Authority to lay its trunk line through a 1-1/2 mile segment of its territory.

Because of Fawn Township's intransigence, the Authority had decided to construct its own treatment plant on the Township's border with Fawn Township, an alternative that also appeared to be less costly. When the Authority asked DER's Meadville Regional Office for effluent limits for a discharge to Little Bull Creek, DER refused to approve this approach. Several meetings followed, the last of which took place in Harrisburg on December 2, 1987. At that meeting, DER's Deputy Secretary Mark McClellan reaffirmed the Regional Office's decision requiring the Authority to transport its sewage to the Upper Allegheny plant.

Mr. Furer's letter closed with a request of the Township Supervisors and the Authority Board for a "hearing" and/or a "meeting" to review matters and resolve the problems.

The letter was referred by Secretary Davis to Richard H. Zinn, the Environmental Protection Director in DER's Meadville Regional Office. It was Mr. Zinn who signed the January 12, 1988 letter from which the appeal was taken. In this letter, Mr. Zinn referred to past planning efforts involving both the Township and Fawn Township, which concluded that the best method for handling the sewage needs of the Ekastown Road area was the transportation of the wastes to the Upper Allegheny plant. Constructing a separate plant on the Township border would be inconsistent with these planning efforts and an "unacceptable alternative," Mr. Zinn wrote.

He went on to state his understanding that the Authority would be willing to proceed with the Upper Allegheny alternative if Fawn Township would remove its objections to the trunk line. Since Fawn Township's Official Sewage Plan was consistent with the Upper Allegheny alternative, Mr. Zinn promised to schedule a joint meeting which he hoped would resolve the difficulties with Fawn Township. He added that DER would issue orders and take legal action against one or both Townships, if necessary to force them to implement their Official Sewage Plans.

DER filed its first Motion to Dismiss on May 12, 1988, claiming that the January 12, 1988 letter was not an appealable order. Since the Authority's December 17, 1987 letter was not then a part of the record and we had no way of discerning its contents, we denied DER's Motion in an Opinion and Order dated July 15, 1988 (1988 EHB 608). DER filed a second Motion to Dismiss on December 5, 1988, enclosing the Authority's December 17, 1987 letter as an exhibit. The Authority filed Objections to the Motion on December 23, 1988, attaching other correspondence. DER's Reply to the Authority's Objections, filed on January 17, 1989, included a copy of an Order issued by DER on December 13, 1988. This Order, addressed to the Township, the Authority and Fawn Township, recited the pertinent past history and then directed (1) the three municipalities, within 60 days, to execute an agreement permitting the Authority to construct a trunk line through Fawn Township for conveyance of sewage to the Upper Allegheny plant; and (2) the two Townships to submit updates of their Official Sewage Plans within 120 days and to implement them after approval.

No appeal was filed with the Board from DER's December 13, 1988 Order. Since Fawn Township's compliance with the Order would render moot the issues in this appeal, a decision on DER's second Motion to Dismiss was

deferred. We are unaware of any subsequent developments, but have been advised by the parties that the issues are not moot. Accordingly, we will act on DER's Motion.

In our July 15, 1988 Opinion and Order, we observed that 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 that the rulings turn on the particular facts involved. Board precedent is only of marginal value, as a result, and the decision in the present case will also 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.

When DER's January 12, 1988 letter is read in conjunction with the Authority's December 17, 1987 letter to which it responded, it is clear that

the appeal must be dismissed. The Authority, in its letter, was bringing its problem to the attention of Secretary Davis and requesting a meeting "to try to resolve this and get this project going." DER's response, through Director Zinn, was to promise a joint meeting to resolve the impasse between the two Townships. This response could have no effect on any "personal or property rights, privileges, immunities, duties, liabilities or obligations of any person."

The Authority's letter mentioned the two alternatives and stated its preference for building its own treatment plant. DER's letter observed that the Authority's preferred approach was inconsistent with prior planning efforts and was unacceptable. It can be argued that, standing alone, DER's response can be construed as a denial affecting the Appellants' obligations and, therefore, appealable. When placed within the context of the two letters, however, it is plain that this language was mere observation or opinion. DER was not responding to a formal request or application; it was reiterating a position consistently held for some time and communicated to Appellants on prior occasions. If it is Appellants' premise that DER's taking of this position amounted to an appealable order, then Appellants should have appealed when the position was first taken, not when it was reiterated months or years later.

Appellants argue also that DER's threat to issue orders and take legal action against the two Townships makes it clear that DER was acting with legal significance in issuing the January 12, 1988 letter. We disagree. DER was attempting to assure Appellants that it would do whatever was necessary to resolve the impasse that had stymied them in pursuing the best alternative identified in prior planning efforts. DER made good on that promise when it issued the Order of December 13, 1988, from which no appeal has been filed.

We are unable to construe DER's January 12, 1988 letter as an appealable order.

ORDER

AND NOW, this 20th day of July, 1990, it is ordered as follows:

1. The Motion to Dismiss, filed by DER on December 5, 1988, is granted.
2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 20, 1990

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Western Region
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M. DIANE SMITH
SECRETARY TO THE BC

RONALD CUMMINGS BOYD	:	
	:	
V.	:	**EHB Docket No. 88-285-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 20, 1990**
and WAYNE MARCHO, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL

Robert D. Myers, Member

Synopsis

An oral Motion to Dismiss an Appeal at the close of an appellant's case in chief will be granted when it is clear that he has failed to make out a prima facie case that a dredging permit has impacted adversely upon a sphaghnum bog on appellant's property. The substance of the evidence presented by appellant (through a DER witness) is that an unpermitted earthen dam is causing the conditions on appellant's property.

OPINION

Ronald Cummings Boyd (Boyd) filed a Notice of Appeal on July 22, 1988, contesting the issuance by the Department of Environmental Resources (DER) of Water Obstruction and Encroachment Permit No. E58-118 on July 12, 1988. This Permit had been issued to Wayne Marcho (Marcho), authorizing him to remove silt from a wetland near the headwaters of Bell Creek and to

construct and maintain two channels upstream of the wetland at points approximately 2400 feet downstream of Potter Lake in Gibson Township, Susquehanna County.[1]

On July 19, 1989 the Board issued an Opinion and Order denying Marcho's Motion to Dismiss Boyd's Appeal (1989 EHB 810). The appeal came on for hearing in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on December 5, 1989. Boyd, acting without legal counsel,[2] appeared and presented evidence in support of his appeal. When he rested his case, Marcho orally moved to dismiss the appeal for failure to make out a prima facie case. The Motion was taken under advisement and the hearing was adjourned. The record consists of the pleadings, a hearing transcript of 141 pages and 26 exhibits.

As a third-party appellant from DER's issuance of the Permit, Boyd had the burden of proof and the burden of proceeding: 25 Pa. Code §21.101(c)(3). To carry the burden of proof, Boyd had to show, by a preponderance of the evidence, that the issuance of the Permit was a violation of law or an abuse of discretion: Warren Sand and Gravel Co., Inc. v. Commonwealth, Dept. of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). To carry the burden of proceeding, Boyd had to present evidence

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[1] In his Notice of Appeal, Boyd inserted the words "Request Supersedeas." The Board notified him by letter dated July 27, 1988 that, if he wished to seek a supersedeas, he had to file a petition conforming with the requirements of 25 Pa. Code §21.77, a copy of which was enclosed. Boyd never filed such a petition and never made any other mention of a supersedeas. Accordingly, no further action was taken on the request.

[2] The Board staff had advised Boyd prior to the hearing that he should have legal counsel. At the outset of the hearing, Judge Myers asked Boyd if he desired to proceed without legal counsel. He replied, "Yes, sir" (N.T. 4). While the Board may render some minimal assistance of an administrative nature to a party acting in propria persona, it cannot provide assistance with regard to substantive aspects of the appeal without jeopardizing its impartiality. Consequently, substantive assistance is withheld as a matter of policy.

in his case in chief legally sufficient, if true, to justify a decision in his favor, at least prima facie: Standard Pennsylvania Practice 2d §58.4. In ruling on Marcho's Motion, the Board must give Boyd the benefit of every fact and inference of fact fairly to be drawn from his evidence and must interpret the evidence most strongly against Marcho: Goodrich-Amram 2d §231(b):3; Clearfield Municipal Authority v. DER, 1989 EHB 627.

Boyd owns the property on which most, if not all, of Potter Lake is located. Bell Creek, which flows out of Potter Lake, traverses Marcho's property immediately downstream. Beaver dams, apparently, are commonplace on Bell Creek. Marcho had removed one of these and had erected a 3-feet high earthen dam in its place. He later filed an application with DER for the Permit at issue, authorizing him to make certain alterations to Bell Creek below the earthen dam to enhance its use as a waterfowl habitat. DER reviewed the application, visited the site and issued the Permit. Boyd claims that the earthen dam, for which no permit has yet been issued, has raised the level of Potter Lake and has threatened the existence of a rare sphaghnum bog that surrounds it. He claims that the earthen dam is an essential component of the waterfowl habitat Marcho is creating and, therefore, had to be considered by DER before issuing the Permit.

Unfortunately for Boyd, the evidence he presented proved just the opposite of what he claimed. Boyd's principal witness was Khervin D. Smith, Chief of the Environmental Review Section in DER's Bureau of Water Resources Management. Smith supervised the environmental review of Marcho's Permit application and had visited the site. He testified that the earthen dam had no connection with Marcho's Permit. The wetlands below it where Marcho proposed to create a waterfowl habitat were fed, away from the main channel of the creek, by springs and surface runoff. The presence of the dam was not

necessary to the preservation of these wetlands. While some areas would have been inundated temporarily by the removal of the dam, they would have resumed their former state after the creek flow returned to its main channel. Nor was the earthen dam necessary to enable Marcho to do the dredging work authorized by the Permit; that work was confined to areas away from the main channel of the creek (See N.T. 73-74, 86-87, 108).

Smith testified further that the work Marcho was authorized to do under the Permit could have no effect on the water level of Potter Lake or on the sphaghnum bog surrounding it. The conditions forming the basis of Boyd's appeal, according to Smith, were caused solely by the earthen dam and, possibly, another beaver dam on Bell Creek. Marcho's application with respect to the earthen dam was still pending before DER.

Smith's testimony was the substance of Boyd's evidence. There can be no doubt that it falls short of making out a prima facie case that DER violated the law or abused its discretion in issuing the Permit. Accordingly, Marcho's motion must be granted.

ORDER

AND NOW, this 20th day of July, 1990, it is ordered that the appeal of Ronald Cummings Boyd is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 20, 1990

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For the Appellant:
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M. DIANE SMI
SECRETARY TO THE

WESTERN HICKORY COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 90-057-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	**Issued: July 20, 1990**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY
JUDGMENT OR TO LIMIT ISSUES

Synopsis

In an appeal of an assessment of civil penalty, a Motion for Partial Summary Judgment based upon the doctrine of administrative finality is rejected because the doctrine has been introduced in an attempt to preclude the appellant from challenging its obligation to treat discharge, when that alleged obligation has not been challenged in the Notice of Appeal. The alternative Motion To Limit The Issues is also denied because appellant has not raised the issue which is sought to be limited.

OPINION

On February 5, 1990, Western Hickory Coal Company, Inc. ("Western Hickory") filed with us a Notice of Appeal which contests the assessment of Civil Penalty No. 89-K-245-S, in the amount of $2,700, on Western Hickory by the Department of Environmental Resources ("DER"). In its Notice of Appeal, Western Hickory challenges both the fact of the underlying violation and the amount of the civil penalty.

Western Hickory filed its Pre-Hearing Memorandum on April 27, 1990, and DER filed its Pre-Hearing Memorandum on May 15, 1990. On June 20, 1990, we received DER's Motion For Partial Summary Judgment, Or, In The Alternative, Motion To Limit The Issues, and accompanying brief. We then, on June 28, 1990, received Western Hickory's Objections to DER's Motion and brief in support thereof. On July 6, 1990, we received DER's Brief In Response To Appellant's Objections To DER's Motion For Partial Summary Judgment.

DER's Assessment Of Civil Penalty, which is attached to the Notice of Appeal, alleges that on or about September 18, 1989, Western Hickory failed to operate or maintain adequate water treatment facilities necessary to treat discharges from its surface mine No. 31 located in Venango Township, Butler County. The assessment further alleges that this failure constituted separate violations 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., and the Clean Streams Law (Clean Streams Law), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. DER assessed the civil penalty pursuant to DER's authority under Section 18.4 of SMCRA, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b).

In its Motion For Partial Summary Judgment Or To Limit Issues, DER alleges that at all relevant times, Western Hickory was engaged in the surface mining of coal pursuant to its surface mining license and permit, and it was owner, occupier, operator, and permittee of mine No. 31. DER asserts the area covered by Western Hickory's permit had been mined previous to Western Hickory's mining at the No. 31 mine site, and discharges of acid mine drainage (discharges Nos. 35 and 36), for which DER determined Western Hickory was responsible, occurred in the vicinity of No. 31 mine. The motion also claims that four separate compliance orders were issued to Western Hickory: No. 88-K-107-S, on July 19, 1988; No. 88-K-182-S, on December 19, 1988; No. 89-K-033-S, on March 10, 1989; and No. 89-K-156-S, on August 1, 1989. DER states that following the issuance of each of these compliance orders, Western Hickory and DER entered into four separate consent assessments of civil penalty, one for each of the four violations cited in each Compliance Order. DER further states that on October 31, 1989, it issued Compliance Order No. 89-K-245-S, based upon a sample taken from the final discharge from Western Hickory's treatment pond. DER claims this sample, when analyzed, showed the water's quality violated the standards in 25 Pa. Code §87.102. DER has attached to its motion affidavits which support these factual averments. Later, on January 16, 1990, DER issued Western Hickory the Assessment Of Civil Penalty now under appeal for the violation cited in Compliance Order No. 89-K-245-S.

DER's Motion states that all of these compliance orders and civil penalty assessments were based upon Western Hickory's failure to provide adequate treatment for discharges Nos. 35 and 36. DER contends that Compliance Orders Nos. 88-K-107-S, 88-K-182-S, 89-K-033-S, and 89-K-156-S have

become final because Western Hickory did not appeal DER's issuance of them. For this proposition, DER cites Delta Mining Company v. DER, 1988 EHB 301, and Kerry Coal Company v. DER, 1988 EHB 304, which preceded the Commonwealth Court's decision in Kent Coal Mining Company v. Commonwealth, DER, 121 Pa. Cmwlth. 149, 550 A.2d 279 (1988). It argues that the four Compliance Orders, together with the consent assessments of civil penalty, conclusively establish, under the doctrine of administrative finality, Western Hickory's obligation to provide and maintain treatment for discharges Nos. 35 and 36. In support of this argument, DER cites Kent Coal, supra. Based on this argument, DER's Motion concludes that the only issue remaining in this appeal is whether DER abused its discretion by assessing a civil penalty in the amount of $2,700.

In its objection to DER's motion, Western Hickory argues that the motion is based upon prior dealings of the parties, "none of which are res adjudicata or collateral estoppel in this matter." Western Hickory urges that since the underlying violation here is the "failure to provide adequate treatment for discharge [of the water] from [its] treatment pond ... on September 18, 1989," and it is not alleged that there was a consent assessment for that violation, there are issues remaining as to the fact of the violation. In particular, in both its Brief in support of its objections and in its Pre-Hearing Memorandum, Western Hickory questions the validity of the test results.

In addressing the Motion For Partial Summary Judgment, we must first determine what issues the appellant has raised and whether they are properly before us. The Notice of Appeal contests the fact of the violation, denying that Western Hickory failed to operate or maintain adequate water treatment

facilities on or about September 18, 1989, and contests the amount of the civil penalty. Western Hickory's Notice of Appeal does not challenge its obligation to provide treatment of the discharge. Although Western Hickory did not file a timely appeal of Compliance Order No. 89-K-245-S. under the Commonwealth Court's decision in Kent Coal, supra, it is permitted to challenge the fact of the violation, as well as the amount of the fine, in its appeal from DER's assessment of the penalty which addressed the same alleged violation. Thus, these issues are properly before us at this time.

In sorting through these arguments and counter-arguments, we must remember that we may grant summary judgment, but only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320, 1322 (1978); Yeagle v. DER, EHB Docket No. 89-086-F (issued June 19, 1990) (slip op. at 2). A motion for summary judgment must be considered in the light most favorable to the non-moving party. Monessen, Inc. v. DER, EHB Docket No. 88-486-E (issued May 7, 1990); Robert C. Penoyer v. DER, 1987 EHB 131.

While Western Hickory's Notice of Appeal is sparse, and its Pre-Hearing Memorandum does little to flesh out the bones of the appeal, neither of these documents suggests that Western Hickory has raised in this appeal the question of its obligation for treatment of the discharge. Since the Board cannot consider issues which were not raised in the Notice of Appeal, the issue of Western Hickory's obligation to provide and maintain treatment for the discharges is not an issue in this appeal. See Skolnick v.

DER, 89-290-F (issued June 11, 1990); Robbi v. DER and York County Solid Waste and Refuse Authority, 1988 EHB 500; 25 Pa. Code §21.51(e). Additionally, it is inappropriate for the Board to grant summary judgment as to issues which are not before it. Yeagle supra.

DER's Brief In Response To Appellant's Objections contends that partial summary judgment must be granted in DER's favor because Western Hickory failed to support its objections with "an affidavit, depositions, or the like," (citing Curry v. Estate of Thompson, 332 Pa. Super. 364, 481 A.2d 568 (1984); Pa. R.C.P. 1035(d)). DER urges that its affidavits, specifically Paragraph 8 of the affidavit of David Updegrave, establish that the discharges were pollutional in nature on the date in question, and, since, Western Hickory has not provided any sworn statements which counter Updegrave's affidavit, its affidavits provide a sufficient basis for granting summary judgment. This argument is flawed for two reasons. First, DER's Motion does not request us to grant summary judgment as to the fact of the violation on the basis that the affidavits conclusively establish that violation. Rather, the Motion is based on the doctrine of administrative finality. Even if we disregard this deficiency and review the affidavits to see if they establish the fact of the violation, DER's argument overlooks the fact that we can only grant summary judgment where it is appropriate to do so. The Curry, supra, decision cited by DER also provides "mere failure to file counter affidavits does not assure that summary judgment will be granted to the moving party," because "the moving party's evidence must clearly exclude any genuine issue of material fact." Id. at ___, 481 A.2d at 660.

Viewing the Motion in the light more favorable to Western Hickory, the non-moving party, it would be inappropriate to grant summary judgment in

DER's favor in the absence of any evidence more concrete than the affidavits. See Newlin Corporation et al. v. DER, 1988 EHB 976. Simply put, when a dispute exists as to the fact of the violation and DER supports the Motion with only an affidavit of its employee which states that the disputed violation occurred, it is not necessary for the appellant to have submitted an affidavit in response in order to defeat the motion for summary judgment, provided it disputes the facts in DER's affidavit in its response to the Motion, because DER's affidavit has not clearly excluded any genuine issue of material fact.

DER's Motion requests that in the event we refuse to grant partial summary judgment, we limit the issues to preclude Western Hickory from challenging its obligation to treat the discharge. We have stated above that this issue is not a subject in this appeal; therefore, we cannot grant the Motion To Limit Issues. The parties should recognize, however, by our foregoing discussion in this Opinion, that appellant will only be permitted to proceed to introduce evidence at the hearing on the issues which have been raised in its Notice of Appeal.

O R D E R

AND NOW, this 20th day of July, 1990, it is ordered that DER's Motion for Partial Summary Judgment Or, In The Alternative To Limit Issues is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 20, 1990

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SECRETARY TO THE BO

SYLVIO AND JEAN DEFAZIO, t/a DIAMOND FUEL, INC.	:	**EHB Docket No. 90-186-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 20, 1990

OPINION AND ORDER SUR PETITION FOR ALLOWANCE OF APPEAL *NUNC PRO TUNC*

By Maxine Woelfling, Chairman

Synopsis

A petition for allowance of an appeal *nunc pro tunc* is denied where petitioners speculate that the reason their appeal was not timely filed was due to a failure of the Postal Service or the Board's own internal filing procedures, but offer no supporting factual bases for these allegations.

OPINION

On October 5, 1989, the Department of Environmental Resources (Department) issued an administrative order to Sylvio and Jean Defazio, t/a Diamond Fuel, Inc. (Petitioners) requiring them to abate pollutional conditions allegedly resulting from an oil spill on Diamond Fuel's property in Abington Township, Lackawanna County. Petitioners believed they had filed a notice of appeal with the Board. When, after conversations with Department counsel, Petitioners' counsel realized the Board had not received a copy of that appeal, he immediately forwarded a copy of the appeal to the Board by

attaching it to an April 23, 1990, letter inquiring about the status of the appeal.

In a letter dated April 26, 1990, the Board advised Petitioners' counsel that Petitioners had not received any correspondence or orders relating to the appeal because the appeal had never been filed with the Board. The Board then directed Petitioners to 25 Pa.Code §21.53, which provides for allowance of appeal *nunc pro tunc*.

On May 7, 1990, Petitioners filed a request for allowance of their appeal *nunc pro tunc*. As grounds for the request, Petitioners alleged that their appeal was properly executed and timely sent to the Board, but not timely filed with the Board as a result of a breakdown in the Board's operations. More specifically, Petitioners contended that the U.S. Postal authorities either lost or failed to deliver the appeal or that the Board either lost or misplaced the appeal upon delivery (Appellants' Response to Objections and Appeal *Nunc Pro Tunc*, Paragraphs 6, 9-10). In support of their arguments, Petitioners provided a copy of the Department's order, a copy of a letter dated October 25, 1989, purporting to be the notice of appeal, their April 23, 1990, letter to the Board inquiring about their appeal, and the Board's April 26, 1990, response.

On May 25, 1990, the Department filed objections to the petition, contending that Petitioners had failed to establish fraud or breakdown in the Board's operations and had failed to allege any unique and compelling circumstances which would bring them within the ambit of Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979).[1] Finally, the Department argued that

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[1] Petitioners have not argued the holding of that case, and we, therefore, do not address it.

Petitioners' six month delay in following up on its initial appeal militated against allowance of the appeal *nunc pro tunc.*

On June 8, 1990, Petitioners filed a response to the Department's objections, reiterating their arguments in support of the petition and countering that there is no Board rule requiring the use of certified mail for Board appeals or requiring any follow-up on appeals.

On June 29, 1990, the Department filed a reply to Petitioners' response, repeating its earlier arguments and adding that the appeal was untimely and the Board lacked jurisdiction, since the date the Board receives the appeal, rather than the date of mailing, is determinative of timeliness.[2]

Unless the requirements for an appeal *nunc pro tunc* are met, the Board lacks jurisdiction to hear an appeal from a Department action where the appeal is filed with the Board more than 30 days after a party receives written notice of the Department's action. Rostosky v. Comm., Department of Environmental Resources, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). The Board may hear an appeal *nunc pro tunc* if the petitioner demonstrates good cause; good cause has been interpreted to include fraud or a breakdown in the operation of the Board. Cubbon Lumber Company v. Comm., Department of Environmental Resources, 1989 EHB 160.

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[2] On July 12, 1990, the Board received from counsel for Petitioners a letter objecting to this reply because it was Petitioners' understanding that the reply would be prepared and filed by a different Department counsel. Petitioners also requested an opportunity to respond to the Department's reply. We deny Petitioners' request, since any further briefing of the issues involved herein would only be repetitive, as is evidenced by the Department's reply. Furthermore, the identity of counsel who prepared the reply is immaterial, since Petitioners' counsel was corresponding with one or the other Department counsel.

The situation presented in this case is analogous to that in Getz v. Comm., Pa. Game Commission, 83 Pa.Cmwlth. 59, 475 A.2d 1369 (1984), wherein the Commonwealth Court held that speculation regarding the operations of the Postal Service was not sufficient to satisfy the requisite burden for allowance of an appeal *nunc pro tunc*. Relying on Getz, the Board denied a petition to appeal *nunc pro tunc* in Shirley E. Gorham v. DER, 1987 EHB 767, because the only justification advanced for untimely filing was speculation that the Postal Service had failed to deliver the appeal to the Board.

Here, Petitioners speculate that the appeal was either lost or mislaid by the Postal Service or the Board, but they have not produced a return receipt or anything else establishing that the appeal was mailed or delivered. While the Petitioners correctly characterize the Board's rules as not requiring a return receipt or some other evidence of mailing, the burden is on Petitioners to produce some evidence to substantiate the filing of their appeal *nunc pro tunc*. Because they have produced nothing more than speculation, the Commonwealth Court's decision in Getz requires us to deny this petition.

O R D E R

AND NOW, this 20th day of July, 1990, it is ordered that the Petition for Leave to Appeal *Nunc Pro Tunc* filed by Sylvio and Jean DeFazio and Diamond Fuel, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
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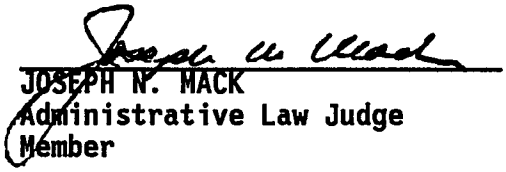

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 20, 1990

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M. DIANE SMI
SECRETARY TO THE E

RAY CAREY	:	
v.	:	**EHB Docket No. 88-521-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and LATIMER CONSTRUCTION COMPANY, Permittee	:	Issued: July 24, 1990

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

By Richard S. Ehmann, Member

Synopsis

Ray Carey's (Carey's) appeal which challenges the Department of Environmental Resources' (DER's) grant of a mine permittee's bond release request is dismissed. Insofar as Carey's notice of appeal raises matters bearing upon Stage I bond release, Carey has failed to establish that this appeal was timely filed with the Board, and, thus, we will not address those issues. Carey has also failed to carry his burden of proof to establish the permittee's alleged non-compliance with the statutes, regulations, and its plan regarding Stage II of the bond release.

INTRODUCTION

On December 19, 1988, Carey, pro se, filed a notice of appeal with this Board seeking review of the release of a bond by DER.[1] The notice of appeal states Carey received notice of the challenged DER action on December 9, 1988. Although the notice of appeal does not specify the particular bond release which is being appealed, Carey submitted, pursuant to our request for additional information, a letter from DER to Carey, dated December 7, 1988. The letter states that on November 23, 1988, DER released the bond which was the subject of Completion Report 1-88-147. This Completion Report was for Stage II bond release. (Latimer Exhibit 4) In the notice of appeal, Carey raises issues bearing upon Stage II bond release as well as Stage I bond release.

On April 28, 1989, permittee Latimer Construction Company (Latimer) filed with us its motion to dismiss the appeal based upon Carey's failure to comply with our Pre-Hearing Order No. 1 and our Order issued on March 17, 1989 which directed him to file a more adequate pre-hearing memorandum. By an Order dated May 8, 1989, we granted Carey an extension until May 31, 1989 in order to obtain counsel and respond to the motion to dismiss. Entry of appearance was made by his counsel on June 1, 1989; a pre-hearing memorandum and answer to the motion to dismiss were also filed on behalf of Carey that day.

On June 5, 1989, Latimer again filed a motion to dismiss based on Carey's failure to meet the requirements of Pre-Hearing Order No. 1 in a

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[1]The bond was released by DER 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 regulations promulgated thereunder.

timely, adequate, and complete fashion. We then issued an Order on June 8, 1989 directing Carey to amend his pre-hearing memorandum to fully comply with the requirements of Pre-Hearing Order No. 1 by June 22, 1989. An amended pre-hearing memorandum was filed on June 26, 1989 by Carey. The pre-hearing memoranda of Latimer and DER were filed on June 10, 1989, and July 17, 1989, respectively. The matter was assigned to Board Member Richard S. Ehmann on October 31, 1989, after the resignation of Board Member William A. Roth.

On February 7, 1990, at the commencement of the hearing before Board Member Ehmann, Latimer attempted to file a proposed stipulation of fact, and Carey attempted to file a response to Latimer's proposed stipulation of fact. These stipulations were rejected because of the failure of the parties to comply with our Order directing them to file a joint stipulation prior to the date of the hearing. Proposed findings of fact and accompanying post-hearing briefs were later filed by Carey on March 29, 1990, by Latimer on April 30, 1990, and by DER on May 1, 1990.

Carey, in his post-hearing brief Conclusions of Law,[2] urges that all of the landowners were not given proper notice by the Commonwealth and/or contractor at the time of the application for partial (Stage I) bond release. He therefore argues any "question" which could have been raised at the time of application for partial bond release is not barred from this proceeding.

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[2]The post-hearing brief of Carey's counsel is inadequate and leaves this Board in an awkward position in dealing with the appeal. His Discussion makes cursory references to various sections of the Pa. Code and SMCRA without developing arguments of which those sections would be supportive. It fails to deal with the notice question, which was specifically raised at the hearing in ruling on the motion in limine made by Latimer. It also is devoid of any citation to case law, even regarding the assignment of the burden of proof. Moreover, the Discussion, Conclusions of Law, and Summary portions of the brief make no reference to the transcript of the hearing or to the evidence established at the hearing.

Additionally, he urges a "partial Bond Release does not release responsibility for part of the requirements under the various acts, but continues to support compliance with all segments of the act until finally completed and for five years thereafter regarding vegetation, etc." (Carey's Conclusions of Law No. 3.) Carey further argues in his Conclusions of Law that he has sustained the burden of proof regarding his claims that: (1) Latimer did not properly regrade the site; (2) Latimer removed and did not replace field drains, creating an inadequate drainage condition; and (3) that five or six acres of the property cannot be used for the post-mining use of farming, which was the pre-mining use. Carey is deemed to have abandoned any contentions of law not raised in his post-hearing brief. Lucky Strike Coal Co. et al. v. Commonwealth, DER, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988).

Latimer, in its post-hearing brief, first urges that by failing to timely file a notice of appeal with the Board following Stage I bond release, Carey has waived any contention at this time regarding that stage of reclamation. Latimer points to Carey's knowledge of and participation in Stage I proceedings when they were taking place. Further, Latimer argues DER did not abuse its discretion in granting Latimer's request as to either Stage I or Stage II bond release.

DER's post-hearing brief does not address the issue of whether in this appeal we should examine Carey's claims regarding Stage I of the bond release. DER flatly states that Carey did not appeal the Stage I bond release and that he is challenging Stage II bond release. DER's brief instead focuses on its concern that a hump which Carey desires to have graded out is located at or near an area on the mine site where Kennametal Industries disposed of industrial sludge (before Latimer mined adjacent thereto). DER urges this

sludge is residual waste under the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. DER also raises a concern that the hump is located on top of or immediately adjacent to the top of an area which had been used as a dump by the Carey family during their ownership and prior to that time. DER argues these wastes located in the hump area are residual wastes within the meaning of the SWMA, and regrading of the hump might re-affect these residual wastes. It points out that a solid waste expert testified that a study would need to be performed to identify the waste, and contingencies would need to be made for disposal of the material, prior to additional grading or excavation in the area. Thus, DER contends that additional regrading would be in violation of the SWMA unless Carey were first to obtain a permit for moving and affecting the residual waste.

After hearing this matter and conducting a full and thorough review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Carey, owner of a parcel of land in Derry Township, Westmoreland County (the Carey site). (N.T. 21, 118)[3]

2. Respondent is the Department of Environmental Resources (DER), which is empowered to administer and enforce 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.

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[3]References to "N.T.", followed by a page number, are references to a page in the single volume of the transcript of the February 7, 1990 hearing. "RC Ex." designates an exhibit introduced by Carey; "L Ex." designates an exhibit introduced by Latimer; and "C Ex." designates an exhibit introduced by the Commonwealth.

1987, as amended, 35 P.S. §691.1 et seq. (Clean Streams Law); the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA); Section 1917-A of the Administrative Code, Act of June 7, 1923, P.L. 498, as amended, 71 P.S. §510-17 (Administrative Code), and the rules and regulations promulgated thereunder.

3. Permittee is Latimer Construction Company. (Proposed Findings of Fact of the parties)

4. In May of 1984, DER authorized Latimer to conduct a surface mining operation on the Carey site pursuant to Mining Permit No. 65830117. (Proposed Findings of Fact of the parties)

5. A reclamation plan was included with the permit application (N.T. 126), but this plan was not introduced into evidence at the hearing.

6. The area with which Carey is dissatisfied as to reclamation is about five or six acres of his 100 acre property. (N.T. 30, 89)

7. At the time the permit was issued, a one-half interest in the property in question was owned by Ray Carey's mother, Bertha. The other half interest was held in equal portions by Ray Carey and his two brothers. (N.T. 66, 111)

8. Ray Carey handled the business affairs for the Carey site and he negotiated the lease agreement with Latimer to permit surface mining to occur at the site. (N.T. 23-24)

Stage I Bond Release

9. Latimer completed active surface mining at the Carey site and applied for Stage I bond release May 23, 1986. (N.T. 119; L Ex. 32)

10. Stage I bond release requires that the site be regraded to approximate original contour (AOC) and that necessary erosion and sedimentation controls be in place. (N.T. 127, 171)

11. Carey testified he did not have notice of the application for Stage I bond release or the release itself, either actual or by publication. (N.T. 26, 54, 71, 76)

12. After conducting an inspection on August 8, 1986, DER surface mine inspector William Stroble recommended a Stage I bond release be granted based on his opinion that the Carey site has been regraded to AOC. (N.T. 120; L Ex. 30)

13. By a letter dated September 15, 1986, F. Thomas Zeglin, an engineer representing Ray Carey, notified DER that Carey objected to the reclamation at the Carey site. (N.T. 72-73)

14. On October 27, 1986, a meeting was held at the site at which Carey discussed with representatives of North Cambria Fuel (NCF)[4] and DER his objections to the reclamation. (N.T. 45-46, 51, 74-75, 122-23)

15. By a letter dated October 29, 1986, DER notified Latimer that it was granting a release of 60 percent of the bond (Stage I bond release.) (L Ex. 25)

16. In June of 1987, Carey received a letter from DER which stated that there were no problems with the reclamation. (N.T. 96-97)

17. On July 10, 1987, Carey informed DER through a letter that he was still not satisfied with the regrading at the Carey Site. (RC Ex. 9)

18. Bertha E. Carey died in September of 1987. (N.T. 67, 115)

---

[4]Carey testified Latimer did the stripping of the site and NCF did the post-mining regrading. (N.T. 25)

19. DER notified Ray Carey by letter dated September 15, 1987, that no further reclamation would be required because the site had been returned to AOC. (N.T. 97; C Ex. 1)

20. Carey testified he found an unopened envelope containing notice of the Stage I bond release at his mother's house in 1988. (N.T. 26, 72, 115)

21. Carey did not file an appeal from Stage I bond release. (N.T. 76)

Stage II Bond Release

22. Ownership of the site was conveyed by the estate of Bertha Carey and the other property owners to Ray Carey in early 1988. (N.T. 66)

23. Latimer applied for Stage II bond release during the summer of 1988. (L Ex. 34)

24. The requirements for Stage II bond release are that the site must be topsoiled, planted, have at least 70 percent ground cover and not be contributing suspended solids to stream waters. (N.T. 128, 164-166)

25. In a letter dated September 1, 1988 to DER, Carey made the following objections to the reclamation: 1) there are deep washed places; 2) one area never caught grass; 3) only ragweed grows in the fall; and 4) the drainage ditch to one pond was never leveled. (L Ex. 1)

26. J. Scott Roberts, a forester with DER, inspected the site on November 2, 1988, attentive to the objections to the release raised by Carey. (N.T. 162-68)

27. Roberts' inspection report dated November 2, 1988, makes the following comments:

a) no sign of accelerated erosion or offsite sedimentation was noted;

b) the area that did not catch grass was located at a former garbage dump, and while most of the grasses noted were of the warm season variety, growth was in excess of 30 percent [on this dump area] and the area was not eroding;

c) the entire site had strong growth of permanent grasses and legumes; and

d) the drainage ditch had been taken out and was easily traversed, although it was not the best removal job. (N.T. 169-70; L Ex. 34)

28. Roberts recommended release of Stage II bonds. (L Ex. 34)

29. In a letter dated November 7, 1988, Roberts informed Carey of the results of his inspection. (N.T. 162)

30. Thereafter, Carey met with Roberts to discuss his complaints. During the meeting, Roberts and Carey could not agree on the status of the reclamation. (N.T. 186)

31. DER granted Latimer's request for Stage II bond release on November 23, 1988. (N.T. 186; L Ex. 4)

32. On portions of the site there is planted vegetation growing to Carey's satisfaction. (N.T. 33, 44, 68, 107)

33. There are no discharges flowing off the site from the stripped area which have any elevated levels of suspended solids. (N.T. 68, 124)

34. No water impoundments exist at the site. (N.T. 124, 166)

35. The area about which Carey is concerned is not designated as prime farmland. (N.T. 188, 199-200)

DISCUSSION

In reviewing this appeal, our scope of review is limited to determining whether or not the grant of bond release by DER was an abuse of

discretion or an arbitrary exercise of power on the part of DER. Duncan v. DER and The Arcadia Company, Inc., 1989 EHB 459; Warren Sand and Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). Ray Carey carries the burden of proof pursuant to 25 Pa.Code §21.101(c)(3).

Initially, we must address Latimer's argument which seeks to exclude any evidence bearing on Stage I bond release on the basis that by failing to timely appeal Stage I bond release, Carey has waived any objections to that release during this proceeding.

The SMCRA, at 52 P.S. §1396.4(b), states in relevant part:

> (b) The applicant shall give public notice of every application for...a bond release under this act in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks.... Any person having an interest which is or may be adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law and from the adjudication of said board such person may further appeal as provided by Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure).

(Emphasis added)

The regulations, at 25 Pa.Code §86.171(b), give further detail on the type of public notice required by the Act. The regulations also provide that the proof of publication shall be considered part of the bond release application. 25 Pa.Code §86.171(a)(3).

In the instant case, Latimer Exhibit 32 is a completion report which was admitted into evidence for the purpose of showing the report that was filed. A necessary part of the completion report is a proof of publication of Latimer's Stage I and Stage II bond release application. This document

purports that notice by publication was made in the Latrobe Bulletin on July 23, July 30, August 6, and August 13, 1986, and includes a copy of the published notice. The published notice directs that any person adversely affected by the bond release is allowed to file written objections to the bond release, within 30 days from the date of final publication of the notice, with the Bureau of Mining and Reclamation, Department of Environmental Resources, R.D. #2, Box 603-C, Greensburg, PA, 15601. On September 15, 1986, nearly 30 days after the final publication, Ray Carey filed such written objections through his agent, Thomas Zeglin. (Findings of Fact No. 13) Clearly, Latimer complied with SMCRA §1396.4(b) and 25 Pa.Code §86.171 by giving notice by publication as to the proceedings. While Carey testified he did not receive such notice by publication (Findings of Fact No. 11), it is clear that he gleaned knowledge of the bond release proceeding in some fashion and filed written objections with the proper department on nearly the proper date, and we thus find his testimony that he did not receive notice to be without credibility.

The courts of Pennsylvania have long held that one has notice of a fact if he or his agent knows the fact, or has reason to know it, or should know it, or has been given a notification of it. Borough of Bridgewater v. Pennsylvania, P.U.C., 181 Pa.Super. 84, 124 A.2d 165 (1956). Here, Carey and his agent, Zeglin, both had actual knowledge or notice of the reclamation proceedings, as well as constructive notice made by publication. He filed written objections to the reclamation approximately 30 days following the final notice by publication, and he participated in an informal conference on the site concerning his objections. Thus, he cannot persuade us that he was without notice of the procedings.

The SMCRA at 1396.4(b) provides that:

> [A]ny person having an interest which is or may be adversely affected by an action of the department...to release or deny release of a bond and who participated in the informal hearing held pursuant to this subsection or filed written objections before the close of the public comment period, may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law and from the adjudication of said board such person may further appeal as provided by Title 2 of the Pennsylvania Consolidated Statutes.

The regulations at 25 Pa.Code §86.171(f)(3) state that if there has been an informal conference, the notification of the decision shall be made to the permittee and other interested parties within 30 days after conclusion of the conference. Further, 25 Pa.Code §86.171(g) states:

> Following receipt of the decision of the Department under subsection (f), the permittee or an affected person may appeal. Appeals shall be filed with the Environmental Hearing Board under Section 1921-A of The Administration Code of 1929 (71 P.S. §510-21) and according to the requirements of Chapter 21 (relating to Environmental Hearing Board).

It is not clear from the testimony whether Carey received written notice of the decision to release the bond within thirty days after the conclusion of the informal conference. Even assuming ad arguendo that Carey was not so notified, he received a letter from DER representatives in June of 1987 stating that the Department would not be taking further action on his objections (N.T. 96-97), and he also received a letter from DER representatives, dated September 15, 1987, stating that Latimer would not be required to do any further reclamation at the site. (N.T. 98; C Ex. 1) Carey did not file an appeal of Stage I bond release with this Board upon learning

of the decision of the Department, but waited until December 19, 1988, after Stage II of the bond release had been completed. (Findings of Fact No. 21)

Subsection 1396.4(b) of SMCRA, supra, gives a person who has an interest which is or may be adversely affected by DER's release of a bond and who participated in the informal hearing the opportunity to bring his appeal before this Board "in the manner provided by law." We have jurisdiction to hear appeals "from an action of the Department if the appeal is filed within 30 days after a party receives written notice of the action or within 30 days after notice of the action is published in the Pennsylvania Bulletin. 25 Pa.Code §21.52(a)." Blevins v. DER and Southeastern Chester County Refuse Authority, 1988 EHB 1075. See Rostosky v. Commonwealth, DER, 26 Pa.Commw. 478, 364 A.2d 761 (1976); Beltrami v. DER, 1989 EHB 594.

The SMCRA and accompanying regulations contemplate bond release occurring in stages, and appeals of DER's action on a bond release application to be filed with us during the time period immediately surrounding the decision to release the bond. This appeal scheme is designed to accompany the reclamation process, wherein bond release occurs in the same sequence as reclamation. Completion of backfilling, regrading, and drainage control is considered during Stage I (25 Pa.Code §172(d)(1)), and, if no objections are brought as to these, the bond release process proceeds to Stage II, which occurs after topsoil replacement and revegetation (25 Pa.Code §172(d)(2)). To allow a person to challenge backfilling and regrading after the topsoil has been replaced and the site has been vegetated would work a prejudice to site restoration. A successful challenge of such issues at that point in time would require destruction of the restored vegetation and attempted removal of the replaced topsoil in order to further grade the underlying mine spoil, with

the topsoil (assuming it was successfully removed and stored) reapplied and vegetation efforts renewed. It takes no great mental effort to see that the more frequently this occurs on any one tract, the more likely it is that such efforts will be less than a complete success.

Further, we lack jurisdiction to entertain an untimely appeal of matters bearing upon Stage I bond release after subsequent release of Stage II of the bond. The instant appeal was filed within thirty days of Carey's receipt of a letter from DER dated December 7, 1988, which accompanies his notice of appeal, apprising him that Stage II bond release had been granted. Thus, Carey filed his appeal only from Stage II bond release. Because Carey failed to file his appeal of the Stage I bond release in a timely fashion, we are without jurisdiction to examine the merits of the portion of his appeal bearing upon Stage I bond release and we must dismiss that portion of the appeal.

Stage II Bond Release

In reviewing the issue of whether DER committed an abuse of discretion in granting Latimer's request for a Stage II bond release, we examine DER's determination that Latimer complied with the requirements for Stage II bond release found at §4(g) of SMCRA and 25 Pa.Code §86.172(d)(2).

The relevant portion of Section 4(g) of SMCRA, 52 P.S. §1396.4(g) provides:

> (2) when revegetation has been successfully established on the affected area in accordance with the approved reclamation plan, the department shall retain the amount of bond for the revegetated area which would be sufficient for the cost to the Commonwealth of reestablishing revegetation....

Further, 25 Pa.Code §86.172(d)(2) states that Stage II shall be

deemed to have been completed when:

> (i) Topsoil has been replaced and revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met.
>
> (ii) The lands are not contributing suspended solids to stream flow or run off outside the permit area.

Professional engineer Van G. Plocus testified on Latimer's behalf that the topsoil appeared to be evenly spread at the site upon his inspection, and Carey did not rebut this testimony. There was also no evidence that the Carey site is contributing suspended solids to stream flow, and, in fact, Carey testified he was aware of none. (N.T. 68) Consequently, he did not carry his burden of proof as to any abuse of discretion by DER in granting the Stage II bond release request.

Next, we turn to Carey's contention that the site has not been returned to a condition in which it can be used as prime farmland. The pertinent portion of §1396.4(g) of SMCRA provides:

> No part of the bond shall be released under this subsection so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements of law or until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to subsection (a)(2)I.

The areas with which Carey is concerned are not designated as prime farmlands, however. (Findings of Fact No. 35) Thus, Carey's claim that the site has not been restored to prime farmland also fails.

Finally, as to Carey's contention that the site has not been adequately reclaimed for its post-mining use, he has failed to introduce any evidence to show that farming is the approved post-mining use for the area about which he is complaining, or that farming was the pre-mining use of the area. Moreover, it is clear that Carey is actually seeking to have Latimer improve the site, including the portion of the site which had been mined prior to Latimer's operations and which Carey had not farmed but instead used as a dump, to a better than pre-mining condition.[5] He has failed, however, to establish that DER erred in granting Stage II bond release, and we accordingly dismiss his appeal.

CONCLUSIONS OF LAW

1. This Board has no jurisdiction over the claims in Carey's appeal which bear upon Stage I bond release because the appeal of such issues is untimely filed with us.

2. This Board has jurisdiction over the parties and the subject matter of the portion of this appeal bearing upon Stage II of the bond release.

3. Ray Carey has the burden of proof in this appeal.

4. 25 Pa.Code §86.172(d)(2) states that Stage II shall be deemed to have been completed when:

> (i) Topsoil has been replaced and revegetation has been established in accordance

---

[5]In reaching the conclusions we have come to in this Adjudication, we have not ruled on the issue raised in DER's post-hearing brief as to the impact of regrading on both the industrial sludge dumped on the site with Carey's permission and the wastes dumped there by Carey. We acknowledge the legitimacy of DER's concerns regarding the disturbance of these previously disposed wastes. As pointed out in DER's brief, the re-affecting of such a dump site containing these wastes would appear to first require a permit be issued under the SWMA.

with the approved reclamation plan and the standards for the success of revegetation are met.

5. Carey failed to establish Latimer's non-compliance with its reclamation plans for Stage II bond release.

6. Carey failed to establish Latimer has not complied with the statutes and regulations applicable to Stage II bond release.

7. DER did not abuse its discretion in granting Latimer's Stage II bond release request.

8. Carey failed to establish the areas he claims were not adequately reclaimed are prime farmland.

9. Carey failed to show farming is the approved post-mining use for his site.

10. Carey failed to show that farming was the pre-mining use for his site.

O R D E R

AND NOW, this 24th day of July, 1990, it is ordered that the portion of this appeal challenging matters which relate to DER approval of Latimer's Stage I bond release request is dismissed as untimely filed, and DER approval of Latimer's Stage II bond release requests is sustained and the appeal of Ray Carey thereto is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Board Member Joseph N. Mack recused himself in this case and has not participated in this adjudication.

DATED: July 24, 1990

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M. DIANE SMITH
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CRONER, INC.	:	
	:	
V.	:	**EHB Docket No. 87-206-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 26, 1990

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

Richard S. Ehmann, Member

Synopsis

An appeal challenging a Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") regulation on blasting, which was promulgated to obtain primacy under the federal Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §1201 et seq. (1977), as being unconstitutional on its face, is an indirect attack upon the identical federal surface mining regulation. As such, our jurisdiction is preempted by 30 U.S.C. §1276(a)(1), which directs that all such challenges of federal regulations be brought in the United States District Court for the District of Columbia Circuit. Accordingly, the DER Motion to Dismiss based on this argument must be granted. Appellant's Motion For Summary Judgment cannot be ruled upon by this Board because we lack jurisdiction to do so.

BACKGROUND

On May 28, 1987 Croner, Inc. ("Croner") filed an appeal with the Board from the April 28, 1987 letter from Michael C. Welch, District Mining

Manager for DER, which approved a revised Blasting Plan for Croner's Surface Mining Permit No. 56663094. This permit is for a mine site located in Brothersvalley Township, Somerset County.

The verified Notice of Appeal filed by Croner raises a challenge to the constitutionality of the two conditions DER placed in the Blast Plan. The conditions are:

> 1. When the Scale Distance falls below sixty (60) at the Hartman residence or any dwelling, a peak particle velocity of one (1) inch per second and an air over pressure of 132 dBL must be maintained.
>
> 2. John and Evelyn Hartman cannot release the vibration limit of one (1) inch per second and 132 dBL air over pressure when blasting occurs closer than 300 feet to their dwelling.

With regard to these conditions Croner states four reasons to appeal. They are: (1) The condition on peak particle velocity and air pressure is more stringent than those imposed "on blasting in operations other than coal mining so it arbitrarily denies Croner's right to equal protection of the laws; (2) the conditions arbitrarily preclude a landowner affected by coal mine blasting from waiving the peak particle velocity and air over pressure limitations while allowing a landowner to waive them if he is affected by non-coal operations and thus violate Croner's right to equal protection under the law; (3) the conditions deny Croner its right to equal protection of the law by arbitrarily precluding an affected landowner from waiving these limitations when such waivers are allowed by 25 Pa. Code §87.127(i) by other similarly situated individuals without a reasonable basis for distinction in the regulations; and (4) Croner is deprived of its right to equal protection under law by the disparate treatment of blasting in coal mining operations versus non-coal mining operations, which is unsupported by any reasonable basis.

When the appeal was docketed it was assigned to Board Member William A. Roth.

By letter dated September 16, 1987 from counsel for Croner, the parties stipulated that they would file cross-motions for summary judgment. The letter goes on to say:

> "Proceeding in this manner was agreed by [DER] Attorney Dunlop and I to be the most efficient way to resolve this case in light of the fact that our appeal simply challenges the constitutionality and application of the DER regulation in question."

Following that letter and under a second letter dated October 1987 Croner filed its Motion Seeking Relief In the Nature of Summary Judgment. The motion and its contemporaneous supporting brief suggest that 25 Pa. Code §87.127(e) and (i) are arbitrary, contravene the law by limiting waivers and violate Croner's right to equal protection of the law. In this motion's transmittal letter Croner's counsel further advises the Board:

> As stated in my brief, and as previously agreed to with Katherine S. Dunlop, Assistant Counsel for DER, the issues presented in the appeal are being submitted in this fashion with the understanding that this will be the only submission with respect to this matter. That is, Appellant stipulates that the matters raised by the motion and discussed in the brief may be decided, based on the briefs submitted, and no further hearing will be necessary. It was agreed to by myself and Attorney Dunlop that this would be the most expeditious way to have this matter decided by the Environmental Hearing Board in light of the fact that no evidentiary hearing would be necessary.

Croner's motion is accompanied by an affidavit signed by the owner of the property to be mined by Croner.[1]

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[1] One of the two arguments in Croner's Motion and Brief is that the restriction on blast plan approval prohibiting an affected landowner from waiving the limits on vibration and air over pressure occurring within 300 feet of the landowner's dwelling contravenes the landowner's right to waive footnote continued

DER filed an unverified Answer to Croner's motion on December 28, 1987. On February 4, 1988 DER filed its Motion to Dismiss or in the Alternative Motion For Summary Judgment and a Memorandum In Support thereof. DER's Motion to Dismiss challenges our jurisdiction to hear this appeal because DER claims this is a direct or indirect challenge to the federal SMCRA and the regulations promulgated thereunder, which challenges may only be heard in the District Court for the District of Columbia. It further states this appeal is untimely because challenges of the federal regulations must be filed within sixty days of the federal regulation's promulgation. Finally, DER avers that 25 Pa. Code §87.127(e) and (i) are constitutional because they make a rational distinction between who may and who may not waive the blasting limitations incorporated into Croner's Amended Plan.

Subsequently, on October 3, 1988, Croner filed its Answer to the Commonwealth's motion and its brief in support thereof.

On October 30, 1989, Board Member Roth having resigned from this Board, this appeal was reassigned to Board Member Richard S. Ehmann. Then, by Order dated January 17, 1990, this appeal was consolidated with Croner's appeals at Docket Nos. 88-214-E, 88-425-E and 89-498-E.[2]

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continued footnote
surface mining activities set forth in §1396.4(c) of the Pennsylvania Surface Mining Conservation and Reclamation Act, (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. 1396.4(c). This is a new argument not raised previously in Croner's Notice of Appeal. Because it was not raised when this appeal was first filed, it may not be considered at this time, ROBBI v. DER et al., 1988 EHB 500, NGK Metals Corporation v. DER, Docket No. 90-056-MR (Opinion and Order issued April 5, 1990).

[2] Croner's appeal at Docket 88-214-E is an appeal of DER's Compliance Order No. 88-3-115-S for alleged violations by Croner of the blast plan which is challenged in this proceeding. The Croner appeal at Docket 88-425-E is from the September 19, 1988 civil penalty assessment of $720.00 by DER for violation of this blast plan. At Docket No. 89-498-E Croner has appealed DER
footnote continued

The Board found the initial briefs of the parties to have failed to adequately address all issues raised in the respective motions and responses thereto, so by Order dated January 22, 1990, we ordered the parties to submit further briefs on these issues. Croner's Brief was received on February 16, 1990 and DER's Brief was filed on March 2, 1990.[3]

Preliminarily, of course, it must be observed that we have the authority to grant motions for summary judgment in the appropriate circumstances. Commonwealth v. Summerhill Borough, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). In review thereof, we must consider such a motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131; Del-Aware, Unlimited, Inc. et al. v. DER et al., 1988 EHB 150; Rescue et al. v. DER, 1988 EHB 163. It is also clear that we have the authority to grant a motion to dismiss based on allegations of a lack of jurisdiction. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

We must first address DER's Motion to Dismiss, for if DER is correct and we lack jurisdiction, we cannot consider a second issue, no matter how closely connected.[4]

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continued footnote
Compliance Order No. 89-3-245-S dated September 26, 1989, which directs Croner to comply with the DER approved blast plan. In each case the issue is the conditions attached by DER to Croner's plan which are under attack here.

[3] At no time has DER's former or present counsel seen fit to grace us through the filing of even one affidavit to support its Motion or its Answer, nor has counsel felt the need to verify the allegations contained in either DER's Answer or the Motion. In the past we have routinely denied DER motions which lack such factual support because of the requirements of Pa. R.C.P. 1035. We have not done so here for the reasons contained in the opinion.

[4] If we decide we lack jurisdiction over this type of case, we cannot footnote continued

The affidavits filed by Croner make it clear that the Hartmans rather than Croner, own the dwelling house at the Hartman farm near to which Croner wishes to blast as part of its surface mining operation. It is also clear from the affidavits that the Hartmans have signed a waiver as to blasting but that the permit's conditions bar the Hartmans from releasing Croner from the limitations on blasting set forth in the regulations. Finally, it is clear from a review of the Notice of Appeal, Motions, Briefs, and all of the attachments thereto filed on Croner's behalf, that Croner's challenge is not to a specific vibration or decibel number but to DER's regulation-based refusal to allow any waivers of these numbers by Mr. and Mrs. Hartman.[5] With this in mind, we must now turn to the argument in DER's Motion to Dismiss.

Under §503(a) of federal SMCRA, 30 U.S.C. §1253(a) a state may assume jurisdiction over surface coal mining and reclamation activities by submitting a program for the approval of the Secretary of the Interior "...which demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes through - (7) rules and regulations issued by the Secretary pursuant to this chapter." The implementing regulations for this part of federal SMCRA at 30 CFR §732.15 provide that:

> The Secretary shall not approve a State program unless, on the basis of information contained in the program submission, comments, testimony and written presentations at the public

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continued footnote
decide whether or not Croner's challenge to DER's regulation was untimely as DER's Motion suggests. Once we determine we lack jurisdiction, our power to adjudicate is gone.

[5] Croner's Motion does not challenge the application of the regulation to it on the basis of whether the blast plan's conditions properly interpret the regulation but only raises the unconstitutionality of 25 Pa. Code §87.127. We clearly have jurisdiction to decide "interpretation" issues but do not do so here because Croner has not raised them.

> hearings, and other relevant information, the Secretary finds that -
>
> (a) The program provides for the State to carry out the provisions and meet the purposes of the Act and this Chapter within the State and that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of the Chapter.
>
> (b) The State regulatory authority has the authority under State laws and regulations pertaining to coal exploration and surface coal mining and reclamation operations and the State program includes provisions to -
>
> (1) Implement, administer and enforce all applicable requirements consistent with Subchapter K of this chapter;
>
> * * * *

Subchapter K of the chapter is found at 30 CFR Pt. 816; 30 CFR §816.1 states that "This part sets forth the minimum environmental protection performance standards to be adopted and implemented under regulatory programs for surface mining activities."

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. (state SMCRA), was substantially amended in 1980 by the Act of October 10, 1980, P.L. 835, No. 155, (Act 155), in order to secure primacy over surface coal mining. Section 17 of Act 155 provides that

> It is hereby determined that it is in the public interest for Pennsylvania to secure primacy jurisdiction over the enforcement and administration of Public Law 95-87, the Federal Surface Mining Control and Reclamation Act of 1977, and that the General Assemby should amend this act in order to obtain approval of the Pennsylvania program by the United States Department of the Interior ["OSM"]. [sic]

Section 15 of Act 155 authorizes the Environmental Quality Board ("EQB") to promulgate initial regulations on an emergency basis and to repromulgate them

after program approval by OSM and an opportunity for the legislature and the general public to be heard.

After passage of the amendment to state SMCRA in 1980, the EQB promulgated 25 Pa. Code §87.127 as part of the revision of all of the chapters of regulations dealing with surface coal mining. These regulations became effective on July 31, 1982 and were first published in 12 Pa. Bulletin 2473. That these regulations are the primacy regulations is evident from the EQB's findings at 12 Pa. Bulletin 2473-74.[6] In finding No. 4 the EQB states the primacy package was submitted to OSM on January 25, 1981. Finding No. 7 states:

> (7) That it is the intent of this Board in revising the Department's coal mining regulations as provided by this order to take no action that might in any way jeopardize, delay or prejudice the Department's ability to obtain primary jurisdiction over the Pennsylvania coal mining program from [OSM].

This DER regulatory program was duly approved for primacy purposes by OSM as reflected in 30 C.F.R. §938.10 (1982).

The regulation at issue herein, 25 Pa. Code §87.127, provides in relevant part:

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[6] DER broadly argues that 25 Pa. Code §87.127 was adopted by the EQB to secure primacy, yet does not provide us with anything to support its argument. Although this may now be a matter of common knowledge, we cannot dismiss Croner's appeal on the basis of common knowledge. However, even though DER has not provided this information to us, it is available through official notice. 25 Pa. Code §21.109. Under this concept we may take notice of state statutes, Lynn v. County of Lackawanna, 75 Pa. Cmwlth. 238, 462 A.2d 320 (1983); federal statutes, In re. Snyder's Estate, 346 Pa. 615, 31 A.2d 132 (1943), cert. denied sub nom., Snyder v. Provident Trust Co. 320 U.S. 750, 64 S. Ct. 53, 88 L. Ed. 445 (1943), rehearing denied, 320 U.S. 812, 64 S. Ct. 155, 88 L.Ed. 49 (1943); regulations promulgated under statutes, 45 Pa. C.S. §506, Edelbrew Brewery v. Weiss, 170 Pa. Super 34, 84 A.2d 371 (1951) and various official proceedings or acts, Commonwealth et rel. Jones v. Rundle, 413 Pa. 456, 199 A.2d 135 (1964), Leitag v. Dilworth, 25 D & C 2d 221 (1961).

> (e) Airblasts shall be controlled so that they do not exceed the noise level specified in this subsection at any dwelling...unless such structure is owned by the person who conducts the surface mining activities and is not leased to another person. The lessee may sign a waiver relieving the operator from meeting the airblast limitations of this subsection.
>
> (i) The maximum peak particle velocity limitation of subsection (h) shall not apply at the following locations:
>
> 1. At structure owned by the person conducting the mining activity, and not leased to another party.
>
> 2. At structures owned by the person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

The corresponding federal regulation, 30 CFR §816.67(e), provides:

> (e) The maximum airblast and ground-vibration standards of paragraphs (b) and (d) of this section shall not apply at the following locations:
>
> 1. At structures owned by the permittee and not leased to another person.
>
> 2. At structuresowned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

It is obvious from a reading of these regulations that the waiver provisions are virtually identical. Furthermore, as explained above, the regulations set forth in Subchapter K, of which §816.67(e) is a part, are a necessary part of a state's regulatory program if it wishes to obtain primacy over surface coal mining.

The nearly mirror perfect wording of these separate state and federal regulations, the language of the acts amending the statutes and the EQB's language in promulgating these regulations each force the conclusion that this

regulation is solely primacy driven. Collectively the conclusion cannot be refuted. This is important because both Croner's motion and briefs and DER's motions and briefs frame the issue before us as the constitutionality of Section 87.127. Thus, the parties both concede the rightness of the DER imposed conditions in the Blast Plan if the regulation itself is proper.

We are clearly empowered to pass on the constitutionality of a regulation or the constitutionality of application of a regulation, St. Joe Minerals Corporation v. Goddard et al., 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974).[7] However, DER takes the position that since 25 Pa. Code §87.127 was adopted to obtain primacy over surface coal mining and is virtually identical to 30 CFR §816.67(e), Croner's attack on §87.127 is, in essence, an attack on the federal regulation, and, therefore, under §526(a) of federal SMCRA, 30 U.S.C. §1276(a), Croner may only bring such a challenge in the United States District Court for the District of Columbia.[8] If this is so, then we have no jurisdiction over Croner's challenge to the constitutionality of the

---

[7] The contention to the contrary by DER is not supported by the cases cited in DER's second brief. Each of those cases deals with the constitutionality of a statute, rather than a regulation, as is before us. Moreover, both of DER's briefs fail to address either St. Joe Minerals Corp. supra, or our decisions based thereon. While we directed counsel for both parties to rebrief the issues, the failure of DER's brief to address our ability to pass on the constitutionality of regulations under St. Joe supra, is compounded by Croner's second brief, which missed this case also and failed to cite us to any other cases on our ability to consider the constitutionality of a regulation. Our order requiring new briefs obviously accomplished nothing.

[8] DER does concede that in certain circumstances the federal courts have also allowed attacks in the United States District Court for the district in which the state capital is located, but in either situation DER argues the issue is one for the federal courts to decide.

regulation and must dismiss Docket No. 87-206-E, for Croner raises no issues relating to the application of the regulation. Unfortunately for Croner, we must grant DER's motion.

It is in this context that we must examine 30 U.S.C. §1276(a)(1), which mandates that judicial review of OSM regulations take place only in the United States District Court for the District of Columbia Circuit. Several cases have interpreted this section and make it clear that any such review must occur there. Drummond Coal Co. v. Watt, 735 F.2d 469 (11th Cir. 1984), Tug Valley Recovery Center v. Watt, 703 F.2d 796 (4th Cir. 1983) (whether the attack is directly on the federal regulation or an attack on a state primacy regulation); Commonwealth of Virginia ex. rel. Virginia Department of Conservation v. Watt, 741 F.2d 37 (4th Cir. 1984), cert. granted 469 U.S. 979, 105 S. et. 379, 83 L. Ed.2d 315(1984) cert. dismissed, 469 U.S. 1198, 105 S. Ct. 938, 83 L. Ed.2d 984 (1985).

In Commonwealth of Virginia, supra, mine operators sought to enjoin OSM enforcement of the federal regulations in the local United States District Court because of a claim that under Virginia's "primacy law" certain mine operations were exempt from OSM primacy regulation. The Commonwealth of Virginia also challenged OSM enforcement of federal regulations claiming it denied the state legislature the power to separately regulate surface mines. The Court of Appeals held any action "tantamount to an attack on a federal regulation" must be heard in the District Court for the District of Columbia Circuit. Id. at 40. The Court reasoned that granting the relief sought would result in a prohibition of implementation of the federal regulation in Virginia. Citing Tug Valley Recovery Center, supra, the Court concluded this result can only be obtained in the court specified in 30 U.S.C. §1276(a)(1), i.e., the District Court for the District of Columbia. In United States v.

Troup 821 F.2d 194 (3rd Cir. 1987) a Pennsylvania strip miner challenged the federal regulation on reclamation fees in a suit brought by the United States to collect those fees. When the United States received a judgment of less than it sought, it appealed and the Court of Appeals reversed the District Court. In so doing it held that Troup's challenge to the regulations was of the type which must be brought in the District Court of the District of Columbia. In accord, see Amerikohl v. U.S., 16 Cl. Ct. 623 (1989).

No matter how much we may wish to retain our jurisdiction over constitutional challenges to state regulation of surface coal mining, we believe it is clear under the authority cited above that we lack jurisdiction to hear Croner's constitutional challenge, and because the proper forum to hear this case is not within the judicial system of the Commonwealth, we cannot transfer this appeal to that forum. This leaves us no option but to dismiss the appeal.

However, since the appeals docketed at EHB Dockets 88-214-E, 88-425-E and 89-498-E could each be argued to be raising additional issues beyond that of the constitutionality challenge raised in this appeal, we will unconsolidate them to allow Croner to proceed before us on those cases. Insofar as they spring from DER implementation of the OSM approved regulations, our jurisdiction to hear these appeals is not challengable. See 30 U.S.C. §1276(e).

ORDER

AND NOW, this 26th day of July, 1990, it is ordered that the DER's Motion To Dismiss is granted. The appeal by Croner, Inc. at Docket No. 87-206-E is dismissed for want of jurisdiction. The appeals by Croner, Inc. at Docket Nos. 88-214-E, 88-425-E and 89-498-E are unconsolidated from Docket No. 87-206-E and consolidated at Docket No. 88-214-E.

Croner shall file its Pre-Hearing Memorandum on or before August 27, 1990. DER's responsive memorandum shall be filed two weeks thereafter.

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DATED: July 26, 1990

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M. DIANE SMITH
SECRETARY TO THE E

WINTON CONSOLIDATED COMPANIES	:	
	:	
v.	:	**EHB Docket No. 89-356-E**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
C.J.C., Inc., Permittee	:	**Issued: July 31, 1990**

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT
OR TO DISMISS

Synopsis

A motion for summary judgment is treated as a motion for judgment on the pleadings in this appeal. The motion is granted and the appeal of Winton Consolidated Companies ("Winton") is dismissed. The law is clear that notice to landowners, opportunity for them to object, and permission of landowners are not prerequisites to DER's approval of a firm to act as a contractor under a previously issued surface mining permit. Also, sections 86.62 and 86.64 of 25 Pa.Code do not relate to approval of a contractor, but rather relate to permits to mine, and DER has not issued a permit in this matter. Moreover, a "de facto" transfer of a surface mining permit is not a type of transfer contemplated by 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. It is also clear that Winton's assertions of material misrepresentations cannot succeed, since those allegations are unrelated to the DER action in question

and bear upon the issue of landowner permission, which is not a proper issue in this appeal. Thus, there is no necessity for a hearing on the matter.

OPINION

On September 7, 1989, Winton commenced the instant proceeding by its pro se filing of a skeleton notice of appeal. Subsequently, on September 25, 1989, Winton filed its notice of appeal. Winton seeks our review of a DER action expressed in a letter, dated May 4, 1989, from the Bureau of Mining and Reclamation to the president of C.J.C., Inc. ("C.J.C.") which is attached to the notice of appeal. The letter states that DER has approved Carbon as a contractor to C.J.C. under C.J.C.'s surface mining permit. In its notice of appeal, Winton states that it received what it characterizes as "constructive notice" of the DER action on August 9, 1989, by way of a review of the files of DER's Pottsville office.

Winton filed its pre-hearing memorandum on December 18, 1989, and C.J.C. filed its pre-hearing memorandum on March 5, 1990. The matter was then reassigned to Board Member Richard S. Ehmann on April 25, 1990. A rule to show cause why DER should not be sanctioned for its failure to comply with Board orders and respond by March 2, 1990 to a default notice regarding its failure to file a pre-hearing memorandum was issued on April 30, 1990. DER responded to the rule on May 21, 1990 by a letter which stated, inter alia, that DER did not plan to submit a pre-hearing memorandum and that it adopted the legal issues contained in C.J.C.'s pre-hearing memorandum. On May 23, 1990, we issued an Order discharging the rule.

On June 5, 1990, C.J.C. filed a Motion For Summary Judgment Or To Dismiss Appeal and a brief in support of the motion. Winton filed its Answer

To Motion For Summary Judgment and memorandum in support thereof on June 25, 1990.

The letter from the Bureau of Mining and Reclamation to the president of C.J.C. which is attached to Winton's notice of appeal states:

> Carbon, Inc., Surface Mine Operator's License #282633, is hereby approved as a contractor to C.J.C., Inc. and as such is permitted to conduct surface mining activities on area approved by MDP/SMP #35773205, issued on July 9, 1986, to your firm.
>
> Please be advised that C.J.C., Inc. shall be jointly and severally liable with Carbon, Inc. for any violation of Section 3.1(b) of Act 418... as Carbon, Inc. may be charged and for which C.J.C., Inc. may have participated.

Winton's notice of appeal alleges at paragraph No. 1 that DER's action in granting Carbon the "right and privilege to operate as a contractor to C.J.C. Coal Co. under their mining permit" was an abuse of discretion because: 1) DER was aware that "Carbon and C.J.C. may not have the permission of all owners of the surface and mineral estates"; 2) the effect of the grant was a de facto transfer of a surface mining permit; and 3) DER failed to provide interested parties notice or an opportunity to object to the action. At paragraph No. 2, Winton asserts Carbon and C.J.C. have made material misrepresentations regarding the identity of surface and mineral owners, the size of the property, and the actions of objectors to the [surface mining] permit transfer from C.J.C. to Carbon. At paragraph No. 3, Winton states that there have been violations of 25 Pa.Code §§86.62 and 86.64. Any issues raised in Winton's pre-hearing memorandum which were not raised in the notice of appeal are untimely and may not be considered by the Board. See Skolnick, et al. v. DER, EHB Docket No. 89-290-F (issued June 11, 1990); ROBBI v. DER and York County Solid Waste and Refuse Authority, 1988 EHB 500.

In the first count of its motion for summary judgment or to dismiss, C.J.C. urges that Winton's appeal requires us to adjudicate a landownership dispute and that we do not have jurisdiction over such a dispute, so we should dismiss the appeal. A review of Winton's notice of appeal and pre-hearing memorandum shows this contention to be without merit. Winton is alleging DER abused its discretion in granting Carbon the right to act as contractor to C.J.C. under its surface mining permit where DER allegedly was aware of a landownership dispute; it is not asking the Board to adjudicate the landownership dispute, however. We clearly have jurisdiction over appeals of DER actions. See the Environmental Hearing Board Act (Hearing Board Act), the Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7511 et seq. and 25 Pa.Code §21.2(a).

Likewise, we find Count II of C.J.C.'s motion to lack merit. This count urges that Winton is barred from objecting to DER's approval of Carbon as a contractor since Winton did not timely appeal the issuance of C.J.C.'s surface mining permit, which was issued on July 9, 1986. Winton, in its response to the motion for summary judgment, however, acknowledges that it is barred from objecting to C.J.C.'s operating under the 1986 surface mining permit, but states that it is challenging the grant to Carbon of a right to operate under that permit because this amounts to a transfer of the permit. The notice of appeal shows the subject of the appeal to be the grant to Carbon of the right to operate as a contractor to C.J.C. under their surface mining permit. Winton does not challenge DER's issuance of the 1986 surface mining permit itself. We therefore disagree with C.J.C.'s allegation that the appeal is untimely and we refuse to dismiss the appeal on that ground.

Next, we address the third count of C.J.C.'s motion for summary judgment or to dismiss. This count urges that judgment should be entered in C.J.C.'s favor because DER's approval of Carbon as a contractor under C.J.C.'s surface mining permit has not caused Winton to suffer any actual injury or harm and, thus, Winton has failed to state a claim upon which relief can be granted. The Hearing Board Act, 35 P.S. §7514(c), states that no action of DER adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the Board. We will, thus, examine C.J.C.'s contention that Winton has not been adversely affected by the appealed DER action.

While C.J.C. has filed a motion for summary judgment, we will treat it as a motion for judgment on the pleadings since "such a motion made at the close of the pleadings and supported only by the pleadings is more correctly labeled a motion for judgment on the pleadings rather than one for summary judgment." Beardell v. Western Wayne School District, 91 Pa.Cmwlth. 348,___, 496 A.2d 1373, 1375 (1985). A motion for judgment on the pleadings, like a motion for summary judgment, may be granted when no material facts are in dispute and a hearing is pointless because the law is clear on the issue. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303; Deitz v. DER, EHB Docket No. 88-525-MJ (issued March 14, 1990). In ruling upon the motion for judgment on the pleadings, the Board will treat all facts pleaded by the non-moving party as true. Upper Allegheny, supra, at 305.

In its notice of appeal, Winton first alleges that DER was aware that Carbon and C.J.C. may not have the permission of all owners of the surface and mineral rights, and DER failed to provide notice or opportunity to object to interested parties who would be materially affected by the action. As we

stated above, the contested DER action is the approval by DER of Carbon's operating as a contractor under C.J.C.'s surface mining permit. Winton has not pointed us to any authority which would support the argument that notice and an opportunity to be heard must be given one asserting ownership rights in a mine site prior to DER approval of a contractor to mine under a previously issued surface mining permit which was not challenged at the time of issuance.

Next in paragraph one of its notice of appeal, Winton asserts that the DER action amounts to a "de facto" transfer of C.J.C.'s surface mining permit. In essence, Winton is arguing that contractor approval was used as a means to avoid the permit transfer requirements. While this might be the effect of what has occurred, no permit was issued to Carbon. It is clear that this argument cannot succeed since there is no such "de facto" transfer of a permit recognized by the law and Winton does not suggest that there is. Moreover, Winton's assertion in its memorandum in opposition to C.J.C's motion that the grant of the "operator's privilege" is a substantial change in the existing surface mining permit is without basis in the law, and the decision cited by Winton in support of this proposition, Martin v. DER, 1984 EHB 736, is totally inapposite as it deals with DER's refusal to alter the terms of an approved reclamation plan. In the instant action, DER has approved the operation of Carbon as a contractor under the surface mining permit held by C.J.C., as permittee, and has stated that Carbon will be jointly and severally liable with the permittee for violations of SMCRA. This is not a substantial change in C.J.C.'s permit. All of the coal that C.J.C. could have mined under the permit can still be surface mined. In the mining of it, C.J.C and its contractor must comply with the permit's terms, the SMCRA, and applicable regulations. The only modification is that Carbon will do the work for C.J.C.

and will be jointly and severally liable for compliance with all of these requirements. This is in accordance with SMCRA, 52 P.S. §1396.3a(d)

Thus, we must find the first paragraph of Winton's notice of appeal fails to state a claim that DER has abused its discretion in approving Carbon as a contractor under C.J.C.'s surface mining permit.

Turning to the allegations contained in the second paragraph of the notice of appeal concerning material misrepresentations of Carbon and C.J.C., it is clear that they are outside the scope of the present appeal. While the notice of appeal states that the misrepresentations listed herein are not exclusive, Winton has had the right to conduct discovery and to add misrepresentations to the list. Its pre-hearing memorandum identifies only three asserted misrepresentations. The first was allegedly made by C.J.C. in its application for permit renewal and revision made in 1985. These statements obviously do not relate to the DER action challenged in this appeal, but relate to a prior permit application which may not now be collaterally attacked. See JEK, supra. The second alleged misrepresentation was made by Carbon's legal counsel in a letter to DER dated December 23, 1989 which Winton asserts was made to cause Winton's objections to be dismissed. Again, as this letter chronologically follows the DER action on appeal, it could not be viewed as causing DER to have abused its discretion in May of 1989, seven months prior thereto. The final asserted misrepresentation was made by Pompey Coal Company and Carbon in submitting a landower consent form dated November 10, 1988. Although Winton's pre-hearing memorandum does not detail the facts surrounding this document, we have already stated above in this Opinion that landowner permission is irrelevant to the DER action in question.

As to the allegation contained in the third paragraph of the notice of appeal that there have been violations of 25 Pa.Code §§86.62 and 86.64, those sections are clearly outside the parameters of the appealed action. Sections 86.62 and 86.64 deal with information which must be contained in an application for a surface mining permit as to who owns the area to be mined and the adjacent lands and the written consents from the surface owners to the strip mining of the coal. Since these sections relate to applications for a surface mining permit and not to approval of an entity as contractor, such issues are not grounds to challenge a contractor approval as to a previously issued permit.

Reviewing all of Winton's filings with the Board, it appears that Winton is concerned because C.J.C., while it has possessed a right to mine coal on land that Winton claims it owns, has not pushed to mine this tract, but now that it has hired Carbon as its miner, Carbon is doing so. Unfortunately for Winton, SMCRA contemplates that an entity like C.J.C. may, after becoming a permittee of a strip mine, hire a contractor to mine the site for it. There is nothing illegal about this under SMCRA, 52 P.S. §1396.3a(d). "Contract stripping" is a recognized possibility under this Act which has occurred in the coal fields in our state for quite some time. The fact that Winton is unhappy that this is allowed does not change anything unless Winton raises valid reasons why a specific contractor should not have been approved.

Winton's pleadings have failed to state any valid reason for disturbing the DER action which is being challenged. The issue raised by Winton in its memorandum accompanying its Answer to the motion, that the amount of coal being mined at the site is injurious to its interests, is outside the scope of this appeal, as it was not raised in the notice of

appeal, and is irrelevant to the DER action in question. Although Winton may in fact be injured as a result of DER's action, because this mining is occurring on land in which it claims to own an interest, Winton's allegations do not state a basis for us to reverse DER's decision to approve Carbon. Winton has not pointed out any question of an abuse of discretion by DER in approving Carbon's operating as a contractor under C.J.C.'s surface mining permit. Since the applicable law is clear, a hearing on this matter is pointless and we accordingly grant judgment on the pleadings in favor of C.J.C. and dismiss the appeal.[1]

O R D E R

AND NOW, this 31st day of July, 1990, it is ordered that C.J.C.'s motion for summary judgment or to dismiss is treated as a motion for judgment on the pleadings, and judgment on the pleadings is granted in favor of C.J.C. The appeal of Winton of DER approval of Carbon's surface mine operator's license and approval to act as a contractor under C.J.C.'s surface mining permit is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

[1]The parties are advised that in this situation, where a motion for summary judgment has been filed without any sworn documentation, such as deposition testimony, admissions, or supporting affidavits, we would have been forced to deny the motion pursuant to Pa.R.C.P. 1035(b), but since we have treated the motion as one for judgment on the pleadings, factual verification is not an issue for us.

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: July 31, 1990

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LAWRENCE W. HARTPENCE AND	:	
IMOGENE KNOLL t/b/a HYDRO-CLEAN, INC.	:	
and TRI-CYCLE, INC.	:	
V.	:	**EHB Docket No. 90-028-MR**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 7, 1990**

OPINION AND ORDER
SUR
CONSOLIDATED MOTION TO COMPEL

Robert D. Myers, Member

Synopsis

In disposing of discovery motions, the Board upholds DER's privilege of protecting the source of confidential information; requires DER to provide data which may be relevant in measuring the reliability of the informant; requires DER to produce the qualifications of the individual performing laboratory tests on samples taken by DER personnel, even though the individual is employed by an independent laboratory; and requires DER to produce the samples for testing by Appellants, even though not requested while discovery was still open.

OPINION

This appeal involves an Order and Assessment of Civil Penalties, issued by the Department of Environmental Resources (DER) pursuant to authority contained in the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. ; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L.

177, as amended, 71 P.S. §510-17; and 25 Pa. Code §§275.101(a), 275.204 and 285.134.

On June 18, 1990, Appellants filed a consolidated motion, seeking (1) to compel answers to certain Interrogatories, (2) to compel production of samples taken on Appellants' property, and (3) to stay the Board's Order of May 30, 1990[1] pending disposition of the Consolidated Motion.[2] DER filed its Answer on July 16, 1990.

The Interrogatories which Appellants seek to have answered are Nos. 1(a), (b) and (c); 2(a), (b), (c), (d), (e), (f), (g), and (h); and 19(d). Interrogatory No. 1 refers to a complaint allegedly received by DER on April 18, 1989, and calls for the name and address of the complainant and copies of all writings documenting the complaint. DER responded to the document request by stating that a review of the "complaint log and telephone complaint log" has determined that no writing exists. DER objected to the remainder of the Interrogatory on the ground that it sought the disclosure of confidential information, the identity of the informant.

The Board considered this issue in Columbo et al. v. DER, 1989 EHB 606. Applying that ruling to the present case, it is clear that (1) DER has

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[1] The Order set deadlines for completing discovery and for filing a pre-hearing memorandum.

[2] In their transmittal letter, Appellants requested the opportunity to brief their Motion "upon a schedule" the Board might establish. The Board has discretion whether or not to permit the filing of briefs in connection with pre-hearing motions (25 Pa. Code §21.116; 1 Pa. Code §35.191). Since a movant is required to state in his motion the grounds for the relief sought and the statutory or other authority relied upon (1 Pa. Code §35.177), there is little to be gained by filing a brief. Discovery motions, moreover, need to be handled expeditiously because of the strict time limitations on discovery in Board proceedings (25 Pa. Code §21.111). A party desiring to submit a brief (to expound more fully on the contents of his motion or answer) should file it with the motion or answer, as appropriate. Appellants' brief was filed on July 30, 1990, and has been considered in disposing of the Consolidated Motion.

the privilege to protect its confidential sources of information, (2) the privilege must be balanced against Appellants' right to a fair hearing, (3) the privilege should be denied if it appears that the informant's testimony would exculpate Appellants, and (4) Appellants have the burden of proving their entitlement to the information. Appellants' stated reason for wanting the identity of the informant is their belief that someone is out to make them look bad and may have dumped substances on or near their property.

The Order and Assessemnt of Civil Penalties alleges essentially that DER received a complaint on April 18, 1989 regarding the dumping or depositing of sewage sludge on Appellants' property (paragraph P), that DER investigated the complaint but was denied access to Appellants' property (paragraphs Q and R), and that DER's investigation on April 21, 1989 (after issuance of a search warrant) revealed the storage and processing of sewage sludge and the disposal and burning of construction/demolition waste without a permit from DER (paragraphs S and T). Appellants are directed to cease such activities, to take remedial measures and to pay civil penalties. The penalties are assessed for denying access to the property on April 20, 1989, and for the unlawful storage of sewage sludge, the unlawful processing of sewage sludge and the unlawful disposal and burning of construction/demolition waste on April 21, 1989.

It is apparent that the Order and Assessment of Civil Penalties is based solely on the findings of DER personnel, not on the complaint received on April 18, 1989. Appellants' objections to DER's action, as set forth in detail in an attachment to their Notice of Appeal, contain no mention of a belief that someone else may have dumped the material on their property. To the contrary, they maintain that the material and the activities associated with it are not subject to DER permit requirements. Since Appellants are

deemed to have waived any objection not included in their Notice of Appeal (NGK Metals Corporation v. DER, EHB Docket No. 90-056-MR, Opinion and Order sur Petition to Amend Notice of Appeal, April 5, 1990), they cannot now raise the contention that someone else dumped the material on their property. It follows, then, that they have no valid claim to the identity of DER's informant.

Interrogatory No. 2 requests, with respect to the informant, data and documentation on any other complaints made by said person before or since April 18, 1989, including information on any DER action resulting from said complaints. DER raised the same objection made with respect to Interrogatory No. 1, arguing that providing the detailed information requested would result in the disclosure of the informant's name. Appellants contend, on the other hand, that the information is relevant in measuring the reasonableness of DER's assessment of a civil penalty against Appellants for refusing a warrantless search of their property based on the informant's complaint. We have serious concerns about the relevancy of the information, given the circumstances involved and the current state of the law on warrantless searches; but DER did not object on that ground and we will not raise it, sua sponte, at the discovery stage. However, in order to protect the identity of the informant, we will compel DER to provide only the following information with respect to Interrogatory No. 2:

(a) The number of times prior to April 18, 1989 that the informant filed a complaint with DER concerning violations by anyone of Pennsylvania's environmental statutes or regulations;

(b) Whether DER's agents or employees investigated each such complaint; and

(c) whether the investigation of each such complaint resulted in the assessment by DER of a civil penalty and/or notice of violation against the party named by the informant.

In Interrogatory 19, Appellants seek detailed information on the samples obtained by DER during its inspection of April 21, 1989. Subpart (d) requests information on the person who tested the samples. DER responded by supplying the name and address of the independent laboratory where the testing was done. Appellants want the Board to compel DER to give a complete answer by providing the educational background and professional degrees and/or licenses held by the individual who performed the testing. DER contends that the information is not in its possession, is in the possession of a third party beyond its control, and that Appellants should pursue discovery against the third party. We will grant Appellants' request. DER obviously placed great reliance on the validity of the testing done on the samples. The qualifications of the individual who did the testing are an important element in measuring its validity. Qualifications are the sort of information DER regularly provides and we see no basis for its refusal to do so here simply because an independent laboratory is involved. DER's reliance on our decision in DER v. Texas Eastern Gas Pipeline Company, 1989 EHB 186, 196, is not warranted.

The second part of Appellants' Consolidated Motion also concerns the samples taken from Appellants' property during the inspection of April 21, 1989. Appellants want to examine and test the same samples. DER resists because Appellants did not first make a request for production under Pa. R.C.P. 4009(a)(1) while discovery was still open. This argument normally would be persuasive, but we are not certain when Appellants first became aware that the samples had been tested for DER. Section 608(3) of the SWMA, 35

P.S.§6018.608(3), which authorizes DER to take samples, requires DER to furnish a copy of the results of any analysis of the samples, within five business days, to the person with apparent authority over the premises. Apparently, this was not done despite the fact that DER received the results in May 1989. According to Appellants, they were unaware that the samples had been tested until they received DER's Answers to the Interrogatories in late May 1990.

While a Request for Production should have been used by Appellants to obtain the samples, since discovery remained open until June 18, 1990, we are loath to sanction them for failure to do so when DER has neglected to perform a statutory duty of its own. Consequently, we will grant this part of the Consolidated Motion.

The final part of Appellants' Consolidated Motion requests a stay of our May 30, 1990 Order pending disposition of the Consolidated Motion. The deadlines set in the May 30 Order have passed; and, in view of our disposition of the Consolidated Motion, we need to set new deadlines. As a result, this part of the Consolidated Motion is moot. However, we are unwilling to leave discovery open indefinitely as Appellants appear to suggest. Two extensions have been granted previously and we expect legal counsel to move diligently to complete the process within the additional time allowed in the following Order:

ORDER

AND NOW, this 7th day of August 1990, it is ordered as follows:

1. Appellants' Consolidated Motion is granted in part and denied in part, in accordance with the foregoing Opinion.

2. Within twenty (20) days after the date of this Order, DER shall deliver to Appellants:

(a) Answers to Interrogatory No. 2 as modified in the foregoing Opinion;

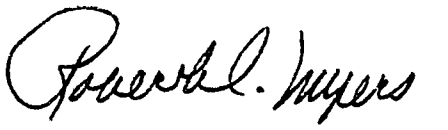
(b) A complete Answer to Interrogatory 19(d) as discussed in the foregoing Opinion; and

(c) the samples taken from Appellants' property on April 21, 1989 and analyzed on behalf of DER.

3. Discovery shall be completed by September 28, 1990.

4. Appellants shall file their pre-hearing memorandum on or before October 5, 1990.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 7, 1990

cc: **Bureau of Litigation**
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Harrisburg, PA
For the Commonwealth, DER:
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Scranton, PA
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M. DIANE SMIT
SECRETARY TO THE B

GLOBAL HAULING	:	**EHB Docket No. 90-121-E**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 8, 1990

OPINION AND ORDER SUR
REQUEST FOR RECONSIDERATION

By Maxine Woelfling, Chairman

Synopsis

A request for reconsideration of the dismissal of an appeal of a civil penalty assessment for failure to perfect is denied where the appellant fails to present compelling and persuasive reasons. The magnitude of the penalty involved, appellant's alleged confusion of this appeal with another pending appeal, and his absence from the state are not sufficient grounds for reconsideration where the Board has given appellant ample opportunity to perfect his appeal.

DISCUSSION

This matter was initiated on March 22, 1990, with the receipt of a letter from M. J. Pavlock, t/d/b/a Global Hauling (Global)[1] indicating that Global wished to appeal the attached copy of a February 12, 1990, civil penalty assessment in the amount of $14,000. The assessment was issued by the

[1] Throughout this opinion we will refer interchangeably to Pavlock and Global.

Department of Environmental Resources pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* Because the letter lacked the information required by 25 Pa.Code §21.51, it was docketed as a skeleton appeal, and the Board, on March 27, 1990, requested Global to provide its complete address and telephone number, a list of its objections to the civil penalty assessment, and evidence that it had served a copy of the appeal on the Department officer who issued the assessment and the Bureau of Litigation.

Global failed to provide this information within ten days, as required by the Board's notice, and a second request for the information was sent to Mr. Pavlock via certified mail, return receipt requested, on April 9, 1990. The notice requested Pavlock to submit the requested information within ten days of the receipt of the notice; the return receipt indicated that Pavlock, through Ann Noska as agent of the addressee, had received the notice on April 14, 1990.

Pavlock did not respond to the Board's notice until May 3, 1990, when he sent a letter providing his complete address and telephone number and indicating that he would not list his objections to the Department's assessment until he received "the proper documentation" to "review the procedures with his attorney. He also stated that he could not make the required service of copies of his notice of appeal because the Board failed to enclose a notice of appeal with its second notice.

The Board then, on May 9, 1990, issued a rule upon Global to show cause why its appeal should not be dismissed as a sanction for failure to perfect. The rule was sent by certified mail, return receipt requested, and the return receipt indicated again that Ann Noska, as agent for Pavlock, received the rule on May 11, 1990. Global was to respond to the rule on or

before May 29, 1990. When Pavlock failed to respond, the Board, on June 15, 1990, issued an order dismissing the appeal.

On July 5, 1990, the Board received a request from Pavlock to reconsider the dismissal of his appeal. He advanced these reasons as grounds for reconsideration:

> My reasons are that I have been traveling out of state for the past 10 months and have received my mail when I returned.
>
> I have followed through as I felt the instructions requested and feel that as I spoke with Betty Lambert, that perhaps my misunderstanding could have been due to the fact there are two appeals rather than one. I would appreciate your reconsideration due to the extreme amount of financial penalty involved. Thank you for your consideration on this matter.

We will deny Pavlock's request for reconsideration.

Our rule governing reconsideration, 25 Pa.Code §21.122, provides that reconsideration will only be granted "for compelling and persuasive reasons."[2] Neither the size of the penalty involved, Pavlock's alleged confusion over whether the Board's notices pertained to this appeal or another appeal pending, nor Pavlock's absence from the Commonwealth can be characterized as compelling and persuasive reasons. The Board provided Pavlock with ample opportunity to properly perfect his appeal and, having not done so after three opportunities, the Board had no choice but to dismiss the appeal. That Pavlock suddenly realizes the consequences of his failing to respond is not sufficient grounds for reconsideration.

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[2] The criteria set forth in 25 Pa.Code §21.122(a)(1) and (2) are not germane to this request for reconsideration.

AND NOW, this 8th day of August , 1990, it is ordered that the request for reconsideration of M. J. Pavlock t/d/b/a Global Hauling is denied and the Board's order of June 15, 1990, dismissing his appeal is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 8, 1990

cc: **Bureau of Litigation**
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Western Region
For Appellant:
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Clarksville, PA

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M. DIANE SMI
SECRETARY TO THE

MUSTANG COAL & CONTRACTING CORPORATION	:	
	:	
v.	:	**EHB Docket No. 89-494-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 9, 1990**

OPINION AND ORDER

Synopsis

The Department of Environmental Resources' Motion to Dismiss for appellant's failure to comply with Pre-Hearing Order No. 1 is denied where the burden of proof in the proceeding is on DER and where the appellant has made some attempt to respond to the Board's order for a more specific Pre-Hearing memorandum. However, at the hearing on the merits the appellant is limited to introducing only such physical evidence, testimony, and legal arguments as are specifically set out in its Pre-Hearing Memorandum.

OPINION

This matter arises out of a notice of appeal filed on October 20, 1989 by Mustang Coal & Contracting Corporation ("Mustang") from a Department of Environmental Resources' ("DER") September 22, 1989 civil penalty assessment. The penalty was assessed against Mustang for allegedly conducting surface mining beyond the permitted and bonded area at a site in Woodward Township, Clearfield County, known as the Chandler Mine Site.

After being granted an extension of 38 days, Mustang filed its Pre-Hearing Memorandum on February 14, 1990. Because it failed to meet virtually all the requirements of Pre-Hearing Order No. 1,[1] DER, on February 23, 1990, filed a Motion to Dismiss or in the Alternative to Strike Appellant's Pre-Hearing Memorandum. Mustang responded on March 15, 1990 by filing an Objection to Motion to Dismiss or to Strike, to which it attached copies of surveys, maps, and a deed. Also attached was a March 27, 1989 letter from Ronald A. Lobb Associates to DER Inspector Supervisor John Varner which stated that further surveying needed to be done to establish the property lines in question. Mustang claimed that these documents showed that Mustang operated within its permit boundaries. In its Reply, filed on April 4, 1990, DER argued that Mustang had failed to explain with any specificity how these documents supported its contentions. In an Opinion and Order issued on June 11, 1990, the Board struck Mustang's Pre-Hearing Memorandum and ordered it to file a new Memorandum meeting all the requirements of Pre-Hearing Order No. 1.

On July 2, 1990, Mustang filed an Amended Pre-Hearing Memorandum. Although labeled "Amended", this document is virtually identical to Mustang's original Pre-Hearing Memorandum. The only difference (apart from being double-spaced instead of single-spaced) is that the new Memorandum adds the dates on which Mustang's mining permit was issued and renewed, as well as its expiration date. In addition, it attaches the same documents as those attached to its March 15, 1990 Objection.

---

[1]This matter is more fully discussed in the Board's Opinion and Order of June 11, 1990, at the same docket number.

The matter now before us is a second Motion to Dismiss filed by DER on July 6, 1990. Mustang's response, filed on August 3, 1990, is identical to the Objection which it filed to DER's earlier motion.

As DER correctly points out in its supporting brief, Mustang has responded to our Order to file a more specific Pre-Hearing Memorandum by simply making a few, superficial additions to its old Memorandum and resubmitting it as an "Amended" Pre-Hearing Memorandum. This "Amended" Pre-Hearing Memorandum does little more to meet the requirements of our Pre-Hearing Order No. 1 than did the original.

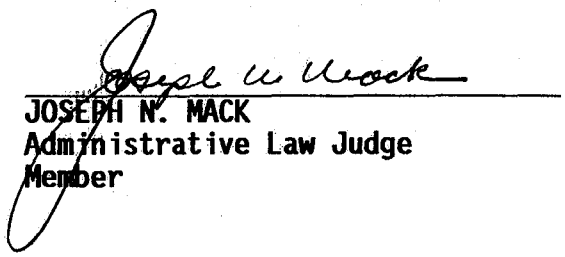
Failure to comply with an order of the Board requiring a more specific Pre-Hearing Memorandum may warrant sanctions pursuant to 25 Pa.Code §21.124. Nowakowski v. DER, EHB Docket No. 88-115-F (March 9, 1990). Although DER seeks dismissal, the Board has been reluctant to dismiss an appeal for failure to comply with Pre-Hearing Order No. 1, where, as here, DER bears the burden of proof. Mid-Continent Insurance Co. v. DER, 1989 EHB 1299; Wazelle v. DER, 1983 EHB 576. The Board is further reluctant to do so where we are dealing with a pro se appellant. Cotterman v. DER, 1983 EHB 618. Furthermore, Mustang has made some attempt, albeit halfhearted, to comply with our order for a more specific Pre-Hearing Memorandum by attaching surveys and other documents which it claims show that Mustang operated within the permitted area.

Therefore, we will allow Mustang's appeal; however, at the hearing on the merits, Mustang shall be barred from introducing any evidence or testimony or advancing any legal arguments not specifically set out in its Amended Pre-Hearing Memorandum.

O R D E R

AND NOW, this 9th day of August, 1990, DER's Motion to Dismiss is denied. At the hearing on the merits, Mustang is limited to the physical evidence, testimony, and legal arguments specifically set forth in its Amended Pre-Hearing Memorandum.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 9, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Central Region
For Appellant:
Peter R. Swistock, Jr., President
Mustang Coal & Contracting Corp.
Houtzdale, PA

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M. DIANE SMITH
SECRETARY TO THE BO

AL HAMILTON CONTRACTING COMPANY	:	**EHB Docket No. 90-268-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 9, 1990

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

By Maxine Woelfling, Chairman

Synopsis

A petition for supersedeas of a letter from the Department of Environmental Resources (Department) notifying a mine operator that it had failed to implement an abatement plan in accordance with a schedule approved by the Department is denied because there is little likelihood of the operator succeeding on the merits of its appeal. The only issue before the Board is whether or not the operator has complied with the implementation schedule, and the operator doesn't contest that it hasn't done so. Furthermore, the grant of a supersedeas would result in the alteration of the *status quo ante* which is that the operator is obligated to implement the abatement plan in accordance with the previously approved schedule.

OPINION

This matter was initiated with the July 5, 1990, filing of a notice of appeal by Al Hamilton Contracting Company (Hamilton) seeking review of a June 5, 1990, letter from the Department advising Hamilton that it was in

violation of a compliance schedule for implementation of a permanent treatment plan to abate acid discharges from Hamilton's operation in Covington Township, Clearfield County, which is operated pursuant to Surface Mining Permit 17773166 and Mine Drainage Permit 4577SM8 and commonly referred to as the Caledonia Pike Operation. More specifically, Hamilton is challenging the necessity for implementation of a permanent treatment plan involving the construction of wetlands because it is achieving the mandated effluent limitations in 25 Pa.Code §87.102 with interim chemical treatment facilities installed to comply with the Department's directives in Compliance Order 88H008 (88H008).[1]

A petition for supersedeas was filed by Hamilton on July 13, 1990, and a hearing on the petition was conducted on July 31, 1990. The parties were advised at the close of the hearing that any memoranda of law in support of their respective positions should be submitted to the Board by August 8, 1990, and both parties filed memoranda on that date.

Hamilton argues that it is entitled to a supersedeas of the Department's June 5, 1990, letter because it has violated no Department order, statute, or regulation, and, therefore, is likely to succeed on the merits of its appeal. It also contends that it will suffer irreparable harm for two reasons: 1) as the result of the Department's being prohibited, by Hamilton's being on the violation docket, from approving bond releases, bond increments,

---

[1] This compliance order was appealed by Hamilton at Docket No. 88-113-W, and a hearing on the merits is presently scheduled for September 17-19, 1990. Hamilton also appealed a February 2, 1989, order from the Department to conduct a groundwater study in and around the Caledonia Pike Operation; that appeal, which was docketed at No. 89-045-W, was consolidated with Docket No. 88-113-W by Board order dated September 15, 1989. The Department order which was the subject of Hamilton's appeal at Docket No. 89-045-W was superseded on April 19, 1989.

or new mining permits and, 2) because of the effect the substantial sums of money it must expend to construct the wetlands treatment system will have on its already precarious financial condition. Hamilton also asserts that the public or third parties will not suffer any harm because it is already treating discharges at the Caledonia Pike Operation to meet applicable effluent limitations.

The Department opposes the grant of a supersedeas to Hamilton, noting that Hamilton has failed to satisfy the applicable criteria for grant of a supersedeas. Opposing any attempt by Hamilton here to litigate the merits of 88H008, the Department argues that the only issue before the Board is whether Hamilton has complied with its self-imposed deadlines for implementation of the wetlands treatment system and that Hamilton cannot succeed on the merits of this claim because, by its own admission, it has not complied with the deadlines. The Department also contends that Hamilton's evidence regarding irreparable harm was speculative and that the public would be harmed by Hamilton's failure to implement a pernanent treatment system.

In order to be entitled to a supersedeas, Hamilton must show, by a preponderance of the evidence, (1) that it is likely to prevail on the merits, (2) that it will suffer irreparable harm, and (3) that there is no likelihood of injury to the public or other parties, §4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514, 25 Pa.Code §21.78, and Bethayres Reclamation Corporation v. DER and Lower Moreland Township, EHB Docket No. 83-227-W (Opinion issued May 29, 1990). While the party seeking the supersedeas must satisfy all three of these criteria, the Board's evaluation of the evidence relating to the three criteria necessarily involves a balancing test, Chambers Development Company, Inc., et al. v. DER, et al., 1988 EHB 68, aff'd at 118 Pa.Cmwlth 97, 545 A.2d 404 (1988). Here,

because there is little likelihood of Hamilton's succeeding on the merits, we must deny Hamilton's petition.

In ascertaining whether Hamilton has a likelihood of succeeding on the merits of its appeal, we must determine whether Hamilton has a reasonable probability of succeeding in its challenge to the Department's June 5, 1990, letter, Bethayres Reclamation Corporation, *supra*, and Houtzdale Municipal Authority v. DER, 1987 EHB 1. The essence of Hamilton's claim in this regard is that the so-called wetlands treatment system is unnecessary because Hamilton's interim chemical treatment system is achieving the same end, i.e. the effluent limitations in 25 Pa.Code §87.102, and that Hamilton only proposed the wetland treatment system as a concept. Unfortunately for Hamilton, these are not the issues in front of the Board in this appeal.

To define the issues before the Board in this appeal, one need only examine the first three paragraphs of the Department's June 5, 1990, letter:

> On October 11, 1989, the Department received a proposed time schedule for implementation of the permanent abatement plan for treatment of acid discharges cited in the above-referenced Compliance Order. This time schedule was received from James McNeil of Energy Environmental Services on behalf of Al Hamilton Contracting Company. The technical aspects of the permanent treatment plan were approved by the Department August 1, 1988. The time schedule for implementation of the permanent treatment plan was subsequently approved in my letter to you dated October 25, 1989.
>
> Under Section B of the approved time schedule, the field survey of the proposed wetland areas was to be completed by December 31, 1989; the final design was to be completed by February 28, 1990; site development was to be completed by March 30, 1990. To date, Al Hamilton has not met any of these dates.

> Based on the company's failure to comply with these self-established completion dates, Al Hamilton Contracting Company is in violation of Compliance Order #88H008.
>
> (emphasis added)

The only determination made by the Department in this letter was that Hamilton had failed to comply with dates for implementation of a permanent treatment plan for abatement of the discharges at the Caledonia Pike Operation, which dates were approved by the Department on October 25, 1989. Whether or not Hamilton has complied with the implementation schedule is the only issue before the Board, and since Hamilton, admittedly, has not met any of these compliance dates, there is no likelihood of Hamilton's succeeding on the merits of its claim.[2]

This result is also compelled from a different standpoint. We have consistently held that supersedeas relief will not be granted if the relief will alter the *status quo ante*, Joseph R. Amity v. DER, 1988 EHB 766. The *status quo ante* in this case is that Hamilton is obligated to implement the wetlands treatment plan approved by the Department in its October 25, 1989, letter to Hamilton (Ex. P-7, A-14).[3] Hamilton was required by Paragraph 6 of 88H008 to submit a permanent treatment plan to the Department and by Paragraph 7 of that order to implement the permanent treatment plan within 90 days of its approval by the Department (Ex. C-1); 88H008 has not been superseded by this Board (Ex. C-100). Whether Hamilton now finds this

---

[2] There may be another reason why Hamilton cannot succeed on the merits of its claim, namely whether or not the Department's June 5, 1990, letter constitutes an appealable action or is merely a notice of violation. In light of the denial of the petition, this issue has not been addressed by the Board.

[3] This denotes exhibits admitted into evidence during the course of the hearing on the petition for supersedeas.

treatment plan to be unacceptable because of its cost is simply not relevant at this time. Hamilton made this proposal to the Department and the Department approved it months ago. Hamilton is obligated to implement the proposal unless and until it is modified with the approval of the Department.

Having determined that there is little likelihood of Hamilton succeeding on the merits, it is unnecessary for the Board to consider whether Hamilton will suffer irreparable harm or whether there is any likelihood of harm to the public or harm to third parties.

O R D E R

AND NOW, this 9th day of August, 1990, it is ordered that Al Hamilton Contracting Company's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: August 9, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
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Central Region
For Appellant:
Alan F. Kirk, Esq.
William C. Kriner, Esq.
KRINER, KOERBER & KIRK
Clearfield, PA

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M. DIANE SMITH
SECRETARY TO THE BO

KATHLEEN M. CALLAGHAN	:	
LAKE HAUTO CLUB, and	:	
DR. VINCENT DAUCHESS	:	
	:	
v.	:	**EHB Docket No. 90-272-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 9, 1990**
and PANTHER CREEK PARTNERS, Permittee	:	

OPINION AND ORDER SUR
MOTION FOR EXPEDITED DISCOVERY SCHEDULE

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for expedited discovery schedule filed by the Permittee is denied where the Permittee has not established that it will be harmed by a 75-day discovery period.

OPINION

This proceeding involves two appeals, which have been consolidated, from the Department of Environmental Resources' (DER) granting on June 8, 1990 of an air quality plan approval, an air quality permit, a surface mining operator's license, a surface mining permit, and a variance to mine within one hundred feet of a stream to Panther Creek Partners (Panther Creek). The appeals were filed by Lake Hauto Club and Dr. Vincent Dauchess (Lake Hauto) and by Kathleen M.Callaghan (Callaghan). The approvals, etc. granted by DER were in connection with the "Panther Creek Energy Project"--a proposed facility which would generate electricity by burning coal refuse and sell the

electricity to a public utility. The facility is to be located in the Borough of Nesquehoning, Carbon County.

This Opinion and Order addresses a motion to expedite discovery schedule filed by Panther Creek. In this motion, Panther Creek sets out the public benefits it believes will flow from the project and argues that these benefits will be jeopardized if the project is delayed or stopped by "protracted proceedings." Specifically, Panther Creek avers that the rates specified in its contract to sell electricity to Metropolitan Edison Co. are contingent upon the facility beginning to produce power by January 1, 1993, and that it will take 30 months to construct the facility. Delays in construction will allegedly cause the loss of these favorable rates and could cause Panther Creek to suffer liquidated damages and termination of the agreement. Similarly, Panther Creek asserts that it has contracts with Bechtel Power Corp. to construct the facility and with American Line Builders, Inc. to construct transmission lines and that the costs incurred by Panther Creek will escalate if work is delayed or suspended. Finally, Panther Creek asserts that the Appellants will not be prejudiced if discovery is limited to a period of 45 days from approximately July 9, 1990.

Both Lake Hauto and Callaghan filed responses to the motion. Lake Hauto asserts that it is willing to expedite discovery to the extent possible, but that the Board's customary discovery period of 75 days is appropriate. Lake Hauto also asserts that its right to discovery should not be jeopardized by Panther Creek's failure to anticipate, when entering into contracts, appeals from DER's actions. Callaghan's response denies many allegations in Panther Creek's motion regarding the details of the project and the environmental and other public benefits of the project. Callaghan contends that she does not have an attorney, and that she will be prejudiced by an

expedited discovery schedule because she needs time to locate expert witnesses to donate services on her behalf.

We will deny Panther Creek's motion and allow the parties 75 days for discovery. Since this is only 30 days more than the 45-day discovery period Panther Creek sought, we do not believe that allowing the normal discovery period will pose an undue hardship on Panther Creek.[1] Moreover, Panther Creek has not demonstrated to us exactly what effect this proceeding will have on its various contracts. The status quo is that DER has granted the necessary permits and that Panther Creek may, so far as we know, press ahead with its plans. Panther Creek's arguments regarding its contracts would have greater force if the Appellants had filed a petition for supersedeas, which has not occurred as of this date. While the pendency of this litigation may create some uncertainty regarding the project, this is a foreseeable, and unavoidable, consequence whenever regulatory approval is required for a project of this magnitude. Panther Creek has not explained how this uncertainty will cause a delay or a suspension of the project.

None of this is to suggest that we will allow delaying tactics in this proceeding. We will not, for example, favor requests for extensions to conduct additional discovery or to answer motions. We will attempt to balance Panther Creek's interest in a prompt decision with the Appellants' interest in presenting a complete case and the Board's responsibility to provide a well-reasoned decision.

---

[1] In its reply to the Appellants' responses, Panther Creek points out that the Board's regulations provide for a 60-day discovery period unless otherwise ordered by the Board. However, the Board's standardized Pre-Hearing Order No. 1 provides for a 75-day discovery period. We favor the latter figure--particularly in complex cases such as this one.

ORDER

AND NOW, this 9th day of August, 1990, it is ordered that the motion for expedited discovery schedule filed by Panther Creek Partners is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: August 9, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Barbara Smith, Esq.
Northeastern Region
For Lake Hauto Club
and Dr. Vincent Dauchess:
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Philadelphia, PA
Pro Se: Kathleen M. Callaghan
For Permittee:
R. Timothy Weston, Esq.
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nb

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M. DIANE SMITH
SECRETARY TO THE BO

LAKE ADVENTURE COMMUNITY ASSOCIATION	:	**EHB Docket No. 90-181-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 14, 1990

OPINION AND ORDER SUR
PETITION TO INTERVENE

By Maxine Woelfling, Chairman

Synopsis

A municipality's petition to intervene in an appeal by a recreational community of an order to abate illegal sewage discharges is granted. The petition is not untimely where it is filed only three months after the filing of a notice of appeal and four days before the parties submitted a proposed consent adjudication for the Board's approval. The interests of the municipality will not be adequately represented by the Department of Environmental Resources, since the municipality has the ultimate responsibility for sewage services within its borders.

OPINION

This matter was initiated with the May 4, 1990, filing of a notice of appeal by the Lake Adventure Community Association, Inc. (Lake Adventure) seeking review of a May 1, 1990, order from the Department of Environmental Resources (Department) to Lake Adventure. The order, which was issued

pursuant to 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), and 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), cited Lake Adventure for unpermitted discharges of raw and/or partially treated sewage from its recreational vehicle community in Dingman Township, Pike County, into Lake Adventure, Birchy Creek, and an unnamed tributary to Shohola Creek. Lake Adventure was directed by the order to cease operation of its collection system, pump stations, and treatment facilities until it submitted a proposal to abate the problem which was approved by the Department.[1]

A petition for supersedeas was filed by Lake Adventure on May 21, 1990, and a hearing on the petition was scheduled for May 30, 1990. At the request of the parties, the supersedeas hearing was rescheduled for June 7, 1990. Lake Adventure then, in a June 5, 1990, letter, requested the Board to cancel this hearing because it had reached agreement with the Department. By order dated June 15, 1990, the Board directed the parties to file a status report on or before July 6, 1990. By letter dated July 13, 1990, counsel for Lake Adventure advised the Board that the parties were in the process of finalizing and executing a consent adjudication.

The Board then, on July 23, 1990, received a petition to intervene from Dingman Township. Lake Adventure and the Department were advised of the petition's filing and directed in a July 26, 1990, letter from the Board to file any responses to the petition by August 2, 1990. On July 27, 1990, the Department filed a proposed consent adjudication for the Board review and approval pursuant to 25 Pa.Code §21.120. The Department responded to the

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[1] Although the order does not indicate this, Lake Adventure operates a spray irrigation system (attachment to Notice of Appeal).

petition on August 1, 1990, and Lake Adventure responded on August 2, 1990. Dingman Township filed a reply to the Department's response on August 8, 1990.

Dingman Township has asserted that it should be allowed to intervene in this appeal because the disposition of this appeal may affect the outcome of a civil suit it instituted in the Pike County Court of Common Pleas in April, 1990; that action sought, *inter alia*, to prohibit Lake Adventure from discharging raw or inadequately treated sewage. Citing its obligations under the Sewage Facilities Act, Dingman Township argues that the Department cannot adequately protect its interests, especially if it enters into an amicable resolution of this appeal.

In its response to Dingman Township's petition to intervene, the Department asserts that on the same day it issued the order in question to Lake Adventure, an order was issued to Dingman Township requiring it to revise its official sewage facilities plan to take into account the sewage disposal needs of Lake Adventure. While arguing that the orders to Dingman Township and Lake Adventure and the proposed consent order and adjudication were intended "to work in concert and require cooperation between Dingman Township and Lake Adventure" and acknowledging that Dingman Township has an interest in this proceeding, the Department, nonetheless, urges us to find the petition to be untimely.

Lake Adventure's response to the petition reiterates the Department's arguments, but also contends that Dingman Township has been uncooperative in addressing Lake Adventure's sewage disposal needs. It concludes its argument by asserting that Dingman Township's interests will be adequately protected by the Department.

Dingman Township's reply paints a somewhat different picture of a municipality with good faith intentions to comply with the Department's order

which, despite those intentions, has been left out of negotiations between the Department and Lake Adventure. The municipality also argues that it advised the Department and Lake Adventure of its intention to intervene promptly after becoming aware of the settlement negotiations between the Department and Lake Adventure.

As we have stated in Keystone Sanitation Company, Inc. v. DER, 1989 EHB 1287, 1289-1290:

> Intervention before the Board is governed by 25 Pa.Code §21.62. The Board has consistently held that intervention is discretionary and that petitioners must show a direct, immediate, and substantial interest in the outcome of the litigation. Franklin Township Board of Supervisors et al. v. DER, 1985 EHB 853. The factors considered by the Board in ruling on a petition to intervene include 1) the prospective intervenor's relevant interest; 2) the adequacy of representtion provided by the existing parties; and 3) the ability of the prospective intervenor to present relevant evidence. BethEnergy Mines Inc. v. DER, 1987 EHB 873. Intervention will not be granted, however, if it is not in the public interest. Franklin Township, *supra*.

We must also determine if the filing of the petition is timely, 25 Pa.Code §21.62(a) and Benjamin Coal Company v. DER, 1989 EHB 1315. Since the Department and Lake Adventure both concede Dingman Township's interest in this matter, we must determine if that interest will be adequately protected by the Department and whether Dingman Township's petition was timely.

Our own rules of practice and procedure provide at 25 Pa.Code §21.62(a) that petitions to intervene must be filed "prior to the initial presentation of evidence...." Certainly, Dingman Township's petition is timely under this standard, since no evidence has yet been presented in this appeal. Both the Department and Lake Adventure have suggested that Dingman Township has somehow sat on its rights and delayed the filing of its petition

until it was aware of an impending settlement between the Department and Lake Adventure. This argument must be rejected, for this proceeding was not even three months old when Dingman Township filed its petition; no pre-hearing memoranda had been filed, the parties were not engaged in discovery, and no hearing on the merits had been scheduled by the Board. Indeed, it appears that the parties were made aware of Dingman Township's intentions, and, despite this, proceeded to lodge a proposed consent adjudication with the Board. Under the circumstances, the petition was not untimely.

Moreover, the interests of Dingman Township will not, as Lake Adventure suggests, be adequately represented by the Department, for the interests of the two are separate and distinct. Under §5(a) of the Sewage Facilities Act, Dingman Township is responsible for sewage services for areas within its jurisdiction. Any abatement plan submitted by Lake Adventure will, of necessity, involve Dingman Township; at the very least, any proposal to expand or upgrade the sewage collection and treatment system at Lake Adventure will require approval by Dingman Township as part of its official sewage facilities plan. See 25 Pa.Code §71.52. The Department, on the other hand, has broad oversight responsibilities under §10 of the Sewage Facilities Act to assure that Dingman Township fulfills this responsibility. The Department's interest, here, is not the same as Dingman Township's, so it cannot be concluded that it will adequately represent Dingman Township's interests.[2]

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[2] How well the Department was protecting the interests of Dingman Township is reflected in the proposed consent adjudication. Paragraph 2 requires Lake Adventure to "use the best efforts to work with Dingman Township to secure Act 537 Plan Approval and work toward resolving the violations set forth in Paragraph E." And, Paragraph 3, which sets forth a variety of corrective actions to be taken by Lake Adventure, contains a compliance schedule tied to the dates of 537 Plan Approval.

Having found that the petition to intervene was not untimely, that Dingman Township has a relevant interest, and that its interest will not be adequately represented by the Department, the petition will be granted.

O R D E R

AND NOW, this 14th day of August, 1990, it is ordered that:

1) The petition to intervene of Dingman Township is granted;

2) On or before September 5, 1990, the parties shall advise the Board whether they wish the Board to proceed with review of the proposed consent adjudication as it is presently drafted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: August 14, 1990

cc: **Bureau of Litigation**
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For Intervenor:
John W. Carroll, Esq.
Donna L. Fisher, Esq.
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Harrisburg, PA
and
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BEECHER, WAGNER, ROSE & KLEMEYER
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M. DIANE SMI
SECRETARY TO THE E

ENERGY RESOURCES, INC.	:	
	:	
v.	:	EHB Docket No. 89-534-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 15, 1990

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Appellant's failure to file a signed, verified answer to a Request for Admissions within 30 days as required by Pa.R.C.P. 4014(b) deems the matters contained in the request as admitted. Where the deemed admissions show that there exists no dispute as to any material fact and the moving party is entitled to judgment as a matter of law, a motion for summary judgment will be granted.

OPINION

This matter was initiated by Energy Resources, Inc. (ERI) on November 6, 1989 with the filing of an appeal at Docket No. 89-534-MJ to a Department of Environmental Resources' (DER or Department) Compliance Order dated October

3, 1989.[1] The Compliance Order cited ERI for an iron discharge from a mine site in Oliver Township, Jefferson County in excess of the effluent standards of 25 Pa.Code §87.102, and required ERI to upgrade the treatment being provided to the discharge to bring it into compliance.

The Department, on November 21, 1989, issued an Assessment of Civil Penalty against ERI for the discharge cited in the October 3, 1989 Compliance Order. ERI appealed this civil penalty assessment on December 19, 1989 at Docket No. 89-605-MJ. Both appeals were consolidated by the Board at Docket No. 89-534-MJ on March 19, 1990 at the request of ERI.

The Board, upon receipt of each appeal, issued Pre-Hearing Order No. 1, and pre-hearing memoranda were filed by ERI and the Department.

Under cover of a letter dated February 23, 1990, the Department served on ERI Commonwealth's Request for Admissions, which clearly stated on the first page:

> You are advised that Pa.R.Civ.P. 4014 provides that the matters contained herein are admitted unless, within thirty days after service of this request, a verified answer or a specific objection to each matter, signed by you or your attorney, is served upon the Department.
>
> (emphasis in the original)

An unsigned and unverified response purporting to be ERI's "Answers & Objections to the Commonwealth's Request for Admissions" was filed with the Board's Harrisburg office on March 26, 1990. However, this document did not come to the attention of the Board or DER until after DER had filed a Motion

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[1]The date of receipt of the Compliance Order is not stated in the appeal notice. This could have required an inquiry into the date of receipt to establish jurisdiction were it not that this order will dismiss the appeal in any case.

for Summary Judgment on April 23, 1990 based on what it deemed to be ERI's lack of response to the Request for Admissions. The response filed by ERI was accompanied by a cover letter signed by "Ray A. Mitchell", but no mention was made of Mr. Mitchell's relation to the company. This response, in paragraph No. 12, denies that on September 7, 1989 there was a discharge of water from ERI's mine with a concentration of iron in excess of 7 mg/l. As to the request for an admission regarding reasonableness of the penalty in paragraph No. 15, no answer was supplied.

Subsequently, on April 30, 1990, ERI filed a "Reply to Commonwealth's Request for Admissions," which was signed by Charles E. Shestak, Manager of Mining & Environmental Compliance, but was unverified. Although this Reply was filed more than 30 days after the deadline for responding to the Request for Admissions, no extension of time had ever been sought by or granted to ERI, nor did this Reply make any reference to the purported answers filed by Ray Mitchell on March 26, 1990.[2]

On June 12, 1990, the Department filed an Amended Motion for Summary Judgment, differing only in that it incorporates ERI's April 30 Reply, which admits all of the facts necessary to constitute a complete case for the Department as to the Compliance Order, and only questions the reasonableness of the civil penalty. ERI has filed no response to the Department's motion.

Pa. R.C.P. 4014(b) requires that a verified answer or an objection signed by the party or his attorney be filed in response to a request for admissions within thirty days after service of the request. Otherwise, they

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[2]The cover letter accompanying the Reply, also signed by Mr. Shestak, simply stated, "Please be advised that Ray Mitchell will not be testifying on behalf of Energy Resources, Inc. as he is no longer in the employ of Energy Resources, Inc."

shall be deemed admitted. Miller v. DER, 1988 EHB 538. Since the document filed by ERI on March 26, 1990 is neither signed nor verified, we shall treat it as a failure to respond. Furthermore, since ERI's April 30, 1990 Reply was not filed within 30 days of DER's Request for Admissions, and no extension was granted to ERI, this, too, is a failure to respond.

Admissions, including those by failure to answer, are conclusive within the proceeding unless the court on motion permits withdrawal or amendment of the admissions. Poli v. South Union Township Sewage Authority, 56 Pa.Cmwlth. 62, 424 A.2d 568 (1981). No such motion for withdrawal or amendment has been filed by ERI.

Turning to the Department's amended motion, the Board is authorized to grant summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035(b); Morco Corporation v. Commonwealth, DER, 1989 EHB 1071; Summerhill Borough v. Commonwealth, DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). In this case, ERI's deemed admissions establish that on September 7, 1989 there was a discharge of water from ERI's Mine No. 13 which was in excess of the allowed concentration of iron, and that this discharge constitutes a violation of Sections 301, 307, 315, and 611 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.301, §691.307, §691.315 and §691.611; 25 Pa.Code §87.102(a)(2); and the conditions of the permit.

The one remaining issue deals with ERI's deemed admission of the reasonableness of the civil penalty assessed by DER. This is a proper subject

of admission under Pa.R.C.P. 4014(a), as this Rule allows for admissions in the form of statements or opinions of the application of law to fact.

Since there remains no dispute as to any material fact and the Department is entitled to judgment as a matter of law, the Amended Motion for Summary Judgment is granted.

O R D E R

AND NOW, this 15th day of August, 1990, it is ordered that the Amended Motion for Summary Judgment filed by the Department of Environmental Resources is granted and the appeals consolidated at 89-534-MJ are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 15, 1990

cc: **See next page**

cc: **Bureau of Litigation**
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SECRETARY TO THE BO

DOUGLAS E. BARRY AND SANDRA L. BARRY, t/a D. E. BARRY COMPANY	:	**EHB Docket No. 90-109-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 16, 1990**

OPINION AND ORDER SUR PETITION TO INTERVENE

By Maxine Woelfling, Chairman

Synopsis

Petition to intervene by a water authority in an appeal of an order to cease unpermitted disposal of solid waste and submit a closure plan is denied where the issues raised by the authority are not relevant to the appeal. The authority does not have an automatic right of intervention under 1 Pa.Code §35.28(b) because it is not an agency of the Commonwealth as that term is defined in 1 Pa.Code §31.2.

OPINION

This matter was initiated by the March 9, 1990, filing of a notice of appeal by Douglas E. and Sandra L. Barry, t/a D. E. Barry Company (Barry), seeking review of a February 9, 1990, compliance order issued by the Department of Environmental Resources (Department). The order directed Barry

to immediately cease dumping or depositing any solid waste onto the surface of the ground or into the waters of the Commonwealth and to submit a closure plan for its site in East Bradford Township, Chester County.

In its notice of appeal, Barry challenges the validity of the compliance order, alleging that the materials stored on its property do not constitute solid waste and that its activities do not constitute disposal of solid waste. As a result, Barry argues that 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 closure plan regulations under 25 Pa.Code, Ch. 273 are not applicable to its activities.

A petition to intervene in this matter was filed on June 18, 1990, by the West Chester Area Municipal Authority (Authority), which provides water service to the residents of West Chester. The Authority contends that activities on the Barry property adversely affect the present and future drinking water supplies of the Authority, since the Authority's well field is in close proximity and downgradient from the Barry property. The Authority maintains the remediation plan submitted by Barry to the Department is inadequate. The Authority asserts it has obligations under federal and state law to provide safe drinking water, thus making its interest in the outcome of this proceeding direct, immediate, and not adequately represented by either the Department or the Barrys. The Authority plans to introduce evidence on the propriety of the testing program and states any further evidence would depend upon the results of the remedial investigation. The Authority further states it will negotiate for a resolution that includes the remedial investigation outlined in its complaint in a related case which was attached to the petition.

On June 28, 1990, Barry filed a response in opposition to the Authority's petition to intervene, arguing that the Authority's interests are well beyond the scope of this proceeding, since the issues before the Board concern the applicability of the closure plan requirements and not the adequacy of the closure plan. As such, Barry asserts, any interests the Authority may have in this appeal will be adequately represented by the Department.

The Department did not respond to the Authority's petition to intervene.

On July 10, 1990, the Authority filed a reply adding, *inter alia*, that it, as an agency of the Commonwealth, has an automatic right to intervene in accordance with 1 Pa.Code §35.28(b) and that its interest is to participate in adjudicating the issue of whether solid waste was illegally disposed of on the Barry site. The Authority states that it is seeking to protect itself from a claim of collateral estoppel in a related action in the Chester County Court of Common Pleas and wishes to participate in the appeal in this forum in the interests of judicial economy.

Intervention may be discretionary or as of right. The Authority contends that it has an automatic right of intervention in this appeal pursuant to 1 Pa.Code §35.28(b) because of its status as a Commonwealth agency. That provision of the General Rules of Administrative Practice and Procedure (General Rules) states that "The Commonwealth or an officer or agency thereof may intervene as of right in a proceeding subject to this part." The term "Commonwealth" is not defined in 1 Pa.Code §31.3, the definitional section of the General Rules. However, the term "agency" is defined as:

> A department, departmental administration board or commission, officer, independent board

> or commission, authority or other agency of the Commonwealth now in existence or hereafter created, including--to the extent that it is an administrative agency within the meaning of Pa. Cont. art. V, § 9--the Governor's Office, but not including the Senate or House of Representatives of this Commonwealth or a court, political subdivision, municipal or other local authority, or an officer or agency of a court, political subdivision or local authority.
>
> (emphasis added)

Thus, because the Authority is not included within the definition of "agency" in the General Rules, it does not have an automatic right of intervention under 1 Pa.Code §35.28.

Intervention under the Board's rules of practice and procedure at 25 Pa.Code §21.62 is discretionary. We have held in Keystone Sanitation Company, Inc. v. DER, 1989 EHB 1287, 1289-1290 that:

> ...petitioners must show a direct, immediate, and substantial interest in the outcome of the litigation. Franklin Township Board of Supervisors et al. v. DER, 1985 EHB 853. The factors considered by the Board in ruling on a petition to intervene include 1) the prospective intervenor's relevant interest; 2) the adequacy of representation provided by the existing parties; and 3) the ability of the prospective intervenor to present relevant evidence. BethEnergy Mines Inc. v. DER, 1987 EHB 873. Intervention will not be granted, however, if it is not in the public interest. Franklin Township, *supra*.

Intervention is not allowed where it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or confusion of issues. City of Harrisburg v. DER, 1988 EHB 946.

Here, we must agree with Barry that the issues raised by the Authority are outside the scope of this appeal. The Authority cites its interest in providing safe drinking water to its customers and the proximity of its well fields to the Barry site as grounds for intervention. However, the Department order at issue in this appeal nowhere alleges that Barry is

contaminating ground or surface water. Rather, the order is quite simple - it cites Barry for unpermitted waste disposal and directs it to cease disposal and submit a closure plan. Although the Authority adds in its reply to Barry's response in opposition to the petition to intervene that it wishes to participate in adjudicating whether solid waste was illegally disposed of at the Barry site, the Department is best able to present evidence on this issue in light of the issues raised by Barry in its notice of appeal, namely, whether the SWMA and the regulations adopted thereunder are applicable to activities on the Barry site.

The Authority focuses on another issue which is not relevant to the appeal - the adequacy of the closure/remediation plan allegedly being developed by Barry. The Department's order merely directed Barry to submit a closure plan in accordance with the requirements of the Department's regulations; the adequacy of that closure plan is not before the Board at this time, since the Department's review and approval or disapproval of that plan has yet to occur.

The interests of judicial economy are also cited by the Authority as grounds for intervention. However, the Authority has failed to explain how the interests of judicial economy will be served when the scope of the action it has brought against Barry in the Chester County Court of Common Pleas is far broader than this appeal.[1]

Because the Authority has no automatic right of intervention in this

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[1] That action seeks injunctive relief and stems from Barry's alleged violations of the SWMA, the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Hazardous Sites Clean-up Act, the Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 *et seq.*; and the Storage Tank and Spill Prevention Act, the Act of July 6, 1989, P.L. 169, 35 P.S. §6021.101 *et seq.* (Exhibit A to Authority's Petition for Leave to Intervene)

appeal and its intervention will broaden the scope of this appeal to issues either not addressed in the Department's order or not raised by Barry in its notice of appeal, the Authority's petition to intervene will be denied.

O R D E R

AND NOW, this 16th day of August, 1990, it is ordered that the petition to intervene of the West Chester Area Municipal Authority is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: August 16, 1990

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

BELLEFONTE LIME COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 90-261-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 16, 1990**

OPINION AND ORDER SUR
PETITION TO INTERVENE

By Terrance J. Fitzpatrick, Member

Synopsis

A petition to intervene is denied as moot where the party filing the appeal has filed a motion for leave to withdraw its appeal without prejudice.

OPINION

This is an appeal by Bellefonte Lime Company, Inc. (Bellefonte) from the Department of Environmental Resources' (DER) granting to Bellefonte of Noncoal Authorization to Mine, Permit No. 301684-1479401-01-3 (permit) to mine an additional 4.7 acres of land on its site in Spring Township, Centre County. Bellefonte objected to special conditions 2, 3, and 5 inserted in the permit by DER.[1]

This Opinion and Order addresses a Petition to Intervene filed by Centre Lime and Stone, Inc. (Centre). In its petition, Centre alleges, among other things, that it is engaged in the mining of lime products, via the surface mining and deep mining methods, on land which adjoins Bellefonts's

[1] In general terms, these three conditions relate to pumping and management of water on the site.

mine site. Centre contends that the conditions inserted by DER are necessary to prevent a discharge from Bellefonte's site to Centre's deep mine. Centre asserts that its interests will not be adequately represented unless it is allowed to intervene because DER allegedly has indicated a willingness to compromise on the special conditions, and also because DER has not monitored Bellefonte's compliance with the special conditions.

Bellefonte filed an answer objecting to Centre's petition to intervene. Bellefonte points out that on the same day it filed its answer to Centre's petition, it also filed a "motion for leave to withdraw appeal without prejudice." Bellefonte argues that its motion will terminate the appeal and render Centre's petition to intervene moot. Bellefonte requests leave to object to Centre's petition on its merits in the event that the Board does not grant Bellefonte's motion.[2]

Centre submitted a letter on August 8, 1990. In this letter, Centre contends that its petition to intervene should be addressed before the Board rules on Bellefonte's motion for leave to withdraw appeal without prejudice. Centre contends that it should be permitted to participate fully in any negotiations between Bellefonte and DER or in any agreement which would modify the conditions of Bellefonte's permit.

We agree with Bellefonte that its motion for leave to withdraw appeal without prejudice renders Centre's petition to intervene moot.[3] The effect of our granting Bellefonte's motion is to allow Bellefonte to raise the same objections which it raised here in later appeals from DER actions. The permit

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[2] DER submitted a letter on August 3, 1990 which stated that it did not object to Bellefonte's motion. Like Bellefonte, DER requested an opportunity to respond to Centre's petition to intervene if Bellefonte's motion was not granted.

[3] We will grant Bellefonte's motion in a separate order.

conditions which Bellefonte took issue with, however, remain unchanged. Since the purpose of Centre's request for intervention was to support these permit conditions, it is clear that we lack the ability to grant any further relief to Centre.

Centre's contention that DER may compromise with Bellefonte and either modify or fail to enforce the permit conditions raises issues which are beyond the Board's scope of review in this proceeding. If DER modifies the conditions, then Centre may pursue an appeal from that action to this Board. If DER simply refuses to act to enforce the permit conditions, however, then Centre's remedy does not lie with this Board since we are not a court of equity. See Marinari v. Commonwealth, DER, ___ Pa. Commonwealth Ct. ___, 566 A.2d 385 (1989), Westinghouse Electric Corp. v. DER, EHB Docket No. 89-058-F (May 14, 1990).

Accordingly, we will deny Centre's petition to intervene.

ORDER

AND NOW, this 16th day of August, 1990, it is ordered that the petition to intervene filed by Centre Lime and Stone Company, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: August 16, 1990

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

FRANKLIN TOWNSHIP MUNICIPAL SANITARY AUTHORITY AND BOROUGH OF DELMONT	:	
v.	:	
	:	EHB Docket No. 88-155-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 21, 1990

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

The appeal by Franklin Township Municipal Sanitary Authority ("FTMSA") and Delmont Borough ("Delmont") from the Department of Environmental Resources' ("DER") denial of their request for DER approval of a proposed change in the scope of their existing federal sewerage system construction grant is sustained. Even though EPA is not subject to our jurisdiction and the monies in the grant flow from EPA through DER to Delmont and FTMSA, there is no federal preemption of our jurisdiction to hear appeals from DER's rejection of this request. This is because action we are reviewing in this grant applicant's appeal is a DER decision under 25 Pa. Code §103.14(b)(1) as promulgated under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended. 35 P.S. §691.1 et seq. ("Clean Streams Law")

DER's decision, that the cost of upgrading FTMSA's sewage treatment plant to meet the advanced secondary treatment effluent limitations in the 1987 renewal of FTMSA's NPDES permit is eneligible for grants funding under Section 103.14b(1), cannot be sustained where the grant project had not ended either at the time that DER issued the renewal permit or subsequently when DER issued its Consent Order directing FTMSA to construct the upgraded treatment facilities.

These actions by DER meant that the upgrading of FTMSA's plant became a change in scope of the initial grants project arising from a change directed by DER within the meaning of Section 103.14(b)(1), which DER should have approved.

Background

By letter dated March 21, 1988, Stuart I. Gansell wrote to Delmont and FTMSA, on DER's behalf, advising them that DER denied their request for a change in scope of Grant Project C-421108-02. This request had been made so that construction of treatment facilities at the FTMSA sewage treatment plant to treat sewage to a higher degree would be eligible for grants-in-aid under a federal grant.[1] On April 20, 1988, Delmont and FTMSA appealed this DER

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[1]DER's letter, while rejecting the request for a change in scope, dealt only with the release of the unspent funds ($247,000) remaining in the total amount initially awarded under the grant. This is because DER's letter was responding to the March 1, 1988 letter from Delmont and FTMSA which sought a change in scope and the release of these funds to help pay the cost of building more treatment facilities. The Notice of Appeal filed by FTMSA and Delmont attacks the DER denial of the change in scope which, if reversed, would make virtually all of the treatment facility's construction costs grant-eligible. The Pre-Hearing Memoranda filed by Delmont and FTMSA, and that filed on behalf of DER, however, make it clear that the issue is the eligibility for grants funding of the entire cost of upgrading the treatment plant's efficiency. This was further confirmed by argument at the hearing and in the parties' briefs. It is this issue which we adjudicate herein.

decision to the Board.

Thereafter, Delmont and FTMSA undertook some discovery. Appellants' Pre-Hearing Memorandum was received by this Board on July 5, 1988. DER's Pre-Hearing Memorandum was filed with us on September 14, 1988.

On March 27, 1989, Appellants filed their Motion For Summary Judgment and Motion For Expedited Ruling on Motion For Summary Judgment. On April 3, 1989, DER filed a Motion For Extension Of Time To Respond To Appellants' Motion For Summary Judgment. On April 7, 1989, Appellants filed Objections to DER's Motion. We issued an Order on April 11, 1989, denying DER's Motion and directing it to file its response to Appellants' Motion For Summary Judgment by April 17, 1989.

DER timely filed its Reply In Opposition To Appellants' Motion For Expedited Ruling On Motion For Summary Judgment. On that same date, it filed its Reply In Opposition To Appellants' Motion For Summary Judgment and its Motion To Dismiss Summary Judgment Request. By Order of May 12, 1989, we denied Appellants' Motion For Expedited Ruling and transferred this matter from former Board member, William A. Roth, to the Board Chairman, Maxine Woelfling. Thereafter, on June 22, 1989, Board Chairman Woelfling denied Appellants' Motion For Summary Judgment, because it was unclear as to whether material facts were still in dispute. See Franklin Township Municipal Sanitary Authority et al. v. DER, 1989 EHB 727.

On November 15, 1989, this matter was reassigned to incoming Board member, Richard S. Ehmann. After a conference call with counsel for the parties, we scheduled this matter for hearing on February 20, 21 and 22, 1990.

Thereafter, on January 19, 1990, DER filed a Motion To Dismiss this appeal. The Motion was based on an argument that this Board lacks

jurisdiction to review DER decisions on federal sewage grants. On February 6, 1990, Appellants replied to DER's Motion, urging that we have authority to review DER's decision to deny Appellants' request to change the scope of this grants project. By Order dated February 8, 1990, we denied DER's Motion.

On February 9, 1990, the parties filed a Stipulation of Undisputed Facts with us. On February 12, 1990, DER filed a Motion To Limit Testimony. The motion sought to bar expert testimony of James G. Ryan on behalf of Appellants. On February 20, 1990, we received Appellants' Reply, which opposed DER's Motion. Immediately prior to the commencement of the hearing on February 20, 1990, we granted DER's Motion and barred expert testimony by Mr. Ryan. Testimony was taken and evidence was received from both sides on February 20 and 21, 1990. Both sides then rested their cases.

On March 20, 1990, we received the transcripts of the hearings from the Court Reporter, and, by Order dated March 22, 1990, we directed Appellants to file their post-hearing Brief with us by April 21, 1990. Appellants' Brief was filed with us on April 24, 1990. DER's Brief, which had been ordered to be filed by May 21, 1990, was received by us on May 24, 1990. Thereafter, on June 8, 1990, we received a Reply Brief from counsel for Appellants.

After receipt of these briefs and while we were in the process of preparing our adjudication of this matter we received a letter dated August 2, 1990, from Appellants' counsel reciting some "evidence" that Appellants wished to make us aware of. In a subsequent conference telephone call with counsel for both parties, we indicated that we would not consider the content of the letter and advised that if a party wanted us to consider new evidence that

party should formally petition to reopen the record. We have not considered the letter's content in preparing this adjudication, nor have we received any petitions seeking to reopen the record.

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

FINDINGS OF FACT

1. FTMSA is a Pennsylvania municipal authority created under the Pennsylvania Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §301 et seq., whose address is 3001 Meadowbrook Road, Murrysville, PA, 15668. (Appellants' Notice of Appeal and Stip. of Facts No. 1)[2]

2. Delmont is a Pennsylvania municipality, whose address is 77 Greensburg Street, Delmont, PA, 15626. (Appellants' Notice of Appeal and Stip. of Facts No. 2)

3. The Appellee is DER, the agency with the authority to administer the Clean Streams Law, and the rules and regulations promulgated thereunder.

4. DER, through its Bureau of Water Quality Management, Division of Municipal Facilities and Grants, administers certain aspects of the United States Environmental Protection Agency ("EPA") construction grant program for sewage construction programs in Pennsylvania. This program is authorized by

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[2]References to Stip. of Facts No. 1 and similar references herein are references to paragraphs in the joint Stipulation Of Undisputed Facts filed with us by the parties. References to Appellants' Exhibits will be "A-__". References to the DER's Exhibits will be "C-__". References to pages in the transcript will be "T-___".

§201 of the Federal Water Pollution Control Act, 33 U.S.C. §1281 (1986) and the regulations promulgated pursuant thereto at 40 C.F.R. Subchapter B. (Stip. of Facts No. 3)

5. FTMSA owns and operates a sewage treatment plant serving the following Pennsylvania communities in whole or in part: the Municipality of Murrysville, Delmont Borough, Export Borough, Salem Township and Penn Township. FTMSA's sewage treatment plant, also referred to as the Meadowbrook Road Treatment Plant ("Meadowbrook Plant"), receives sanitary sewage from the sewers tributary thereto and discharges treated wastewater into Turtle Creek, which runs adjacent to the Meadowbrook Plant. Turtle Creek is a stream in the Turtle Creek watershed. (Stip. of Facts No. 1)

6. The original FTMSA plant became operational in 1970. (T-29)

7. FTMSA's original plant was designed to produce a quality or degree of wastewater treatment known as " Advanced Secondary Treatment." (T-30)

8. Advanced Secondary Treatment is defined as any project that is designed to meet effluent limitations of less than 30 milligrams per liter ("mg/l") on a thirty day average, as to both suspended solids, and biochemical oxygen demand, five-day (BOD5). (Stip. of Facts Footnote No. 1)

9. In the permit issued in 1968 by DER for FTMSA's original plant, DER specified a discharge meeting advanced secondary effluent quality. (T-30)

10. Despite its design parameters, FTMSA's plant could not be operated to produce a wastewater effluent meeting the advanced secondary treatment requirement in its permit. The plant only met the lower level of treatment known as "Secondary Treatment." (T-30)

11. Secondary Treatment of sewage is that which produces an effluent quality for both BOD5 and suspended solids of 30 mg/l in a period of 30

consecutive days, an average effluent quality of 45 mg/l of those pollutants in a period of seven consecutive days, a 60 mg/l as an instantaneous maximum concentration of these pollutants, and 85 percent removal of the same pollutants in a period of 30 consecutive days. (Stip. of Facts Footnote No. 1)

12. In 1974, DER imposed a ban on further connections to FTMSA's plant because of its failure to achieve the advanced secondary treatment standard in its permit. (T-31)

13. In 1975, FTMSA and DER negotiated a settlement of their differences concerning the treatment plant's effluent. This took the form of a Consent Order and Agreement and mandated both that FTMSA pursue EPA grants to fund an upgrade and that it repair its plant so that it could meet the advanced secondary effluent limitation. (T-31 and 33) FTMSA was also required by the Consent Order And Agreement to look into expansion by conducting a comprehensive study of the provision of sanitary sewer service to the surrounding municipalities, such as Delmont and Salem which had no municipal sewage systems. (T-31 and 33)

14. Delmont and portions of Salem straddle two watersheds; one is the Beaver Run watershed and the other is the Turtle Creek watershed. For years, Delmont and Salem lacked adequate sewage facilities, and both raw sewage and inadequately treated sewage from septic tanks or pipes from house plumbing discharged to water courses and streams. Many of these drained to the Beaver Run watershed and flowed into the Beaver Run Reservoir, which is a major source of drinking water supply. The contamination of this reservoir in this fashion was, for many years, generally considered unsatisfactory. (T-157-158 and A-20)

15. In September of 1979, DER approved award to Delmont of an EPA grant to perform a Facilities Planning Study ("Step I Study") to plan for construction of a sanitary sewer system in Delmont and a portion of Salem which would abate the discharge of raw and partially treated sewage to the Beaver Run Watershed. (Stip. of Facts No. 4)

16. DER had asked FTMSA to be lead applicant for the grant ultimately awarded to Delmont, but, for political reasons, Delmont was named lead applicant for this grant. Nevertheless, most of the study was done by FTMSA because it addressed wide areas outside of Delmont which Delmont would not agree to study. (T-86-87)

17. The Step I Study area included portions of Export Borough, Penn Township, Delmont, Salem and Murrysville. (T-85-86)

18. The Step I Study considered five options to address the sewage disposal problems within the study area. (T-159-160)

19. The study produced a recommendation as to the one of these five options which was the most cost effective in that it produced the most environmental benefit at the least cost. (T-162)

20. One of the options considered, and the option selected by the study (after modification) as the most cost effective, was to expand the Meadowbrook Plant to receive sewage from collection systems to be constructed in Salem and Delmont, and to upgrade the Meadowbrook Plant to enable it to meet its existing advanced secondary effluent limitations for BOD and suspended solids. (Stip. of Facts No. 4 and A-20)

21. Completion of this study was delayed, at least in part, because of DER's uncertainty about a proposed DER facility to treat acid mine drainage in

the Turtle Creek watershed and the impact thereof on effluent limitations for the Meadowbrook Plant. (Stip. of Facts No. 5)

22. While the Step I Study was in progress, DER changed the effluent limitations for the Meadowbrook Plant, relaxing them from advanced secondary treatment to secondary treatment. (T-39)

23. The first time during the Step I Study that Delmont and FTMSA were told to consider the possibility of secondary treatment versus advanced secondary treatment at the FTMSA plant was by letter from DER, dated October 30, 1981, which was over two years after the grant was awarded. (T-40-41 and A-3)

24. The first permit FTMSA received containing only secondary treatment standards for the Meadowbrook Plant was the NPDES permit issued by DER, dated November 30, 1981 ("1981 Permit"). (T-41 and A-8)

25. To clarify which set of effluent limits would apply at the FTMSA plant so that the Step I Study could be concluded, a meeting between officials of various municipalities and DER Secretary, Pete Duncan, was held on January 29, 1982. (T-46-48)

26. In this meeting, DER indicated that it had funds to build a mine drainage treatment plant on Turtle Creek to treat the mine drainage entering the creek, but lacked funds to operate it. When DER's offer to build the plant if the municipalities would pay its cost of operation was rejected, DER elected not to build the plant. This allowed DER to relax the effluent limitations for FTMSA's plant. (T-93-95, 125, 193-194 and A-16)

27. In the course of this meeting, Delmont and FTMSA were advised that only secondary treatment effluent limitations would be applied to the FTMSA plant for a long period into the future. (T-48-49, 93-95, 193-194 and A-16)

28. The relaxation of the advanced secondary effluent limitations, agreed to in the January 29, 1982 meeting, was confirmed by letter from DER to Delmont, dated February 1, 1982. The letter also stated that this position was different from that taken in DER's letter of October 30, 1981. (A-16)

29. The DER letter of February 1, 1982 also provided:

> As indicated during the meeting, should a mine drainage abatement facility become a reality, the quality of Turtle Creek will be evaluated as well as the effect of the secondary level discharge. It is quite possible that a higher degree of treatment could be required at some future time. (A-16)

30. Prior to the January 1982 meeting, the Step I Study was moving very slowly, but thereafter, it began to move along, and the study was completed in late 1982. (T-133, 192, and 196)

31. DER approved the Step I Study and sent it to EPA, which also approved it. (T-129)

32. The DER and EPA approved Step I Study says secondary effluent limitations will apply until after the acid mine drainage treatment plant is built. (T-195-196)

33. In the EPA grant process, after a Step I Study is completed, the municipalities design and secure permits for the approved system, and EPA awards a Step III Grant to fund construction of the approved project. (T-157, 164-165)

34. Delmont and FTSMA felt that there was a construction grants deadline of July 1983 in regard to this project. They believed that they had to have the Step I Study approved and plans for the new sewage system drawn and

submitted by then to DER and EPA to be eligible for a 75% grant. They understood that after that date, EPA would only pay with a grant of up to 55% of costs. (T-52)

35. A Step III Grant was issued and mailed by EPA to Delmont and FTMSA on October 7, 1983. It gave these grant applicants a grant of 77.3% of all approved costs, up to $12,436,860. (A-4)

36. No upgrade of the sewage treatment plant to produce advanced secondary treatment was provided in this grant. (Stip. of Facts No. 7 and T-163)

37. As of the hearing date, FTMSA, Delmont, and Salem had not completed all of the grant-eligible work under this Step III grant award. (T-56 and 178) To finish all of the grant-eligible work on this project so that it would be ready for an EPA audit (the final step), the following matters had to be completed or resolved by Delmont, Salem or FTMSA: (1) A study of the innovative and alternative technology installed (a methane gas generator) at the Meadowbrook plant (2) a study on the acceptability of manual controls for the treatment plant's digester heat exchanger (as opposed to automatic controls) (3) malodor problems at two of the pump stations and (4) the elimination of "wet weather" hydraulic overloading of the new sanitary sewers in Delmont and Salem. (T-115, 174, 179 and 180)

38. DER and EPA are still holding the final 10% of the grant monies - close to one million dollars - awaiting completion of the work in the initial Step III grant. (T-56-57)

39. On or about December 15, 1986, DER received notification from Delmont that FTMSA had started initial operation of the expanded portion of its treatment plant as of December 12, 1986. DER wrote back saying that under

EPA's grants regulations, the grantee has one year after initiation of operation to certify that the project meets the performance standards set for the project. DER indicated one such standard was NPDES Permit PA0025674. The letter also said for the Innovative/Alternative technologies used in the project, the time for complying with the performance standards is two years. (T-117 and C-4)

40. On April 30, 1987, after notifying FTMSA, via a draft of the proposed renewal of its NPDES permit for the Meadowbrook Plant, that its plant's effluent limits would be more restrictive, DER wrote to FTMSA to indicate FTMSA could not use the monies remaining in its existing grant account to fund any of the upgrade of the treatment plant. DER indicated that if FTMSA wanted EPA grants to help pay the costs of such an upgrade, FTMSA would have to submit a completely new and separate grant application for this upgrade. DER further advised FTMSA that such a new request for grants to fund the upgrade project would rank low on DER's priority list of projects to be funded. This letter also advised FTMSA that, in DER's opinion, the purpose of the project which EPA had already funded had been achieved. (C-5)

41. On June 30, 1987, DER issued the renewal of the 1981 NPDES Permit for FTMSA's plant ("1987 Permit"). This 1987 Permit bore the same permit number as the 1981 permit (PA0025674), but reimposed advanced secondary effluent limitations on the Meadowbrook Plant's discharge. (Stip. of Fact No. 8, A-5 and 8, T-284-285)

42. FTMSA appealed the 1987 NPDES Permit to the Environmental Hearing Board, but its appeal was denied as untimely. FTMSA then sought leave to

appeal nunc pro tunc, but the Board denied that request, too. FTMSA appealed to Commonwealth Court from the Board's refusal to grant FTMSA leave to appeal nunc pro tunc. (T-109-110, 219 and A-17)

43. The Commonwealth Court appeal was discontinued by FTMSA after FTMSA and DER entered into the Consent Order and Agreement dated September 23, 1988 ("1988 Consent Order"), which is Exhibit A-17. (T-219)

44. In this Consent Order and Agreement, DER finds as a fact that because the Meadowbrook Plant is incapable of producing the required degree of treatment, the plant is discharging inadequately treated sewage and does not meet the standards in the 1987 Permit. It also finds these discharges to be in violation of the Clean Streams Law, supra. (A-17)

45. Paragraph 1 of this 1988 Consent Order and Agreement says that the eight numbered paragraphs following it are an Order of DER issued pursuant to the Clean Streams Law. (A-17)

46. Paragraph 2 of the 1988 Consent Order and Agreement says that FTMSA shall construct the necessary sewage treatment facilities to achieve compliance with the 1987 Permit and sets a time schedule in which this is to be accomplished. (A-17)

47. Paragraph 4 of the 1988 Consent Order and Agreement allows FTMSA to continue the instant appeal and indicates DER and FTMSA will renegotiate the time schedule if FTMSA is successful in its appeal. (A-17)

48. Also during the course of the litigation over the 1987 Permit's effluent limitations, by letter of February 24, 1988, FTMSA's consulting engineers transmitted to FTMSA a proposed Performance Certification. Its transmittal letter indicated that the treatment plant was functioning as designed and within expected efficiencies, and that it was complying with the

1981 Permit's effluent limitations while the 1987 permit's limitations were under appeal to this Board. (C-6)

49. The Performance Certificate for the treatment plant was submitted to DER by Delmont's engineer under a letter dated March 10, 1988, which indicated that, while the treatment plant could meet the 1981 Permit's secondary treatment limitations, it could not meet the advanced secondary limitations in the 1987 permit. (C-7) In the grants process, such certifications are not submitted until construction is essentially complete. (T-201 and 202, C-6 and 7)

50. Further, while the litigation was in process, but before the project Performance Certificate was submitted to DER, FTMSA and Delmont wrote a letter to DER, dated March 1, 1988, requesting that a change in scope of the grants project be approved by DER. The change sought was a modification of the project to include grant funding for the construction of the treatment facilities necessary to produce an advanced secondary discharge at FTSMA's plant. (A-7)

51. By letter of March 21, 1988, DER wrote to Delmont and FTMSA denying their request for change in scope of the project. (A-7)

52. DER's letter of March 21, 1988 states it is DER's final decision on this change in scope issue. This is the letter from which the instant appeal was filed. (A-7 and the Notice of Appeal filed by FTMSA and Delmont)

53. Neither Appellants nor DER provided this Board with an explanation of why the effluent limitations were made more stringent in the 1987 Permit. There was no evidence provided to the Board suggesting that the mine drainage treatment plant has ever been constructed.

54. Stuart I. Gansell is the current chief of the portion of DER dealing with EPA grants for sewage system construction and has worked in this section as its chief since March 20, 1986. It is he who signed the letter denying the FTMSA's request for a change in scope. (T-222 and A-7)

55. Gansell testified that, because DER saw FTMSA's plant as virtually complete, DER felt that the request for change in scope was in reality a request to build something to meet a new need. (T-225-228)

56. DER based this conclusion upon the fact that construction of the system was essentially complete, the expanded plant was in operation, and during operation, the plant was complying with the requirements of the performance standards. (T-228-229)

57. DER concluded grants participation in the upgrade was outside the scope of the defined project and was, thus, ineligible for funding. (T-229)

58. On behalf of DER, Gansell believes any enforcement action against a grantee, or issuance of a permit with tighter effluent limitations, which occurs while a grant project is in progress, is independent of the grant program, so the 1987 permit's new effluent standards had no impact on the project. (T-232)

59. In Gansell's opinion, only an order to a grantee which directs the grantee to make a specific change in the scope of the project is a change in scope covered by 25 Pa. Code §103.14(b)(1). (T-230)

60. Gansell testified on cross-examination that logically, a change in scope of a grants project must necessarily be outside of the initial design scope of the project. (T-234-235)

61. Gansell also testified on cross-examination that federal grants regulations barring funding for activities outside the scope of the project do

not apply to activities in an approved change of project's scope, because changes in scope are fundable, i.e., when a change in scope is approved, the activity is no longer outside the designed scope of the project. (T-235)

62. According to Gansell, had FTMSA not agreed to work jointly with Delmont and Salem as to their sewage disposal needs, DER could have forced FTMSA to do this. (T-239)

63. Gansell agreed in his testimony that upgrading a treatment plant could properly be a change in scope in the appropriate case. (T-243)

64. DER does require that FTMSA meet the new effluent limitations in the 1987 Permit, and the effect of this is to require an upgrade, even though DER did not specifically direct an upgrade by FTMSA by using the 1987 permit. (T-244, 251-253)

65. Gansell admitted that the 1988 Consent Order is an Order from DER to FTMSA to upgrade the Meadowbrook Plant to meet the 1987 Permit's effluent limitations. (T-249)

66. Gansell admitted that 25 Pa. Code §103.14(b)(1) does not require that the change in scope be directed by DER before it can be approved for funding, but said he refused to approve the change in scope because the grants section had not ordered this specific change in scope. (T-263-264)

67. Gansell also admitted that he never considered why 25 Pa. Code §103.14(b)(1) only requires that, to be fundable, the change in scope need only result from a change directed by DER, as opposed to requiring that the change in scope be specifically directed by DER. (T-263-264)

68. In the decision to deny the change in scope sought by FTMSA and Delmont, Gansell considered the language in DER's Policy and Procedure Manual. (T-268)

69. On this issue, Gansell testified that the language in that manual is identical to the language in §103.14(b)(1), except that the manual fails to consider changes in scope arising from "other changes directed by EPA or DER", and, thus, this policy manual conforms to Gansell's interpretation on DER's behalf, of the regulation, and DER's decision to deny this request. (T-264-269)

70. Based on the December 18, 1986 date of DER's letter, which informs Delmont that it has one year to show the grant-funded project can meet performance standards, the 1987 NPDES permit for the Meadowbrook Plant with its more stringent effluent limitations was in force at the time that compliance with NPDES Permit PA0025674 was a performance standard for this grant project. (T-273)

71. While a change of scope could not be approved if the project were closed, this project is still open. (T-277-278)

72. While DER says that in review of a request for a change in scope, it is not to consider the extent to which a project is still open, it admits it did so in this case because the project was virtually complete and the plant was in operation. (T-279-280)

73. Under applicable federal regulations, 40 C.F.R. §35.2005 (May 12, 1982), the term "performance standard" is defined as: "The performance and operations requirement applicable to a project, including the enforceable requirements of the [Clean Water] act and the specifications for which the project is planned and designed to meet." (T-285)

74. NPDES permits are enforceable requirements of the Clean Water Act which permits may be enforced by DER. (T-288)

75. In this matter, DER believes that only the 1981 Permit's effluent limitations are part of the performance standards, for the grants project, even though the 1987 Permit's enforceable requirements were not being met in 1988 when it denied the change in scope request by Delmont and FTMSA. (T-288-293)

76. In deciding to deny the change in scope request, Gansell distinguished between enforceable requirements as to the grant project and other enforceable requirements; he classified the 1981 Permit's effluent limitations as applicable to the project (but not the 1987 permit's limitations), even though the definition of performance standard contained in the regulation does not limit itself to performance standards in effect at the time the grant project is planned and designed. (T-232, 292-295)

77. The definition of performance standard contained in the federal regulations addresses enforceable requirements and the specifications to which the project is designed, rather than enforceable requirements for which the project was designed, in part, at least, because performance standards are not set until the project commences operation. (T-294-295)

DISCUSSION

The first issue to confront us in this appeal is which party bears the burden of proof. This issue is easily addressed since we have previously held that in these sewage grants situations, the burden is on FTMSA and Delmont, under 25 Pa. Code §21.101, to show they are entitled to the relief sought. City of Philadelphia v. DER, 1989 EHB 653.

What is challenged by FTMSA and Delmont in this appeal is DER's decision, made pursuant to 25 Pa. Code §103.14(b),[3] to deny their request for additional funds to upgrade the FTMSA plant so that it could achieve an advanced secondary level of sewage treatment. DER's Post-Hearing Brief would have us begin this review in late 1985, when the newly expanded (but not upgraded) FTMSA plant commenced operation. We believe Delmont and FTMSA state the better position when they urge us to begin our review of this matter in 1970, and, thus, we start there.

FTMSA's original Meadowbrook Plant began operation in 1970 and although it was designed to produce an effluent treated to advanced secondary levels, and the 1968 DER permit required that level of treatment, operationally it could only achieve the lower level of treatment, known as secondary treatment.

Because the plant's effluent was violating the limitations in the 1968 permit, DER in 1974, imposed a ban on connections of new sources of sewage to the sewers' tributary to the plant. Of course this did not make the plant produce a better effluent quality. In 1975, since the plant continued to violate the effluent limitations in its permit, DER and FTMSA negotiated and resolved their differences through a Consent Order and Agreement which required FTMSA to pursue EPA grants to fund an upgrade of the Meadowbrook Plant so that it would achieve the advanced secondary limitations. Under this Consent Order, FTMSA was also required to look at expanding the plant's capacity to allow it to treat sewage from portions of surrounding municipalities which at that time had no municipal sewage systems.

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[3]None of our many prior decisions on grants issues has interpreted this subsection of §103.14.

In 1979, DER approved award of an EPA grant of funds to a group of municipalities including Delmont and FTMSA, to study options for installing sewers in portions of Delmont and Salem. The major goal of the study was to eliminate the discharge of raw and inadequately treated sewage into streams upstream of the Beaver Run Reservoir (the major public drinking water supply), which was being degraded by these sewage discharges. FTMSA was initially asked by DER to be the lead applicant for this grant, but Delmont was ultimately given this role because of political considerations. The geographic area of the study included portions of Export Borough, Penn Township, Delmont, Salem and Murrysville.

The study itself was to look at five different options through which to address the sewage treatment needs of this area and to produce a recommendation as to the option which would produce the greatest environmental benefit for the least cost. Only one of the five options included expanding and upgrading FTMSA's existing Meadowbrook Plant. As both DER's employees and FTMSA's manager testified, this study's completion was delayed because of DER's uncertainty about whether to build and operate a mine drainage treatment plant to treat mine drainage discharging into Turtle Creek and the impact thereof on effluent limitations for the Meadowbrook Plant's discharge.

On January 29, 1982, DER's secretary met with FTMSA, Delmont, and the municipalities on Turtle Creek concerning the proposed mine drainage treatment plant and the Meadowbrook Plant's effluent limitations. DER indicated it had the funds necessary to build a mine drainage treatment plant but it could not fund the plant's operation. Nevertheless, DER offered to build the plant if the municipalities would fund the cost of its operation. When the municipalities indicated that they, too, lacked the funds to pay for

operation, DER indicated that the plant would not be built in the immediate future, and, until the mine drainage treatment plant was built, the effluent limitations for FTMSA's Meadowbrook Plant would be relaxed back to secondary treatment. DER confirmed this position to Delmont by letter dated February 1, 1982. This letter provided in part:

> As indicated during the meeting, should a mine drainage abatement facility become a reality, the quality of Turtle Creek will be evaluated as well as the effect of the secondary level discharge. It is quite possible that a higher degree of treatment could be required at some future time. (A-16)

Thereafter, before the end of 1982, the study was completed and was sent to DER and EPA. The study recommended expansion of the Meadowbrook Plant (an upgrade no longer being necessary) together with construction of a sewage collection and conveyance system of sewers and sewage pump stations. Both EPA and DER approved the study and its recommendation. This approved study stated that secondary effluent limits would apply to the Meadowbrook Plant's future discharge until after construction of an acid mine drainage treatment plant.

With the study approved, the municipalities designed the Meadowbrook Plant's expansion and the new sewage system, secured DER permits for same, and applied, through DER, for EPA monies to fund the construction of these new facilities. A Step III Grant to fund such construction was awarded on October 7, 1983. Thereafter, FTMSA and Delmont began construction. The expanded treatment plant commenced operation in 1986. However as of the date of the hearing in this appeal, all of the grants funded work is not complete, although the vast majority thereof is done.

In 1981, while the study was in process, another chain of events which contribute to this appeal began. DER issued FTMSA a permit ("1981 Permit)

pursuant to the National Pollutant Discharge Elimination System (NPDES), established pursuant to The Clean Water Act, 33 U.S.C. §1251 et seq., and the Clean Streams Law, supra, to discharge treated effluent from the Meadowbrook Plant.

FTMSA's 1981 Permit was valid until November 30, 1986, was entitled Permit PA0025674 and contained secondary effluent limitations. (A-80 When DER issued FTMSA the renewal of this permit on June 30, 1987, ("1987 Permit"), DER reimposed advanced secondary effluent limitations even though the mine drainage treatment plant had not been built. No explanation of the reason for reimposition of these more stringent effluent limitations was offered to the Board by either party.

Most predictably FTMSA appealed to this Board from the 1987 Permit's more stringent new effluent limitations. After we dismissed its appeal, (See Franklin Township Municipal Sanitary Authority v. DER, 1988 EHB 5), FTMSA challenged our decision by taking an appeal to the Commonwealth Court. The appeal proceeding was, however, discontinued by FTMSA after FTMSA and DER entered into a Consent Order and Agreement ("1988 Consent Order") dated September 23, 1988. This Consent Order found as a fact that the expanded Meadowbrook Plant was discharging inadequately treated sewage because its effluent did not meet the standards in the renewed 1987 permit and that the plant was incapable of producing the required degree of treatment. It also found this situation to be a violation of the Clean Streams Law. After making these findings, the Consent Order directed FTMSA to upgrade the Meadowbrook Plant, to meet these effluent limitations pursuant to a specific time schedule.

On March 1, 1988, during the litigation over the effluent limitations contained in the 1987 Permit, FTMSA and Delmont wrote to DER requesting a "change in scope" of the grant project to include within the grant project for funding purposes the upgrade of the Meadowbrook Plant, which was necessitated by the 1987 Permit's advanced secondary effluent limitation. On March 21, 1988, DER wrote back to Delmont and FTMSA, rejecting this request. It is this letter which generated the instant appeal. Importantly, the 1988 Consent Order specifically recognized the pendency of the instant appeal and allowed FTMSA to continue it. Moreover, the 1988 Consent Order provided that the compliance schedule in the Consent Order would be renegotiated if FTMSA were to prevail in this appeal.

It is before this factual backdrop that the forthright testimony of DER's Stuart J. Gansell convinces us that DER erred in denying the request for a change in scope to include the upgrade of this facility. Mr. Gansell has both worked in the section of DER administering EPA grants for sewerage system construction and been its chief since March 20, 1986. It is he who made DER's decision and signed the letter of March 21, 1988 from which this appeal arose.

Gansell based the denial of the request for a change in scope of the grant funded portion of the project on his interpretation of 25 Pa. Code §103.14(b)(1).

25 Pa. Code §103.14 provides in relevant part:

> (a) All changes in scope of a grant project must be submitted in writing to the Department for approval.
>
> (b) Grant funding for changes in the scope of a grant project will be approved by the Department:
>
> (1) If the change in scope is the result of new or revised requirements of 42 U.S.C. §§ 4342, 4343, 4346A, 4346B and 4347; the Federal Act and

> the Federal regulations promulgated thereunder; this subchapter; other changes directed by EPA or DER. (Emphasis added.)

DER's Policy and Procedure Manual states DER's policy on its regulations. It interprets Section 103.14(b)(1) as if the underlined material does not appear in the regulation but offers no explanation for this interpretation. Gansell's interpretation of this regulation comports with the interpretation thereof found in DER's Policy and Procedure Manual.

In his testimony, Gansell admitted that an upgrading of a treatment plant can be a change in scope. He stated that DER insists FTMSA meet the required limits in the 1987 Permit, and that the effect of this requirement is a mandate to upgrade. He also admitted the 1988 Consent Order is an order from DER directing FTMSA to upgrade the Meadowbrook Plant. Mr. Gansell further admitted he never considered why §103.14 (b)(1) requires that the change in scope need only result from a change directed by DER in order to be fundable, as opposed to requiring that the change in scope have been specifically directed by DER to be fundable.

Gansell testified that he made his decision to deny Delmont and FTMSA's request by distinguishing between enforceable requirements as to a grants project and other enforceable requirements. Gansell testified he concluded that only the effluent limitations in FTMSA's 1981 permit applied to the project. Gansell also admitted that even though DER is not supposed to consider the extent to which a project is still open when reviewing a request for a change in scope, he did consider that this project was nearing completion in evaluating this change in scope request.

In a review of DER's decision, we must determine whether DER's action was an abuse of discretion or an arbitrary exercise of its duties. Warren Sand

and Gravel Co. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Where we find an abuse of discretion by DER, however, we may substitute our discretion for that exercised by DER. Morcoal Co. v. DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983). Using this standard, we are compelled to find that DER erred in denying this change in scope request. DER admitted it is not supposed to consider the extent to which a project is still open in reviewing a change in scope request (and there is no dispute that this project is still open), and DER also admitted that despite this fact, its denial decision was based in part on the fact that the expanded Meadowbrook Plant was operational and the project was almost complete.

DER 's Gansell also admitted that the 1987 Permit is enforceable by DER against FTMSA, and that the placing of these more stringent effluent limitations in this permit mandates a plant upgrade. Standing alone, this is enough under §103.14(b)(1) to say that there is an upgrade needed as a result of other changes to this sewerage system directed by DER. The 1987 Permit does not stand alone, however. It stands in the company of the Order issued by DER to FTMSA on September 23, 1988 to upgrade this treatment plant to meet these stricter effluent limitations. Although this Order is in a form called a Consent Order and Agreement, the language of the document makes it clear it is an Order which is enforceable by DER against FTMSA under the Clean Streams Law supra.

Mr. Gansell concedes on DER's behalf that upgrading a plant can be a change of scope in the appropriate case, but he says the denial letter says that this upgrade is not such a case. Gansell says that DER did not order this change. Apparently, this means Mr. Gansell's grants personnel did not order the upgrade, because the upgrade was obviously mandated, firstly, by the

1987 Permit's issuance, and secondly, by the terms of the 1988 Consent Order. Neither through Mr. Drier nor Mr. Gansell (DER's only two witnesses) did DER justify why an order directing an upgrade had to come from their grants section to be a change in scope. Neither the regulation nor DER's Policy Manual contains such a limitation on from whom within DER the order must come, and both of these witnesses work with the section of DER which issued the 1987 NPDES Permit, negotiated the 1988 Consent Order's upgrade requirement, and which controls the grants funds, i.e., the Bureau of Water Quality Management. Further, even if this grants section were not within the DER Bureau that issues NPDES permits and enforces the Clean Streams Law, the plain language of §103.14(b) says that the change in scope results from a direction from DER, rather than from this small section of one Bureau within DER. Thus, a change in scope could come about from an Order issued by another section of DER, such as that regulating Solid Waste or air pollution.

Mr. Gansell's testimony also asserts that §103.14(b)(1) requires that DER order the specific modification before it is eligible to be a fundable change in scope. This argument parallels DER's Policy Manual, but DER did not offer a rationale for its narrow policy manual interpretation. DER needed to offer us such a rational after Mr. Gansell conceded that the regulation's wording was broader than DER's Policy Manual's interpretation of it and reflected that he had never thought about why this was so. In point of fact, DER interprets §103.14(b)(1) to read that DER must order the specific modification before it can be grant-eligible, whereas §103.14(b)(1) says only that grant funding for the change in scope will be approved when it results from a change directed by EPA or DER. DER thus interprets its own regulation in a narrower fashion than it is written and it offers us no justification therefor.

Finally, Mr. Gansell appeared to say that he reached his decision by concluding that only the 1981 permit's effluent limitations applied to the project. Again, no adequate justification for this position was offered to us by DER. The need for such a justification of position is hardly unreasonable, since Mr. Gansell admitted a plant upgrade could properly be an approvable change in scope in the proper case and that the 1988 Consent Order here mandates an upgrade. Mr. Gansell said in reaching his conclusion that only the 1981 Permit's effluent limitations applied to this grants project he distinguished between enforceable requirements as to the grants project and other enforceable requirements, but he later admitted the definition for performance standards applicable to grants projects does not limit itself to standards in effect at the time a project is planned and designed. Indeed, the testimony shows this definition recognizes at least some of these standards are not to be set until after the project becomes operational. The logic of this latter approach is unassailable because it takes into consideration unknowns which are encountered during construction and commencement of operations, after planning and design are complete.

In deciding if DER acted wrongly, DER's interpretation of its own regulation is entitled to great weight, Einsig v. Pennsylvania Mines Corp., 69 Pa. Cmwlth. 351, 452 A.2d 558 (1982). However, DER has offered us a defense of its position which is nothing more than a repeat of a statement of its position. The rhyme and reason of its position - the logic behind it - which would allow us to give it weight are missing. More importantly, the illogic and inconsistencies have been made too clear to ignore. We cannot assign DER's interpretation determinative weight in light thereof. We are compelled to find that the facts support an interpretation of 25 Pa. Code §103.14(b)(1)

which causes us to conclude that DER abused its discretion and its decision must be reversed. DER's conclusion that the upgrade of the Meadowbrook Plant to meet the 1987 Permit's advanced secondary effluent limitations is not a change in scope under §103.14(b)(1) is wrong. The upgrade is approvable by DER for funding as a change in scope under this subsection.

The argument in DER's Brief that DER's issuance in 1987 of the amended NPDES permit is not a change directed by DER within the meaning of §103.14(b)(1) deserves further mention only because of its sophistry. It attempts to argue that a permit's conditions, which can be enforced by DER, are nevertheless different from an Order from DER. No one can dispute DER's contention that they are different in some ways. However, we have also recognized that they are the same in some ways, too. See Monessen, Inc. v. DER EHB Docket No. 88-486-E (Opinion and Order issued May 21, 1990). Moreover, the argument in DER's Brief totally ignores the 1988 Consent Order between DER and FTMSA, which is clearly not an amended permit but is an order directing specific changes.

DER next argues that the intent of the Clean Water Act, supra., is not to change the scope of a grants projects for funding purposes at any time in the grants process in which an NPDES permit is amended. We do not agree. EPA has the discretion not to amend an NPDES Permit, as does DER. Either agency could also delay amendment until a grant project were complete so as to prevent this issue from arising. When such an amendment occurs during the project and it is followed by an Order to comply with the new limitations in the amendment, it has meaning. In this case, it radically changed the status quo for FTMSA. Unlike the ostrich which we are asked to be, this Board cannot bury its head in the sand and ignore this fact with a prayer that it goes

away. Moreover, there is no citation in DER's Brief to any case or statutory authority that the result we reach today was not the intent of the Congress in enacting the statute. Finally, DER is misguided in asking us to interpret the federal act for it in this case. Before us is the question of whether DER properly interpreted §103.14(b)(1) of its own regulations which were promulgated by the Environmental Quality Board. No federal statute or regulation is challenged by Delmont and FTMSA in the appeal.

DER's caution to us not to interfere with the federal grants process by second-guessing EPA and interpreting federal construction grants regulations is misdirected, as is much of its Brief which wrongly casts this matter as a federal issue. We are not making EPA's decisions for it, nor are we countermanding EPA directions. The grant money is EPA's to distribute to the states. EPA may disagree with DER as to how to distribute it; we lack the jurisdiction to resolve such a dispute. Indeed, even after we issue this Adjudication, we recognize it binds DER but not EPA, and EPA may possess the means to refuse to fund the upgrade. If that occurs, FTMSA and Delmont clearly will have to address that issue in another forum because of the limited nature of our jurisdiction. Nevertheless, as to DER action under 25 Pa. Code §103.14(b)(1), review thereof lies with this Board and in no other location. It is that review and that review only which we are providing. While we have previously held that we have authority to review DER grant actions under the federal regulations (see Warrington Township Municipal Authority v. DER, 1987 EHB 921), we leave it to another forum with greater jurisdiction to "mess" with the federal regulations and review EPA decisions concerning EPA's operation of its grants program.

DER also argues that compliance by FTMSA with the effluent limitations in the 1987 Permit is independent of the availability of grants dollars to fund construction. We agree. We agreed when we wrote Latrobe Municipal Authority et al. v. DER, 1975 EHB 122. We are not changing our position on this issue because that is not the issue before us. Nothing in the Post-Hearing Brief of FTSMA and Delmont suggests they are making this argument. Since under Lucky Strike Coal Company et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 477 (1988), a party is deemed to abandon those arguments not raised in its Post-Hearing Brief, we need not rule on it.

If there were no grants project in process (i.e. partially along the road from beginning a Step I study to ending a Step III construction) at the time DER reimposed these more stringent limitations and ordered FTMSA to upgrade its plant's treatment efficiency to achieve same, or, if the grants project were in process but FTMSA and Delmont had not sought a change in scope to cover the ordered upgrade, FTMSA would have to upgrade regardless of the availability of a grant, just as it would if we ruled against it in this appeal. The issue before us, however, is whether DER acted properly in denying the request for a change in scope, since there was such a project open and in progress when DER denied the request. It is this narrow issue we are adjudicating and not the independence of FTMSA's compliance obligation as to the 1987 Permit and 1988 Order from the availability of a federal grant.[4] The two issues are thus "apples and oranges" and are not related to each

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[4]As was pointed out in State Water Pollution Control Board v. Train, 559 F.2d 921 (4th Cir. 1977), there are a multitude of municipal sewage treatment plants which must comply with their NPDES permits but which would never receive a federal grant to pay for their doing so, because those grants funds are finite.

other. They are both fruits, i.e., grants issues, but they are different fruits.

Finally, we return to the question of whether there is a preemption of our review of DER's actions in the grants funding field, as is argued by DER.[5] In doing so, we again note that in the instant case, we are not reviewing any EPA action, decision, or regulation, nor are we being asked by FTMSA and Delmont to either interpret portions of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., or to bind EPA by our decision. Rather FTMSA and Delmont are challenging DER's interpretation of 25 Pa. Code §103.14(b)(1), as set forth in DER's letter of March 21, 1988, which denied approval of the requested change in scope.

Clearly, under the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 90, 35 P.S. §7514, we are directed and empowered to review decisions by DER. The decision in DER's letter of March 21, 1988 falls within the definition of "Action", found in 25 Pa. Code §21.2, which we are to review. Nothing in DER's Brief suggests the contrary.

Further, it should be emphasized that while DER urges preemption of this field because of pervasive EPA control over grants issues, DER saw fit to act on the request by Delmont and FTMSA under regulations promulgated by the Environmental Quality Board for the purpose of defining and directing the scope of DER's activities within Pennsylvania under this joint state/federal program. This causes us to observe that even DER's staff, in administering this program, obviously believes that these state regulations, rather than federal regulations, guide their grant-related activities. We also observe

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[5]Board member Richard S. Ehmann denied a DER Motion to Dismiss this appeal on these same grounds by Order dated February 8, 1990.

that the "Authority" headnote found at the beginning of Chapter 103 of the regulations indicates that the authority for promulgation of Section 103.14(b)(1) is the Clean Streams Law. No mention is made of any federal statute being the source of the authority to promulgate these regulations. This suggests that in the instant appeal, DER's decision was made under state law and regulations, and it is proper for us to review it.[6]

DER's argument is that Section 4(a) of the Environmental Hearing Board Act, 35 P.S. 514, as it pertains to this Board's ability to hold hearings on DER decisions, is preempted as to any DER decisions or actions as to grants-related issues because of the federal preemption of the field. Were we dealing with a DER decision rendered solely under federal law, this argument might have some limited appeal. But as stated above, the issue before us is a decision made solely under a regulation which was itself promulgated solely under state law.[7] Moreover, the logic of DER's argument, if carried to its end, would mean that DER could make any decision it wishes as to grants issues, reciting as authority for the decision some portion of Chapter 103, but the only agency which could review that decision would be EPA. Thus, DER

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[6]In a footnote, DER's Brief states that EPA has already approved of DER's denial of this change of scope in two stages of internal review. Apparently, DER believes this adds weight to its contention that it interpreted §103.14(b)(1) correctly. This is not so. Our review of these opinions shows that EPA concurs, predominantly under federal regulations, that there should be no change in scope. The passing references to §103.14(b) in the EPA opinions carry no more weight than if they were opinions of another state's equivalent of DER. Indeed, EPA opinions on its obligations to help fund the requested change in scope can be considered sufficiently self-serving that those opinions carry very little weight.

[7]The portion of DER's preemption arguement dealing with alleged preemption of EPA's right to make the funding decisions on advanced treatment projects (Arguement III B in its brief) is disingenuous. As explained, nothing of the kind has been sought by FTMSA and Delmont.

suggests that EPA, which lacks any real interest in the intrastate administration of its grants program, (provided that DER decisions do not violate federal law or DER/EPA agreements), and which must administer the Federal Water Pollution Control Act and all of the regulations promulgated under it for all 50 states, shall decide how Clean Streams Law supra based, EQB promulgated regulations are to be interpreted under state law. Based on our past decisions and those of the Commonwealth Court we cannot accept this argument.

Neither this Board nor the Commonwealth Court has found that preemption bars this Board's review of DER decisions on grants-related issues, in cases like this.

The earliest case on grant matters which we have found in our research is Latrobe Municipal Authority et al. v. DER, supra. In that case, DER specifically argued that we lacked jurisdiction to hear the appeal. That case arose as a challenge by several municipal entities to the number of priority points awarded by DER for federal grants to build sewerage systems. We rejected DER's lack of jurisdiction argument there, saying:

> Where the federal legislative scheme delegates responsibility to the State environmental agency--in this case for establishing a priority ranking system and coming up with an annual priority list--the consequence must normally be to subject the State agency's action to the State's administrative review process.

Id. at 427[8]

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[8]Where a municipality has sought a court order to force DER to reinstate its grants priority, the Commonwealth Court has held appeal to this Board (footnote continued)

Commonwealth DER v. Bethlehem Township Municipal Authority, 77 Pa. Cmwlth. 402, 465 A.2d 1329 (1983) involved an interpretation of a different subsection of the very regulation at issue here, but DER did not assert preemption there. Bethlehem Township Municipal Authority ("Bethlehem") sought to amend its grant application, but DER denied the amendment, saying that this amendment was a "change of scope", so 25 Pa. Code §103.14(b)(2) applied, and, since, Bethlehem did not qualify under the regulation, DER did not have to certify the amendment to EPA.

In our Opinion, we had held §103.14 did not apply and we had directed DER to certify the amendment.[9] On appeal, Commonwealth Court sustained our position, stating in part:

> We fully recognize that the DER is more than a mere intermediary or clearing house for grant applications to the EPA. There exists only a finite level of federal funds for water pollution control projects in any given year. The DER must establish priorities and allocate these funds in a manner which will best serve the interests of the Commonwealth as a whole.

Id. at, 465 A.2d at 1331.

DER again advanced a lack of jurisdiction argument in Warrington Township Municipal Authority, supra. In Warrington, DER argued that we were without jurisdiction because Warrington's appeal amounted to a challenge of the federal grants regulations. While we sustained DER's action as to Warrington, we nevertheless dismissed this DER argument, saying we have authority to interpret those regulations where we are reviewing an action of DER because

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(continued footnote)
should be an adequate remedy at law. Charleston Township Municipal Authority et al. v. Commonwealth, DER, 29 Pa. Cmwlth. 127, 370 A.2d 758 (1977).

[9]Our Opinion is reported at 1981 EHB 22.

"pursuant to its Construction Management Assistance Grant with EPA, [DER] is responsible for administering the Clean Water Act's construction grants program in Pennsylvania." We went on to recognize that we could not declare federal regulation invalid, but we had jurisdiction to determine if DER's action was unreasonable, arbitrary, capricious, or contrary to law.

Borough of West Chester v. DER, 1989 EHB 719, is the grants case most factually similar to the instant appeal. It arose when DER refused grants participation for a portion of the cost of installing an access road to the Borough's sewage treatment plant. While excavating this road grade, the Borough encountered buried garbage and sought approval of grants participation for the portion of the Borough's cost relating to disposal of this garbage in a landfill. Again, in that case, we were asked to interpret §103.14(b) as to "change in scope", just as we had been in Bethlehem, supra. Because the moving of the garbage was necessary for construction of the road and DER recognized this and had required the Borough to dispose of this material at an approved landfill, we found that this was a proper change of scope. Accordingly, we directed DER to take the necessary steps to approve funding for this cost.

The final case we must consider is Ferri Contracting Company, Inc. v. Commonwealth, DER, 96 Pa. Cmwlth. 30, 506 A.2d 981 (1986). Contrary to DER's interpretation of the Court's opinion, this case does not favor DER's preemption argument. Ferri was not a grantee of federal funds, as are Delmont and FTMSA. Rather, Ferri was a contractor hired to do certain work for the grantee. Ferri had first sought our review of DER's decision that certain

costs were ineligible for grants funding.[10] We held Ferri lacked standing to appeal such a denial. On appeal to the Commonwealth Court, the Court stated that a non-grantee or non-grant applicant's right to appeal an administrative decision under the Clean Water Act grants program was preempted by federal statutes and regulations. At the end of the very next sentence, however, the court inserted a footnote, saying in part:

> In so holding, we do not intend a broad reading of preemption doctrine and we stress petitioner's status as a commercial contractor litigating a federal grant program matter... State police powers are not superseded by federal legislation unless that was the clear and manifest purpose of Congress."

Id. at note 3.

Thus, it is clear that Commonwealth Court was not finding preemption as to the group of cases on this issue of which the above cited cases were but a part.

In summary, a review of these cases should make it clear that where, as here, we are asked to review DER's decision to see if it was unreasonable, arbitrary, capricious, or unlawful in interpreting a state regulation promulgated solely under a state statute, we have no second thoughts based on a preemption argument about doing so.

Our discussion of the arguments on this point would be deficient if we failed to point out that we are not alone in our view that an appeal lies to our Board from DER's decision. EPA believes in this right of review of a state decision in a state forum so strongly that it codified it in its regulations. 40 C.F.R. §35.3030 mandates review by the state agency of each state action or omission concerning a specific grant before a grantee may

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[10]Our opinion is reported as Ferri Contracting Company, Inc. v. DER, 1985 EHB 339.

request review by EPA of the state's action or omission. How DER overlooked EPA's regulation in its assertion of preemptive federal law in this area we do not know, but we do know this regulation reaffirms our position on this matter.

In so saying, however, we recognize that EPA has a final say in this matter and we are not suggesting it does not. Were we to even suggest that this is not so, the June 29, 1979 agreement between DER and EPA, captioned "Agreement For The Delegation Of Certain Wastewater Treatment Construction Grant Functions Between The United States Environmental Protection Agency And The Commonwealth of Pennsylvania", leaves final control over all Step 2-3 construction grants in EPA's hands.[11] Thus, such a suggestion would be contrary to an inescapable fact.[12]

Accordingly, based on the above evaluation of this matter, we sustain the appeal of Delmont and FTMSA.

CONCLUSIONS OF LAW

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

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[11]DER appended this document to its Post-Hearing Brief, rather then offering it into evidence at the hearing, as it should have. We note its attachment to DER's prior Motion To Dismiss and we have taken official notice of it.

[12]We are also aware of the vast amount of authority under this federal grants program which is delegated to DER, by EPA/DER agreements, EPA's regulations and the federal act. For example, see 33 U.S.C. §1296, which places sole responsibility on each state for development of its grants priority system. In our eyes, such delegations offer further support of the idea that we are not preempted from review of DER's actions taken under state laws and regulations, or even from review of its actions taken under federal obligations, statutes and regulations.

2. The Environmental Hearing Board's jurisdiction over this appeal is not preempted by the Federal Clean Water Act and the regulations promulgated thereunder.

3. FTMSA and Delmont have the burden of proof in this appeal of DER's denial of their request for DER approval of a change in scope of their federal grants project pursuant to 25 Pa. Code §103.14(b)(1).

4. DER abused its discretion in denying approval of the change in scope under 25 Pa. Code §103.14(b)(1) sought by FTMSA and Delmont to cover a portion of the cost to upgrade the treatment efficiency of FTMSA's Meadowbrook Plant to the advanced secondary level, which DER first inserted in the 1987 NPDES Permit for this plan, and then ordered FTMSA to upgrade to achieve.

ORDER

AND NOW, this 21st day of August, 1990, it is ordered that the appeal by FTMSA and Delmont is sustained. DER is directed to immediately take all steps necessary to approve FTMSA's and Delmont's change in scope request, pursuant to 25 Pa. Code §103.14(b)(1), as to grants funding for the upgrading of FTMSA's Meadowbrook Plant to comply with the effluent limitations in FTMSA's 1987 NPDES Permit for this plant and to submit this approval to EPA.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 21, 1990

cc: Bureau of Litigation
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For the Commonwealth, DER:
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M. DIANE SMI
SECRETARY TO THE E

DELTA COAL SALES, INC.	:	
DELTA MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 90-044-MJ**
	:	**90-045-MJ**
COMMONWEALTH OF PENNSYLVANIA,	:	**(Consolidated)**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 21, 1990

OPINION AND ORDER

By Joseph N. Mack, Member

Synopsis

Where the Appellants have failed to file a pre-hearing memorandum despite two extensions and have failed to respond to a Rule to Show Cause, their appeals are dismissed as a sanction for failure to comply with the Board's orders.

OPINION

On January 26, 1990, Delta Mining, Inc. and Delta Coal Sales, Inc. (collectively "Appellants") filed separate appeals with the Board seeking review of the Department of Environmental Resources' (DER) December 26, 1989 forfeiture of bonds and suspension of permits in connection with Appellants' mining activities.

On January 31, 1990, the Board issued Pre-Hearing Order No. 1, which required both Appellants to file a pre-hearing memorandum by April 17, 1990. In a letter dated April 17, 1990, counsel for Appellants advised the Board

that the parties were close to resolving the matter, and requested a 20-day extension in which to file Appellants' pre-hearing memoranda. This extension was granted on April 25, 1990. By order of May 10, 1990, the two appeals were consolidated at Docket No. 90-044-MJ.

When Appellants failed to file pre-hearing memoranda by May 7, 1990, the Board, on May 10, 1990, issued a Rule to Show Cause why the appeals should not be dismissed as a sanction for failure to comply with the Board's Pre-Hearing Order No. 1. The Appellants' Response, filed on May 29, 1990, stated that the parties were in the process of drafting a Consent Order and Agreement and that additional time was needed to complete said agreement.

By Order of May 30, 1990, the Board discharged its Rule to Show Cause and granted Appellants an extension until June 29, 1990 to file either a pre-hearing memorandum or settlement agreement executed by the parties.

Appellants failed to file either a pre-hearing memorandum or a settlement agreement by the mandated deadline. Therefore, on July 5, 1990 the Board issued a second Rule to Show Cause why the appeal should not be dismissed. The Rule was returnable by July 16, 1990. Appellants did not respond to the Rule by that date, nor have they responded in any way as of the date of this Opinion and Order.

Appellants have ignored the Board's order to file a pre-hearing memorandum, despite being granted two extensions, and have failed to respond to our Rule to Show Cause why their appeals should not be dismissed. Under these circumstances, dismissal as a sanction under 25 Pa.Code §21.124 is warranted for failure to comply with the Board's Order and Rule.

O R D E R

AND NOW, this 21st day of August, 1990, it is ordered that the appeals of Delta Coal Sales, Inc. and Delta Mining, Inc. are dismissed for failure to comply with the Board's Order and Rule.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

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Richard S. Ehmann

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JOSEPH N. MACK
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DATED: August 21, 1990

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

M. DIANE SMITH
SECRETARY TO THE BC

NGK METALS CORPORATION	:	
	:	
	:	
V.	:	**EHB Docket No. 90-056-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 21, 1990**

OPINION AND ORDER
SUR
PETITION TO AMEND ORDERS

Robert D. Myers, Member

Synopsis

A petition to amend interlocutory orders to add language necessary to enable a litigant to seek an interlocutory appeal by permission under 42 Pa. C.S.A. §702(b) will be denied when the question (relating to a litigant's right to raise objections not contained in the Notice of Appeal and for which discovery was unnecessary) does not control the outcome of the litigation. Permitting an interlocutory appeal would delay the ultimate decision.

OPINION

On July 5, 1990 NGK Metals Corporation (NGK) filed a Petition requesting the Board to amend three recent interlocutory orders by including the language from 42 Pa. C.S.A. §702(b) which serves as a prerequisite to interlocutory appeals by permission to Commonwealth Court. The interlocutory orders were issued on April 5, 1990 (denying NGK's Petition to Amend its

Notice of Appeal), May 8, 1990 (granting NGK's Petition for Reconsideration en banc but affirming the April 5, 1990 Order) and June 8, 1990 (denying NGK's Petition for Supersedeas).

In its Petition to Amend, NGK contends that the Board's denial of NGK's Petition to Amend its Notice of Appeal was a departure from prior practice and prevented NGK from challenging (1) the manner of adoption of DER's regulations at 25 Pa. Code Chapter 16 and §93.8a(b), and (2) the validity of DER's use of the IRIS database. The Board's decision, according to NGK, "involves a controlling question of law as to which there is substantial ground for difference of opinion." An immediate appeal on this question would "materially advance the ultimate termination of the matter."[1] The supersedeas decision is included, NGK states, because it is based upon the validity of the regulations and practices which NGK sought to challenge.

The Department of Environmental Resources (DER) filed a Memorandum in Opposition to NGK's Petition to Amend on July 31, 1990. Among the arguments made in the Memorandum, DER raises a jurisdiction question. The Rules of Administrative Procedure at 1 Pa. Code §35.225(a) require that an application to amend an interlocutory order to incorporate the language from 42 Pa. C.S.A.§702(b) must be presented to the agency within 10 days after service of the interlocutory order. Since NGK did not meet this time limit, DER argues that the Board lacks jurisdiction to act.

In its Reply Memorandum filed on August 3, 1990, NGK points out that Rule 1311(b) of the Pennsylvania Rules of Appellate Procedure, which deals with interlocutory appeals by permission pursuant to 42 Pa. C.S.A. §702(b), states that the interlocutory order "may be amended to include the prescribed

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[1] The quoted language is from 42 Pa. C.S.A. §702(b).

statement at any time." This provision, in NGK's view, overrides the Rules of Administrative Procedure.

We see no reason to resolve this conflict at this point,[2] because NGK's Petition to Amend cannot survive on its merits. The issue NGK wishes to present to Commonwealth Court is not a "controlling question" the resolution of which "may materially advance the ultimate termination of the matter." The issue involves the application of the Board's procedural rules at 25 Pa. Code §21.51(e), requiring an appellant to set forth in its Notice of Appeal the specific objections, factual and legal, it has to DER's action. "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."

Aware that discovery frequently is necessary to frame specific objections to DER's actions in areas that are highly technical in nature, the Board traditionally has taken a liberal approach in allowing issues to be raised in the pre-hearing memorandum that were not included in the Notice of Appeal. Commonwealth Court's decision in Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), cast a cloud over this liberality by holding (1) that specifying the grounds for appeal is a jurisdictional prerequisite, and (2) that amendments to the grounds for appeal, beyond the 30-day appeal period, can be allowed only in limited circumstances. This holding remained

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[2] The issue was not presented in Texas Eastern Gas Pipeline Company Litigation, 1989 EHB 281, and City of Harrisburg v. DER, 1989 EHB 373, both of which applied the 10-day time limit without consideration of Pa. R.A.P. 1311(b).

somewhat in limbo until March 6, 1989 when the Pennsylvania Supreme Court affirmed the Commonwealth Court decision (on other grounds without discussing the amendment issue), _____ Pa. _____, 555 A.2d 812 (1989). Since that date, the Board has considered itself bound by the Commonwealth Court holding, allowing amendments where discovery was necessary to formulate an issue and where the right to amend was reserved in the Notice of Appeal. See, for example, Kacer v. DER, 1989 EHB 914.

NGK had reserved the right to amend in its Notice of Appeal "to introduce additional objections in this proceeding based upon subsequent discovery"; but the amendments NGK subsequently offered presented issues for which discovery was unnecessary - issues that could have been raised initially in the Notice of Appeal.[3] Even if Commonwealth Court's holding in the Game Commission case is in error, the Board's action can be sustained because of NGK's failure to show "good cause" why these later-conceived issues should be heard.[4]

Permitting NGK to appeal to Commonwealth Court on this amendment issue will not "materially advance the termination" of the case because the issue is not a "controlling" one. If an appeal were allowed and if NGK were successful, the only result would be the addition of several legal issues to the litigation - issues which may or may not be resolved in NGK's favor. If

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[3] The objections stated in the Notice of Appeal raised appropriate technical and scientific issues. The objections proposed in the Petition to Amend Notice of Appeal raised purely legal issues dealing with procedural matters surrounding the adoption of DER regulations which became effective March 11, 1989, nearly 11 months prior to the filing of the Notice of Appeal.

[4] Such a decision is in accord with numerous recent decisions of the appellate courts enforcing the provisions of Pa. R.A.P. 2116(a). See, for example, Lucarelli v. Workmen's Compensation Appeal Board, 119 Pa. Cmwlth. 72, 546 A.2d 151 (1988).

NGK were unsuccessful in its appeal, the result would be a continuation of the litigation on the technical and scientific issues remaining. The amendment question does not control the outcome of the case; permitting an interlocutory appeal on the question will not hasten the ultimate decision.

ORDER

AND NOW, this 21st day of August 1990, it is ordered that the Petition to Amend Orders, filed by NGK on July 5, 1990, is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

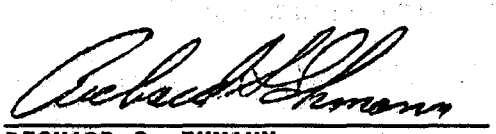
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

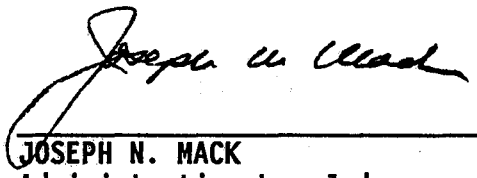
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 21, 1990

cc: **Bureau of Litigation**
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Philadelphia, PA
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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:** August 23, 1990

OPINION AND ORDER SUR
MOTION TO DISMISS AS MOOT

By Maxine Woelfling, Chairman

Synopsis

An appeal of the forfeiture of bonds posted for surface coal mining permits is dismissed as moot where the Department of Environmental Resources (Department) has rescinded the bond forfeitures.

OPINION

The extensive procedural history of this matter is set forth in the Board's opinion at 1989 EHB 591 dismissing those portions of the consolidated appeals relating to the Department's forfeiture of the bonds posted for Mining Permits (MPs) 847-4(A) and 847-5 and in the Board's April 27, 1990, opinion and order[1] granting the Department's motion for partial summary judgment regarding the forfeiture of the bonds posted for MPs 847-1(A), 847-6,

[1] Appellants have petitioned the Commonwealth Court for review of this opinion at No. 1905 C.D. 1990.

847-6(A), 847-8, and 847-8(A). In the order accompanying our April 27, 1990, opinion, we directed the parties to advise us on or before May 29, 1990, whether they had amicably resolved the appeal as it related to the forfeiture of the bonds posted for MPs 847-2 and 847-2(A); our directive was issued based on the Department's representation in a January 19, 1988, letter that the appeal, as it related to these two permits, would be settled.

On May 30, 1990, the Department filed a joint status report advising the Board that the Department was satisfied with the reclamation work performed by Appellants on MPs 847-2 and 847-2(A) and would be rescinding its forfeiture of the bonds posted for these permits. The Department's letter also indicated that it would be filing a motion to dismiss the remainder of the appeal upon rescission of the bond forfeitures.

Having rescinded the bond forfeitures in a June 12, 1990, letter to AH & RS Coal Company from the Department's Bureau of Mining and Reclamation, the Department then, on July 12, 1990, filed a motion to dismiss the remaining portions of the appeal as moot. Appellants were notified by the Board of the motion in a July 17, 1990, letter and directed to file a response on or before August 1, 1990. As of the date of this opinion, no response to the Department's motion has been filed by the Appellants.

Because of the rescission of the bond forfeitures relating to MPs 847-2 and 847-2(A), there is no further relief for the Board to grant Appellants, and the remainder of this appeal must be dismissed as moot. Robert L. Snyder and Jessie M. Snyder et al. v. DER, 1989 EHB 591.

O R D E R

AND NOW, this 23rd day of August, 1990, it is ordered that the Department's motion to dismiss this appeal as it relates to MPs 847-2 and 847-2(A) is granted.

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: August 23, 1990

cc: **Bureau of Litigation**
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and
Robert O. Lampl, Esq.
Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BO

ANTHONY F. PIAZZA, d/b/a COUNTRYSIDE MOBILE HOME PARK	:	**EHB Docket No. 86-180-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 23, 1990

OPINION AND ORDER

By Maxine Woelfling, Chairman

Synopsis

An appeal is dismissed as a sanction for failure to comply with the Board's order and for failure to prosecute. Four years is ample time to pursue an amicable resolution or otherwise bring an appeal to termination.

OPINION

This matter was initiated on April 1, 1986, with the filing of a notice of appeal by Anthony F. Piazza seeking review of the Department of Environmental Resources' disapproval of a proposed revision to the official sewage facilities plan for North Lebanon Township, Lebanon County. The proposed plan revision was to accommodate a 17 unit expansion to the Countryside Mobile Home Park, which is owned by Mr. Piazza.

After the filing of pre-hearing memoranda, the matter was placed on the Board's hearing list on July 29, 1986. When the Board attempted to schedule the matter for hearing in July, 1988, the Department, with the

concurrence of Mr. Piazza, requested that the matter be continued to mid-September, 1988, so that the parties could explore the possibility of an amicable resolution. Thereafter, upon request of Mr. Piazza, the matter was continued to December 2, 1988, and February 3, 1989, again to allow the parties to pursue settlement discussions.

After reviewing Mr. Piazza's February 24, 1989, status report, which requested that the matter be continued once more to allow settlement negotiations, the Board, on April 6, 1989, scheduled the matter for a hearing on the merits July 25-27, 1989. Upon request of both parties, the Board, on July 20, 1989, canceled the hearing and ordered Piazza to file a status report on or before September 29, 1989.

Piazza failed to file the requested status report, and the Board received no communication from either party that the matter had been settled or otherwise resolved. So, on July 10, 1990, the Board issued a rule upon Piazza to show cause why his appeal should not be dismissed as a sanction for failure to comply with the Board's July 20, 1989, order and for failure to prosecute. The rule, which was returnable on July 30, 1990, was sent to Piazza's counsel via certified mail, return receipt requested. The return receipt indicated that the rule was received by Piazza's counsel on July 11, 1990. No response to the rule has been received by the Board as of the date of this opinion and order.

Although the Board always encourages settlements between parties, there comes a time when an appeal must either move forward or otherwise be terminated. There has been ample opportunity here for this appeal to be resolved amicably, and, yet, after four years on the Board's docket, there has been no progress in reaching a settlement. Furthermore, by his lack of response to the Board's order and rule, Piazza has indicated that he has no

intention of moving forward with this appeal. Therefore, the Board has no choice but to dismiss this appeal pursuant to 25 Pa.Code §21.124 as a sanction for Piazza's failure to respond to the Board's order and rule and his failure to prosecute.

O R D E R

AND NOW, this 23rd day of August, 1990, it is ordered that the Board's rule of July 10, 1990, is made absolute and the appeal of Anthony F. Piazza is dismissed as a sanction for failure to respond to the Board's orders and failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 23, 1990

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M. DIANE SMITH
SECRETARY TO THE BO

TINICUM TOWNSHIP	:	**EHB Docket No. 89-170-F**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
DELAWARE VALLEY CONCRETE COMPANY, Permittee	:	**Issued:** August 23, 1990

OPINION AND ORDER SUR
MOTION TO DISMISS
FOR LACK OF JURISDICTION

By: Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss for lack of jurisdiction is denied. The 30 day appeal period in the Board's regulations begins to run on the date Appellant receives notice of DER's action, not the date DER takes the action. 25 Pa.Code §21.52(a).

OPINION

This is an appeal by Tinicum Township, Bucks County, (Tinicum) from the Department of Environmental Resources' (DER) grant of a non-coal surface mining permit to Delaware Valley Concrete Company, Inc. (Delaware Valley).

This Opinion and Order addresses a motion to dismiss for lack of jurisdiction filed by Delaware Valley. In this motion, Delaware Valley argues that DER granted the permit on May 1, 1989, but Tinicum did not file its appeal with the Board until June 16, 1989. Thus, Delaware Valley alleges that the appeal was filed beyond the 30 day appeal period provided for in 25

Pa.Code §21.52(a) and the appeal must be dismissed for lack of jurisdiction. See, *e.g.*, Rostosky v. Commonwealth, DER, 26 Pa.Commonwealth Ct. 478, 364 A.2d 761 (1976).

Tinicum filed an answer to Delaware Valley's motion. Tinicum contends that it did not receive notice of DER's action until May 17, 1990, when Tinicum received a copy of the DER cover letter which accompanied the permit. Tinicum contends that the 30 day appeal period runs from the date it received actual notice because the permit issuance was not published in the Pennsylvania Bulletin. Therefore, Tinicum alleges that its appeal was timely, and that the motion to dismiss should be denied.

We will deny the motion to dismiss. The Board's regulations provide that:

> [J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the Pennsylvania Bulletin... .

25 Pa.Code §21.52(a). This regulation clearly provides that the 30 day appeal period begins to run on the date the appellant receives notice, not on the date DER takes the action. Since Tinicum contends that it received written notice on May 17, 1989, and then filed its appeal on June 16, 1989, it appears that Tinicum's appeal was filed within the 30 day appeal period.[1] Accordingly, we will deny the motion to dismiss.

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[1] For purposes of ruling on Delaware Valley's motion to dismiss, we will accept Tinicum's factual contentions as true. See generally, Herskovitz v. Vespicco, 238 Pa. Superior Ct. 529, 362 A.2d 394 (1976); Columbia Park Citizens Association v. DER, 1989 EHB 899, 903.

O R D E R

AND NOW, this 23rd day of August, 1990, it is ordered that the motion to dismiss for lack of jurisdiction filed by Delaware Valley Concrete Company, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: August 23, 1990

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For Permittee:
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M. DIANE SMITH
SECRETARY TO THE BC

PLYMOUTH TOWNSHIP	:	**EHB Docket No. 90-201-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 23, 1990

OPINION AND ORDER
DISMISSING APPEAL FOR
LACK OF JURISDICTION

By Maxine Woelfling, Chairman

Synopsis

The Board *sua sponte* raises the issue of jurisdiction in an appeal of a permit review letter setting forth comments and requesting additional information. The Board holds it has no jurisdiction over the appeal, since the letter was not a final action of the Department of Environmental Resources (Department). Because the Board has no jurisdiction over the underlying appeal, it has no authority to rule upon a petition to intervene in the matter.

OPINION

Plymouth Township (Township) filed a notice of appeal on May 17, 1990, challenging an April 21, 1990, letter from the Department to Danella Environmental Technologies, Inc. (Danella). Danella had submitted to the Department an application for a solid waste transfer station/processing facility to be located in Plymouth Township, Montgomery County. The letter at

issue contained several comments generated by a Department review of Danella's amendments to its permit application and requested additional information from Danella.

On May 23, 1990, the Board raised the issue of jurisdiction *sua sponte* by issuing a rule upon the Township to show cause why its appeal should not be dismissed because the Department's April 21, 1990, letter is a non-appealable action.[1]

On June 11, 1990, the Township filed its response and a memorandum of law contending the letter of April 21, 1990, constitutes an "action" by the Department affecting the obligations and duties of Danella. The Township explained that the letter is tantamount to a final approval of Danella's permit application, provided the conditions set forth in the letter are met, and that, therefore, the Township is protecting its rights by filing this appeal.

Danella, meanwhile, on June 8, 1990, filed a petition to intervene in this appeal, arguing that it has a vested interest in the value and use of its land which cannot be adequately represented by the other parties to the appeal.

Under the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, the Board has the power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5, Subch. A, on orders, permits, licenses, or decisions of the Department. Actions of the Department are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101 or "actions" as defined at 25

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[1] The Board has authority to raise the issue of jurisdiction, *sua sponte*. Thomas Fahsbender v. DER, 1988 EHB 417, and Herald Products v. DER, 1989 EHB 1152.

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.

An analysis of the particular facts in this case reveals that the Department's letter of April 21, 1990, was neither an "action" nor an "adjudication."

The letter advises Danella that the Department has completed its review of revisions to Danella's permit application and then proceeds to list necessary information which must be submitted before the Department can reach a decision on the permit application.[2] The letter concludes with a request to submit four copies of "the remaining revisions which have to be made on this application."

This letter is, as it states, a "review of revisions" submitted by Danella to the Department. It is far from a final action and quite clearly delineates the numerous additional submissions required before the application

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[2] This information includes, *inter alia*, a revised bond worksheet, documentation of a plan modification to bring the application into compliance with the Montgomery County Solid Waste Management Plan, and review comments from the Pennsylvania Department of Transportation.

can proceed. Until the Department receives the specific information it requested, the pending application cannot be processed or approved. The letter made no final determination regarding the status of the application.

In a similar case, New Hanover Corporation v. DER, 1989 EHB 1075, the appellant sought review of a document containing extensive comments on an application to re-permit a landfill. The Board found the document to be merely an exhaustive recitation of comments on the application and determined that the Department had not made any final decision on the application. Accordingly, the Board held it did not have jurisdiction over the appeal.

In the present case, just as in New Hanover, the letter at issue merely comments on the pending application; it does not approve or disapprove the application. Until the Department makes a final decision to approve or disapprove the solid waste transfer station/processing facility at issue, we have no authority to consider this appeal.

Because we have no jurisdiction over the underlying appeal, we have no authority to rule upon the petition to intervene filed by Danella.

O R D E R

AND NOW, this 23rd day of August, 1990, it is ordered that the Board's May 23, 1990, rule to show cause is made absolute and the appeal of Plymouth Township is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 23, 1990

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For Petitioning Intervenor:
Edward J. Hughes, Esq.
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M. DIANE SMIT
SECRETARY TO THE BO

TRAVELERS INDEMNITY COMPANY and OLD HOME MANOR, INC.	:	
v.	:	**EHB Docket No. 90-081-MJ**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 24, 1990

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment in a bond forfeiture action will be denied where there remain genuine issues of material fact as to the condition of the site at the time of forfeiture and the amount of acreage affected. Summary judgment may not be granted where the Board is faced with opposing affidavits of the parties, because the trier of fact cannot assess the credibility of the opposing affiants.

OPINION

This matter was initiated by Travelers Indemnity Company ("Travelers") and Old Home Manor, Inc. ("OHM") (or collectively "Appellants") with the filing of a notice of appeal on February 20, 1990 from the Department of Environmental Resources' (DER) February 1, 1990 forfeiture of a $29,760

bond posted in connection with OHM's mining activities in Washington Township, Indiana County. The bond was forfeited due to the following alleged violations of OHM[1]:

> 1. Failure to backfill and grade disturbed areas to approximate original contour, access road area.
>
> 2. Failure to adequately revegetate the mine.
>
> 3. Failure to adequately treat discharge.
>
> 4. Failure to comply with the May 8, 1989 Consent Adjudication, which constitutes an Order of the Department.

Pre-hearing memoranda were filed by Appellants and DER on June 11, 1990 and June 22, 1990, respectively. On June 25, 1990, DER filed a Motion for Summary Judgment, to which Appellants responded on July 23, 1990.

In support of its motion, DER has offered the affidavits of three Mine Conservation Inspectors with DER's Bureau of Mining & Reclamation who, on different occasions, had inspected OHM's mining site during the period from August 1988 to June 1990. Together, these affidavits state that at the time the bond was forfeited, OHM had failed to monitor groundwater and surface water and submit monitoring reports as required by its surface mining permit and had not fulfilled its obligations under the May 8, 1989 Consent Adjudication, and that 20.4 acres of the property subject to OHM's mining permit and surety bond were affected by its mining activities. DER has also

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[1]This bond had been previously declared forfeit by DER on March 4, 1986. An appeal was taken at EHB Docket No. 86-185-F. In settlement of that matter, the parties entered into a Consent Adjudication on May 8, 1989 wherein DER agreed to withdraw its forfeiture of the bond in order to allow OHM additional time to comply with the conditions of the permit and the bond.

submitted certification that OHM never appealed two Compliance Orders issued on October 18, 1988 and January 24, 1989, prior to the Consent Adjudication. DER argues that the violations cited therein are final and cannot now be attacked.[2] DER asserts that there remain no genuine issues of fact and that it is entitled to judgment as a matter of law.

Appellants argue that there are several questions of material fact in dispute, including the amount of acreage affected and condition of the site at the time of forfeiture. In support thereof, Appellants have attached the affidavit of OHM's president, W. C. Leasure, who asserts that OHM reclaimed and reseeded the area in question and that 5.5 acres of the 20.4 total acres were never affected by its surface mining activities.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035; Summerhill Borough v. Commonwealth, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). In our review thereof, we must consider such a motion in the light most favorable to the non-moving party. Penoyer v. DER, 1987 EHB 131. Any doubts as to the existence of genuine issues of material fact are to be resolved against the granting of summary judgment. Penn Center House, Inc. v. Hoffman, 520 Pa. 171, 553 A.2d 900 (1989).

At issue in this proceeding are the condition of the mine site at the time of forfeiture and, since the bond in question is proportional, the amount of acreage affected. DER correctly states that OHM never appealed the October

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[2]These Compliance Orders cited OHM for failure to monitor surface water and groundwater in violation of 25 Pa.Code §§87.116 and 87.117.

18, 1988 and January 24, 1989 Compliance Orders and, therefore, the violations cited therein cannot now be collaterally attacked. Fidelity & Deposit Co. of Maryland v. DER, 1989 EHB 751. However, this does not establish that OHM failed to comply with the terms of the subsequent Consent Adjudication or that these violations existed at the time of forfeiture, more than one year later. Furthermore, although the affidavits of DER and Mr. Leasure indicate that groundwater and surface water monitoring was not performed for a period of time, this was not mentioned in DER's February 1, 1990 letter as a reason for forfeiture of the bond. In addition, the bond in question is proportional, accruing liability at the rate of $2,000 per acre. Therefore, the total amount of acreage affected must be proven.

In ruling on DER's motion, we are faced with opposing affidavits of the parties. A resolution of this matter would necessarily involve a determination as to the credibility of the individual affiants. However, the summary judgment process is not intended to provide for trial by affidavits. 2 Goodrich Amram 2d §1035(d)(1). See also Snyder v. DER, EHB Docket No. 79-201-R (Opinion and Order sur Motion for Partial Summary Judgment issued April 27, 1990) (Citing Nanty Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932), the Board held 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, in that case, the Board granted DER's motion for summary judgment because the affidavits were supplemented by Appellants' admissions and other documentary evidence.)

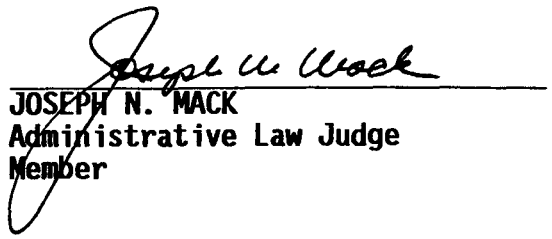
In the present case, material questions of fact remain as to the condition of the mine site at the time of forfeiture and the total amount of acreage affected by OHM's mining activities. Since we must view this matter

in the light most favorable to Appellants, the non-moving party, we must deny DER's Motion for Summary Judgment.

O R D E R

AND NOW, this 24th day of August, 1990, the Department of Environmental Resources' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 24, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Western Region
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WILLIAM L. HARGER	:	
	:	
v.	:	**EHB Docket No. 90-206-E**
	:	
COMMONWEALTH OF PENNSYLVANIA **DEPARTMENT OF ENVIRONMENTAL RESOURCES**	: :	**Issued: August 28, 1990**

OPINION AND ORDER
SUR DER'S MOTION TO LIMIT ISSUES

Synopsis

The doctrine of administrative finality will not be applied to bar Appellant's challenge of DER's authority to issue the Order being contested in the instant proceeding because DER's prior order to this Appellant is too unspecific as to the conduct it addresses and fails to provide any reference to the statute under which it was issued.

OPINION

On May 21, 1990, William L. Harger ("Harger") filed a Notice of Appeal, along with a Petition for Supersedeas, with us from an order dated May 7, 1990 (1990 Order) issued to him by the Department of Environmental Resources ("DER"). The order states, among other things, that Harger is an individual who is owner, developer, manager, or authorized representative of the Harger Mine ("Mine"), which is located within a portion of a previously mined out underground limestone mine in Butler County. The order further states that

the Mine "is an 'undeveloped area' as defined by 34 25 [sic] Pa. Code §33.161 since [DER] has not approved [the Mine] for regular use or occupancy." DER's order explains that DER has received information which indicates Harger is considering resuming active limestone mining or leasing or conveying the mine for such purposes and that Harger has escorted people into the Mine and has had one or more employees performing tasks in the Mine at various times. Additionally, the Order alleges that openings from and through the Mine to adjacent underground storage areas operated by USX Corporation and National Underground Storage, Inc. (NUS) fail to provide reasonable and adequate protection for the health and safety of persons employed therein and property stored therein. The order also alleges the entrances into the mine are unsafe and constitute a danger to members of the community and a public nuisance for several reasons. The order, citing Section 25-13 of the "General Safety Law" (GSL), Act of May 18, 1937, P.L. 654, as amended, 43 P.S. §25-1 et seq., and Sections 1915-A and 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §§510-15 and 510-17, directs Harger to take certain actions regarding the Mine.

In his Notice of Appeal, Harger alleges, in part, that DER has no legal authority or jurisdiction to make or issue the order. He states that he does not have any workers in the Mine; he is not conducting business in the mine; and he is not using the Mine in any manner. Additionally, Harger argues that because if he is not using the mine for any purpose, the regulations do not apply and no DER approvals are necessary. He also urges the order is arbitrary, unreasonable, and capricious.

On June 5, 1990, DER filed a Motion to Limit Issues, with an accompanying affidavit. Simultaneously, it also filed its Response To Appellant's Petition

For Supersedeas and a single Brief supporting both its Motion and its Response to Harger's Petition For Supersedeas. That same day, we wrote Harger's counsel informing him of the Motion to Limit Issues and giving him until June 25, 1990 to file any objections and a brief in support thereof. On June 6, 1990, Board Member Ehmann denied Harger's Petition for Supersedeas for failure to conform to the Board's rules.

By an Order dated June 27, 1990, we granted a sixty day postponement of all of the proceedings except the portion dealing with DER's Motion and we directed Harger to file any response to DER's Motion on or before July 6, 1990. Having received no such response, we now address that Motion.

In the Motion, DER seeks to have Harger precluded from challenging its authority to issue the 1990 order under the GSL. The Motion alleges that on September 22, 1987, DER issued an Order (1987 Order) to Harger which directed him to cease work at the Mine until he complied with state law requirements. A copy of the 1987 Order is attached to the Motion. The Motion further alleges that Harger filed an appeal from that order with this Board which was docketed at No. 87-427-R. A copy of Harger's 1987 Notice of Appeal, which is attached to the Motion, shows one of the reasons for appeal to be that DER lacked jurisdiction over that case because the facility allegedly was a recreational venture and a possible underground storage facility. The Motion next states that Harger withdrew his appeal on July 29, 1988. DER has attached to its Motion an affidavit by which the affiant recites these facts and swears that they are true and correct. DER argues that the doctrine of administrative finality precludes Harger from challenging its authority to enforce the GSL and the regulations at 34 Pa. Code §33.161 et seq. (citing Commonwealth v. Wheeling Pittsburgh Steel Co., 473 Pa. 432, 375 A.2d 320

(1977), cert. denied, 434 U.S. 969 (1977); and Dithridge House v. Commonwealth, DER, 116 Pa. Cmwlth. 24, 541 A.2d 827 (1988)).

While we were initially tempted to grant DER's Motion because of the lack of objection thereto by Harger, we have overcome the temptation and will examine it in detail before ruling on its merits.

The 1987 Order in its entirety reads:

September 22, 1987

Subject: Proposed Storage Mine
near Boyers, PA 16020

To: William Harger
303 Woodland Road
Butler, PA 16001

From: Donald R. Wilkinson
Metal and Non-Metal Mine
P. O. Box 182
Templeton, PA 16259

Order: Cease work at once, at Proposed Storage Mine near Boyers, until State Law Requirements for opening a new underground mine are complied with.

There is nothing in this order pointing to the legal authority under which it was issued by Mr. Wilkinson. Nothing in the Notice of Appeal from that order or the affidavit of Joseph A. Sbaffoni which accompanies DER's Motion establishes such authority, either. Was it the same statute as in the 1990 Order? We do not know. In addition, nothing in these documents establishes that the two DER Orders refer to the same mine or that if they do, the Orders address the same types of acts or omissions by Harger at that mine. This being the case, we cannot grant this motion. In both Dithridge House, supra, and Wheeling-Pittsburgh Steel, supra, cited in DER's Brief, this common identity of statutes and factual background was clear before the doctrine was

applied. In Wheeling-Pittsburgh Steel, supra, for example, DER issued an Order concerning certain emissions from the company's plant and then sought the order's enforcement in the courts. It was in the enforcement proceeding with this common identity issue behind it that DER sought application of this doctrine successfully.

It should also be observed that even if DER could have cleared this hurdle, problems exist with applying this doctrine here. It is not clear from these two cases that all challenges to the legal authority of DER to issue orders of this type are barred by this doctrine in an appeal to us, when the challenges are of a different type than the legal issues raised in a previously abandon appeal. This question is not decided in this opinion. However, the doctrine of administrative finality might not preclude the recipient of a series of DER orders issued under a single statute from challenging DER's legal authority to issue same at some point in time other than when it receives what subsequently turns out to be the first of the series.

Accordingly, we enter the following Order.

O R D E R

AND NOW, this 28th day of August, 1990, upon review of DER's Motion To Limit Issues and Brief in support thereof, it is ordered that the Motion is denied for the reasons set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 28, 1990

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

ANDERSON W. DONAN, M.D., et al.	:	
	:	
v.	:	**EHB Docket No. 85-308-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 29, 1990**

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

By Terrance J. Fitzpatrick, Member

Synopsis

The Department of Environmental Resources' rejection as "frivolous" of a petition to declare an area unsuitable for mining is affirmed. The petitioners had the burden of proving, by a preponderance of the evidence, that their allegations of harm to water supplies and to valuable historic resources had "serious merit." They failed to carry this burden.

INTRODUCTION

This Adjudication involves an appeal by Anderson W. Donan, M.D., Shirley M. Donan, Edward M. Brodie, and JoAnne M. Brodie (collectively, Donan) from a letter of the Department of Environmental Resources (DER) dated June 28, 1985. In this letter, DER rejected as "frivolous" a petition submitted by Donan seeking to have an area in Irwin Township, Venango County, declared "unsuitable for mining."

Donan owns a forty-acre tract of land which is part of the two hundred twenty-five acre area covered by the petition. In a nutshell, Donan

alleges that surface mining in the petition area will degrade springs and brooks located on his property, destroy historic sites, and destroy the habitat of an endangered species.

A hearing on the merits was held on June 13, 14, and 15, 1988. Donan presented testimony from four witnesses; DER presented testimony from three witnesses. After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The Appellants in this proceeding are Anderson W. Donan, M.D., Shirley M. Donan, Edward M. Brodie, and JoAnne M. Brodie, all of 524 Woodland Avenue, Grove City, Pennsylvania.

2. The Appellee in this proceeding is the Department of Environmental Resources (DER), the executive agency of the Commonwealth of Pennsylvania with the authority and duty to administer and enforce the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., 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 by the Environmental Quality Board pursuant to these laws.

3. Donan filed a petition with DER seeking to have an area of approximately 225 acres located in Irwin Township, Venango County, declared unsuitable for mining. (Board Exhibit 2, paragraph 1)[1]

4. Donan owns 40 of the 225 acres covered by the petition. (Bd. Exh. 2, para. 2)

5. Donan filed the petition after an application was filed by Magnum

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[1] Board Exhibit 2 is a Stipulation filed by the parties.

Minerals, Inc. (Magnum) to conduct surface mining within the petition area. Donan knew of the application before filing the petition.[2] (Bd. Exh. 2, para. 21, Transcript at 12)

6. There are two springs and two brooks on Donan's property. The brooks are tributaries to Big Scrubgrass Creek, which is a tributary to the Allegheny River. (Bd. Ex. 2, para. 4)

7. Of the springs and brooks, only spring number 1 is currently being used, or is planned to be used, as a water supply. (Bd. Exh. 2, para. 8, 9, T. 221-223)

8. Appellant's expert hydrogeologist Burt Waite estimated the combined recharge area for both springs based upon flow data for the springs as supplied by Dr. Frank Vento and Dr. Kent Bushnell, and also upon the geology and topography of the area surrounding the springs. (T. 123-124)

9. In estimating the recharge area for the springs, Mr. Waite assumed there were no other springs within that recharge area. The presence of other springs would affect his determination of the recharge area. (T. 134-135)

10. Dr. Frank J. Vento, an expert witness for Donan, estimated a combined recharge area for the springs and brooks; this area extends north and west of Donan's property. (T. 13, 15, 18, 67-68)

11. Dr. Vento and Dr. Kent Bushnell, another expert witness called by Donan, measured the flow rates of the springs and brooks by the "float method," which consists of floating an object downstream and measuring how long it takes the object to travel a certain distance. A calculation is then

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[2] DER will not issue a surface mining permit where it receives, prior to the end of the public comment period on the permit, a petition to declare the area unsuitable for mining. 25 Pa. Code §86.124 (a)(6).

performed which takes into account the velocity of the water and the volume of the water (which requires measuring the depth and width of the watercourse) to arrive at a flow rate. (T. 55-57, 171-174).

12. In order to have an accurate float test, it is necessary to have a defined starting and stopping point, to use the same type of floating object each time, to have a channel which is clear of obstructions, and to have uniform velocity conditions through the section of the stream being measured. (T. 320)

13. The flow rates calculated by Drs. Vento and Bushnell are unreliable because these experts gave uncertain or conflicting testimony regarding the date or dates they took the flow measurements (T. 51, 171, 205), whether a bobber or a stick was used as the float (T. 56, 57, 173, 188), who operated the timer and who operated the float (T. 56, 193), the actual flow measurements which resulted from the tests (T. 209-210), and whether they measured East Brook before or after spring no. 2 entered into it. (T. 56, 205-206)

14. In order to calculate a recharge area with the highest degree of reliability, it is important to take into account all the available information regarding the topography, lithology, and structure on the site in question. (T. 320-321, 447-450).

15. The accuracy of the recharge area calculated by Mr. Waite is dependent upon the accuracy of the flow rates supplied by Drs. Vento and Bushnell. (T. 167)

19. The drill hole data taken from the Magnum Minerals, Inc. application file, as well as Mr. McCommons testimony, suggests that there is a layer of clay near the surface in the vicinity of the Donan property. (T. 73-75, 302-304, Appellant's. Exh. K).

20. In calculating the recharge area from the flow figures, Mr. Waite assumed, without checking site-specific information, that the soil in the area had average permeability. Clay has low permeability, and the presence of clay on the site means a larger recharge area is necessary to supply the amount of groundwater necessary for the spring flows. (T. 164-166)

21. Mr. Waite conceded that his recharge area did not have a great potential to increase in size. (T. 166-167) This evidence tends to further discredit the flow figures supplied by Drs. Vento and Bushnell.

22. Mr. Waite's conclusions regarding the recharge area for the springs lacks probative weight because it included the recharge area for spring no. 2 (which is not a public water supply), because he was not familiar with the soils and conditions in the petition area, and because he relied heavily on the questionable flow data from Drs. Vento and Bushnell. (T. 132-135, 147, 165-167)

23. Dr. Vento's conclusion regarding the recharge area for the springs and brooks lacks probative weight because it includes recharge areas for spring no. 2, East Brook, and West Brook--none of which are public water supplies. (T. 13, 15, 18, 67-68)

24. Limestone can act as a buffer against acid mine drainage. (T. 420, 422)

25. The Vanport Limestone is present throughout some, but not all, of the petition area. The limestone is not present at lower elevations which are below the point where the limestone outcrops. (T. 38-39, 310-312, 339-340, 419, 465-468, Appellant's Exh. E)

26. "Cherty" limestone is limestone which has a high percentage of silica within it; cherty limestone does not buffer as well as limestone which contains a higher percentage of calcium carbonate. (T. 34-35, 420-422)

27. The limestone in the petition area cannot accurately be characterized as cherty. (T. 341-344, 420)

28. The presence of high quality limestone in some parts of the petition area decreases the likelihood that mining will cause the production of acid mine drainage, providing proper mining practices are followed. (T. 420-423)

29. Ponds in abandoned strip mine pits in the general area have good water quality, as evidenced by laboratory analyses of water samples and by Jane Earle's and Milton McCommons' (both of DER) observation of geese and fish in the ponds. (T. 260-263, 309-311, Commonwealth Exh. 7A)

30. The good water quality in the abandoned strip mine pits is an indication that the baseline water quality in these areas is good and that mining in these areas, when conducted properly, does not tend to cause the production of acid mine drainage. (T. 275, 310, 416-417, 424-425)

31. The apparent bad water quality in one abandoned pit north of the petition area was due to depressions left in the backfilled area and water contacting the unreclaimed spoil material left by prior mining. Current reclamation standards would require that the area be restored to approximate original contour and revegetated, so that surface water would not accumulate within the site. (T. 307-308)

32. Mining in the recharge area of spring no. 1 is not likely to have a substantial, permanent, and adverse effect on the quantity or quality of the water in that spring. (T. 369-371, 391-392)

33. Mining in portions of the petition area will be precluded by regulatory buffer zones surrounding property boundaries, residences, a cemetery, roads, and streams. (T. 429, 453-455)

34. Drillhole data indicates there is no coal within portions of the

petition area. (T. 455-457)

35. The Western Pennsylvania Conservancy evaluated the petition area and stated that the overall conditions on the site are not conducive to the Eastern Massasauga. (Board Exh. 2, para. 18)

36. To the extent the Venango path exists in the area, it lies substantially on the Appellant's property. (Bd. Exh. 2, para. 17)

37. The Venango Path and the War of 1812 military road are not localized in the same manner as other historic or archeological sites; any sites of historic activity associated with the path or road would likely be duplicated elsewhere along the path. (Bd. Ex. 2, para. 16)

DISCUSSION

This is one of the Board's first decisions regarding DER's responsibility in processing petitions to declare areas unsuitable for mining. (UFM petition) A summary of the statutory scheme will be helpful.

UFM petitions are authorized by Section 4e of SMCRA, 52 P.S. §1396.4e. This section provides a mandatory basis and four discretionary bases for declaring areas unsuitable for mining. An area "shall" be designated as unsuitable for mining if reclamation is not technologically or economically feasible. 52 P.S. §1396.4e(a). In addition, an area "may" be designated unsuitable for mining where mining will:

> (1) be incompatible with existing State or local land use plans or programs;
>
> (2) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems;
>
> (3) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products and such lands to include aquifers and aquifer recharge areas; or

> (4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

52 P.S. §1396.4e(b).[3] As we will discuss below, Donan's petition hinged upon discretionary bases no. 2 and 3, 52 P.S. §1396.4e(b)(2), (3).

The procedure for filing and disposition of UFM petitions is set out in the regulations. The final determination that an area should be designated unsuitable for mining is made by the Environmental Quality Board (EQB); however, initial review of petitions is conducted by DER. 25 Pa. Code §§86.123, 86.124, 86.126. A person filing a UFM petition must provide, among other things, allegations and evidence "which would tend to establish that the areas are unsuitable for . . . . surface mining." 25 Pa. Code §86.123(c)(2). Once DER receives the petition, DER will notify the petitioner within thirty (30) days whether the petition is complete. 25 Pa. Code §86.124(a). This section, at subsection (a)(2), also provides that:

> The Department may reject petitions for designations . . . . which are frivolous. Once the requirements of §86.123 (relating to procedures: Petitions) are met, no party shall bear any burden of proof, but each accepted petition shall be considered and acted upon by the Department pursuant to the procedures of this subchapter.

Finally, on a point which is significant in this appeal in that an application for a surface mining permit in the petition area was filed prior to the filing of the petition,[4] the regulations provide that DER will not issue permits for surface mining operations in areas covered by a UFM petition

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[3] These standards are mirrored in DER's regulations at 25 Pa. Code §86.122.

[4] As stated in FOF 5 above, Donan filed this petition after Magnum Minerals, Inc. filed an application to conduct surface mining in the petition area. DER granted Magnum's application on August 22, 1988 and Donan filed an appeal which is docketed at EHB Docket No. 88-375-F. The permit has since been transferred to Pengrove Coal Co., a division of Adobe Mining Co.

if the petition is filed with DER prior to the close of the public comment period for the permit application. 25 Pa. Code §86.124(a)(6).

1. **The Burden of Proof**

The parties disagree over who bears the burden of proof in this proceeding. DER argues that Donan bears the burden because the petition was denied before the requirements of 25 Pa. Code §86.123 were met; in other words, the petition was incomplete, citing 25 Pa. Code §86.124(a)(2). DER also argues that Donan has the burden of proof pursuant to the Board's regulations at 25 Pa. Code §21.101(a) in that Donan is asserting the affirmative of an issue--that DER erred in rejecting the UFM petition as frivolous.

Donan argues that DER bears the burden of proof because 25 Pa. Code §21.101(a) allows the Board to shift the burden of going forward when DER has possession of facts relevant to an issue. Donan contends that DER had possession of such facts due to its review of the application of Magnum Minerals, Inc. to conduct surface mining within the petition area.

We conclude that the petitioner has the burden of proof pursuant to 25 Pa. Code §21.101(a) because it is asserting the affirmative of an issue--that DER erred in rejecting the UFM petition. Donan's argument that the burden should be shifted due to DER's knowledge of relevant facts confuses the "burden of proof," which one party must bear throughout the proceeding, with the "burden of going forward," which may shift during the hearing as evidence is introduced. Moreover, while DER had possession of the Magnum Minerals application, it is obvious that Donan also had access to that application since data from that application was used by Donan's expert witnesses at the hearing. See e.g. T. 17-18

Having determined that Donan has the burden of proof, we must now

determine exactly what Donan must prove. Donan argues that the standard of proof is whether he submitted evidence which would "tend to establish" that the area is unsuitable for mining, citing 25 Pa. Code §86.123(c)(2). Donan argues that this is a departure from the Board's normal "preponderance of the evidence" standard. Donan argues that the evidence it submitted met the "tend to establish" standard; therefore, the petition was both complete and non-frivolous.

DER contends that Donan is required to show by "substantial evidence" that DER's rejection of the petition as frivolous and incomplete was "arbitrary, capricious, contrary to law or a manifest abuse of discretion," citing Warren Sand and Gravel, Inc. v. Commonwealth, DER, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). As to what constitutes a "frivolous" petition, DER argues that a frivolous petition is one which "lacks serious merit," which is the definition stated in the federal regulations. See 30 CFR §769.14. DER asserts that it must look behind "artfully pleaded facts" and determine at the outset that a petition has serious merit. If it does not reject such petitions promptly, DER argues, the permit bar will go into effect and DER may be subject to a claim by affected landowners (those landowners who wish to have mining conducted on their property) that there has been a taking of their property without compensation, citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed. 250 (1987).

We believe the standard of proof Donan must bear is this: Donan must prove by a preponderance of the evidence that DER erred in finding that his petition was frivolous, i.e. that it lacked serious merit. The "tend to establish" standard in 25 Pa. Code §86.123(c)(2), cited by Donan, is a test for relevance, not persuasiveness. Even if Donan's evidence was relevant--

which would mean that his application was complete--this would not mean that his application had serious merit (i.e. was non-frivolous)[5] At the same time, DER's citation of the "substantial evidence" test is incorrect--that is a test applied by an appellate court in reviewing an administrative agency's findings of fact. See e.g., T.R.A.S.H., Ltd. v. Commonwealth, DER, ___Pa. Commonwealth Ct. ___, 574 A.2d 721 (1990). The substantial evidence test has no application in proceedings before the Board.

2. Effect of Mining Upon Productivity of Water Supply

The main factual issue in this proceeding surrounded whether mining within the recharge area could have a substantial impact on the springs and brooks on Donan's property. Donan argues that spring no. 1 is being used as a "public water supply," and that it also meets the definition of a "public water system" as defined in the Pennsylvania Safe Drinking Water Act, 35 P.S. §721.3. Donan argues that the springs and brooks will be permanently and adversely affected if mining occurs in the petition area. Donan contends that the recharge areas of the springs and brooks lie within the petition area. Furthermore, Donan argues that surface mining within that recharge area will adversely affect both the chemistry and the quantity of the water in the springs and brooks.

DER contends that it acted properly in dismissing as frivolous

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[5] At points in its brief, DER also appears to equate an incomplete application with a frivolous one. We believe that this approach confuses form with substance. A complete application is one which satisfies the form requirements and is ready to be examined on its merits. To be complete, an application need only be accompanied by, among other things, evidence which is relevant. An application which passes the frivolous test, however, must be supported by evidence which is not only relevant, but which is sufficiently persuasive that the reviewer concludes that it has serious merit. This requires a preliminary review of the merits--the substance--of the petition. The distinction between the relevance and the persuasiveness of evidence may not always be clear in practice, but this distinction is firmly embodied in the law.

Donan's charges that mining will adversely affect a water supply. First, DER contends that the term "water supply" in 52 P.S. §1396.4e(b)(3) must be interpreted in accord with 25 Pa. Code §87.119,[6] which states that the term shall include "any existing or currently designated or currently planned source of water . . . . for the supply of water for human consumption . . . ." DER contends that only spring no. 1 meets this definition. DER further contends that the recharge area for spring no. 1 does not encompass the entire UFM petition area but, instead, is confined largely to Donan's property. Finally, DER argues that there are substantial deposits of limestone in the area and that mining in the UFM petition area is not likely to produce acid mine drainage if standard reclamation practices are followed.

Donan did not prove by a preponderance of the evidence that there is substantial merit in his claim that mining in the petition area "could result in a substantial loss or reduction of long-range productivity of water supply." 52 P.S. §1396.4e(b)(3)

Donan apparently agrees that only spring no. 1 qualifies as a "water supply;" therefore, the evidence regarding effects upon spring no. 2, West Brook, and East Brook is irrelevant.[7] Limiting our consideration to spring no. 1 creates problems in reviewing the recharge areas depicted by Donan's expert witnesses Burt Waite and Dr. Frank Vento. This is so because neither expert drew a recharge area for spring no. 1 standing alone. Mr. Waite's recharge area included spring no. 2. (Finding of Fact 8) Dr. Vento's

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[6] Chapter 87 of DER's regulations involves requirements for the surface mining of coal.

[7] This is not to suggest that a mine operator can pollute with impunity streams which are not "water supplies." The Clean Streams Law bars pollution of the "waters of the Commonwealth." See P.S. §§691.1, 691.301. However, in reviewing a UFM petition, DER must abide by the language of 52 P.S. §1396.4e(b)(3).

recharge area was drawn for both springs and both brooks combined. (FOF 10) For this reason alone, it would be difficult for Donan to establish that his claim regarding the impact on a water supply has serious merit.

While Mr. Waite's recharge area is more probative than Dr. Vento's in that it was only for the springs, his approach to estimating the recharge area has other significant flaws. Mr. Waite back-calculated the recharge area from the flow data on the springs and brooks supplied by Dr. Vento and Dr. Kent Bushnell.[8] (FOF 8) This flow data was not shown to be reliable. The flow data was derived from "float tests" conducted by Drs. Vento and Bushnell. These float tests involve floating an object downstream and measuring how long it takes the object to travel a certain distance. A calculation is then performed which takes into account the velocity of the water and the volume of the water (arrived at by measuring the depth and width of the watercourse) to arrive at a flow rate. (FOF 11) However, as detailed in FOF 13, the testimony of Drs. Vento and Bushnell contained so many inconsistencies that we do not accept their data as reliable. Furthermore, while Mr. Waite testified that he considered the geology and topography of the area, he did not check site-specific information as to soils in the area or whether there were other springs within the recharge area he depicted, both of which, he conceded, could have an effect upon his determination of the recharge area.

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[8] DER's witness Milton McCommons criticized both the practice of back-calculating a recharge area from flow data as well as the general reliability of "float tests" which Donan's experts conducted to arrive at the flow data. (T. 320)

(FOF 9, 20)[9]

To the extent that the recharge area for spring no. 1 could extend off the Donan property in the area covered by the UFM petition, the likelihood that the spring could be affected by acid mine drainage is lessened by the presence of limestone in the area.[10] The parties disputed both the presence and the quality of the Vanport limestone seam in the petition area. Dr. Vento testified that the Vanport limestone was discontinuous in the area. (T. 38, 39, Appell. Exh. E) He also asserted that the limestone was "cherty"-- that is, it had a high percentage of non-buffering silica within it. (T. 34-35) Mr. McCommons and Mr. Tarantino, however, testified that they had observed the limestone in the area and that it was not cherty. They also stated that abandoned mine pits to the north and south of the site were filled with good quality water. (FOF 29, 30)

We conclude that the Vanport limestone would provide at least some buffering capacity against any acid mine drainage which might be produced by mining in the petition area. The isopach map prepared by Dr. Vento (Appellants' Exh. E) does indicate that the Vanport limestone is not present in all portions of the petition area, perhaps because portions of the area lie below the elevation at which the limestone outcrops. (FOF 25). Thus, there is no buffering capacity in some areas where, presumably, mining could occur. However, we disagree with Dr. Vento that the limestone which is present is cherty. Mr. McCommons' testimony established that the two-foot

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[9] DER's witnesses Milton McCommons and Joseph Tarantino testified that the recharge area for the springs is substantially on Donan's property. (T. 330-336, 368, 445-450) It is not necessary for us to examine their conclusions in detail since Donan had the burden of proof, and since Donan's evidence regarding the recharge area clearly falls short of meeting that burden.

[10] Limestone can act as a buffer against acid mine drainage. (FOF 24)

limestone unit upon which Dr. Vento based his opinion was one of five units encountered in a single drill hole. (T. 341-344) Of these five units, two had calcium carbonate levels of 51-59% (cherty), but the other three units were composed of 90-92% calcium carbonate. (T. 341-344, 419-422) This evidence is supported by Mr. McCommons and Mr. Tarantino's testimony that they physically examined the limestone in the petition area and that it was not cherty. (T. 344, 420)

DER brought out two additional facts which further decrease the odds that mining in the petition area will adversely affect spring no. 1. First, drill hole data from the Magnum Minerals application file indicates that there is no coal within portions of the petition area, which decreases the likelihood that any excavation will occur in these areas. (FOF 34, T. 457) Second, mining in parts of the petition area will be precluded by regulatory buffer zones surrounding property boundaries, residences, a cemetery, roads, and streams. (FOF 33)

The above evidence indicates that Donan's claim of a substantial loss or reduction of the long-range productivity of spring no. 1 lacks serious merit. This is not to say that there could be no possible effect upon that spring. Mr. McCommons conceded that mining could cause a temporary decrease in quantity or an increase in sulfates in that spring; however, he denied that there would be a substantial, permanent effect on the spring. (FOF 32) Moreover, we must keep in mind that if mining is conducted and substantial harm is done to the spring, the mine operator can and should be held responsible. But in the present case we are dealing with a UFM petition--a mechanism which would preclude mining on property belonging to others. Before such a blanket preclusion can be forced upon landowners, the evidence of danger to a water supply must amount to more than conjecture. The

evidence supports DER's conclusion that Donan's contention regarding harm to a water supply lacked serious merit.

3. **Effect of Mining upon Historical Sites and Endangered Species' Habitat.**

In addition to the alleged effect mining would have on water resources, Donan urges that its petition should be accepted due to the effect mining could have upon a historical site--the Venango Path--and an endangered species--the Eastern Massasauga (rattlesnake). The evidence did not establish that either of these claims had serious merit.

With regard to the Venango Path, the Pennsylvania Historical and Museum Commission placed a marker on Donan's property on August 23, 1987 marking the site. (Bd. Exh. 2, para. 14) The parties stipulated that any site of prehistoric or historic interest would likely be duplicated elsewhere along the Path. (Bd. Exh. 2, para. 16) In addition, to the extent the Venango Path exists in the petition area, it lies substantially on the Donan's property. (Bd. Exh. 2, para. 17) Of course, Donan can protect historical resources on his property by refusing to allow mining regardless of whether the UFM petition is granted. In sum, we find that Donan's argument that mining in the petition area will "affect fragile or historic lands in which such operations could result in significant harm to important historic . . . . values" lacks serious merit.

Donan's argument that mining could adversely affect habitat of the Eastern Massasauga also lacks serious merit. The only evidence on this issue was Stipulation no. 18 (Bd. Exh. 2, para. 18), which stated that the Western Pennsylvania Conservancy had surveyed a portion of the petition area and concluded that while some characteristics of suitable habitat were present, that habitat was minimal, and the overall conditions were not conducive to a population of the Eastern Massasauga being present. This evidence establishes clearly

that Donan's argument regarding the Eastern Massasauga lacks serious merit.

CONCLUSIONS OF LAW

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

2. A party which files a petition to declare an area unsuitable for mining bears the burden of proving by a preponderance of the evidence that DER erred in rejecting its petition as frivolous.

3. A petition is frivolous if it "lacks serious merit." 30 C.F.R. §769.14

4. Donan failed to prove by a preponderance of the evidence that there was serious merit in his claim that mining in the petition area "could result in a substantial loss or reduction of long-range productivity of water supply." Section 4e of SMCRA, 52 P.S. §1396.4e(a)(3).

5. Donan failed to prove by a preponderance of the evidence that there was serious merit in his claim that mining in the petition area will "affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems." Section 4e of SMCRA, 52 P.S. §1396.4e(a)(2).

ORDER

AND NOW, this 29th day of August, 1990, it is ordered that the appeal filed by Anderson W. Donan, M.D., Shirley M. Donan, Edward M. Brodie, and JoAnne M. Brodie at EHB Docket No. 85-308-F is dismissed.

ENVIRONMENTAL HEARING BOARD

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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 29, 1990

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

K & S COAL COMPANY	:	
	:	
V.	:	**EHB Docket No. 86-599-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 31, 1990**

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

By Robert D. Myers, Member

Synopsis

Appeals were filed by seven deep mine anthracite coal operators, challenging DER actions directing six of them to obtain mining permits and rejecting a permit application filed by the seventh because of the failure to secure a bond and liability insurance. Appellants maintained that DER's actions are unlawful because deep mine anthracite coal operators are exempt from the regulations mandated by Fed. SMCRA and, instead, are governed by the Pennsylvania regulatory program in existence on August 3, 1977. After an analysis of relevant law, the Board holds that Fed. SMCRA applies to the surface effects of underground mining and that anthracite mines remain subject to the regulatory standards of Fed. SMCRA insofar as the necessity for a permit, a bond and liability insurance is concerned. Appellants, therefore,

are subject to the permit, bond and insurance requirements of Pa. SMCRA, the Clean Streams Law and DER's regulations which were formulated in order to secure primary jurisdiction in this regulatory area.

Procedural History

On October 24, 1986, K&S Coal Company (K&S) filed a notice of appeal (86-599) from an Inspection Report, dated September 30, 1986, and a Compliance Order, dated October 6, 1986, both issued by the Department of Environmental Resources (DER) in connection with K&S's alleged mining activities in Zerbe Township, Northumberland County. The Inspection Report and Compliance Order, inter alia, (1) charged K&S with engaging in underground mining and affecting surface areas without a permit, and (2) directed K&S to cease operations and to file either a permit application or a mine closure and reclamation plan.

Notices of Appeal from nearly identical Inspection Reports and Compliance Orders were filed on October 28, 1986 by Tag Coal Company (86-603), Twelve Vein Coal Company (86-604), M&R Coal Company (86-605), and G.B. Mining Company (86-606); on October 30, 1986 by Burnside Mining Company (86-611); and on November 3, 1986 by Greenwood Mining (86-616)[1] All of these appeals were consolidated at docket number 86-599 by a Board Order dated April 18, 1988. In the meantime, Tracey Mining Co. (Tracey) had filed a Notice of Appeal (87-010) on January 5, 1987 from DER's December 5, 1986 denial of a permit application and a cease order pertaining to a site in Frailey Township, Schuylkill County. Tracey's appeal tracked the consolidated appeals through

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[1] The Inspection Reports involved in all these appeals were dated September 29, September 30 or October 1, 1986. The Compliance Orders were dated September 30 or October 1, 1986. The sites were located in Zerbe Township or Coal Township, Northumberland County. The Compliance Order involved in 86-611 required a cessation of operations until a pending permit application was approved. The Compliance Order involved in 86-616 referred to a prior Compliance Order, dated June 23, 1986, the terms of which apparently were nearly identical to those issued to the other Appellants.

the pre-hearing procedures and, on May 23, 1989, it too was consolidated with the others at docket number 86-599.

A hearing scheduled to convene on December 6, 1988 was cancelled when the parties informed the Board that they would stipulate the facts. Joint Stipulations of Facts[2] were filed on May 15, 1989 and an Amended Stipulation of Facts was filed on June 22, 1989. Appellants' brief was filed on July 7, 1989.

When DER's brief had not been filed after repeated extensions of time, the Board issued an Order dated February 6, 1990, (1) denying DER's fifth request for an extension, (2) directing DER to file its brief by February 16, 1990, and (3) warning that, if the brief was not filed by that date, DER would forfeit the privilege of having a brief considered. After DER filed a Motion for Reconsideration, the Board extended the filing date to March 1, 1990. DER's brief was not filed by that date. When the brief finally arrived on March 19, 1990, it was returned with an Order stating that the appeals would be adjudicated without considering a brief from DER. DER's April 2, 1990 request for reconsideration was denied.

The record consists of the pleadings, the Joint Stipulations of Facts, the Amended Stipulation of Facts and 2 exhibits. After a full and complete review of the record, we make the following:

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[2] One Joint Stipulation covered the then consolidated appeals and a separate Joint Stipulation covered Tracey's appeal, which had not yet been consolidated with the others.

Findings of Fact

1. K&S:

(a) is a partnership consisting of Howard Smith, Hellen Kramer, Arden Kramer and Darwin Smith, with offices at R.D. #1 Box 618, Ashland, PA 17921;

(b) is the owner and operator of the #10 Vein Underground Anthracite Coal Mine located in Zerbe Township, Northumberland County;

(c) has conducted mining activity at the #14 Vein Mine without ever obtaining any type of permit from DER; and

(d) is appealing a DER Order received on October 1, 1986 (Jt. Stip. ¶14)[3]

2. Tag Coal Company:

(a) is a partnership consisting of C. Wayne Troxell, Jr. and Cal Lorenz, with offices at 548 N. Market Street, Shamokin PA 17872;

(b) is the owner and operator of the #14 Vein Underground Anthracite Mine located in Zerbe Township, Northumberland County;

(c) has conducted mining activity at the #10 Vein Mine without ever obtaining any type of permit from DER;

(d) has a pump discharge of water from the #14 Vein Mine which has never been conducted pursuant to any type of permit issued by DER;

(e) is appealing a DER Order received on October 6, 1986;

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[3] "Jt. Stip." refers to the Joint Stipulation of Facts covering the consolidated appeals; "Tracey Stip." refers to the Joint Stipulation of Facts covering Tracey's appeal; and "Amend. Stip." refers to the Amended Stipulation of Facts.

(f) received on December 5, 1986 a DER Order ceasing all operations at the #14 Vein Mine for Tag Coal Company's failure to comply with the DER Order received October 6, 1986[4]; and

(g) has never appealed the December 5, 1986 Order

(Jt. Stip. ¶13)

3. Twelve Vein Coal Company:

(a) is a sole proprietorship owned by Steve Shingara, RD 2 Box 369, Shamokin, PA 17872;

(b) is the owner and operator of the #12 Vein Underground Anthracite Coal Mine and Preparation Plant located in Zerbe Township, Northumberland County;

(c) has conducted mining activity at the #12 Vein Mine without ever obtaining any type of permit from DER;

(d) has maintained a pump discharge from the #12 Vein Mine which has never been conducted pursuant to the requirements of any type of permit issued by DER; and

(e) is appealing a DER Order received on September 30, 1986 (Jt. Stip. ¶9).

4. M&R Coal Company:

(a) is a sole proprietorship owned by Dennis Snyder, 120 Elm Street, Gordon, PA 17936;

(b) is the owner and operator of the #0 Vein Underground Anthracite Coal Mine located in Zerbe Township, Northumberland County;

(c) initiated mining activity at the #0 Vein Mine without first obtaining any type of permit from DER;

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[4] The Jt. Stip. uses the date October 16, which obviously is a typographical error.

(d) has maintained a pump discharge of water from the #0 Vein Mine which has not been conducted pursuant to any type of permit issued by DER;

(e) is appealing a DER Order received on September 30, 1986; and

(f) received on September 9, 1987 Mining Permit No. 49851316 for mining activity, including the pump discharge of water, at the #0 Vein Mine (Jt. Stip. ¶10).

5. G. B. Mining Company:

(a) is a sole proprietorship owned by Mr. Anthony Stanchick, 2030 Tioga Street, Shamokin, PA 17872;

(b) is the owner and operator of the #1 Drift Mine Operation, an underground anthracite coal mine located in Coal Township, Northumberland County;

(c) initiated mining activity at the #1 Drift Mine without first obtaining any type of permit from DER;

(d) is appealing a DER Order received October 6, 1986;[5] and

(e) received on September 11, 1987, Mining Permit No. 49861307 from DER for mining activity at the G.B. Mine

(Jt. Stip. ¶11).

6. Burnside Mining Company:

(a) is a partnership consisting of William Rebuck, Peter Rebuck, Robert Yagrer and Terry L. Weidner, with offices at 864 West Holly Street, Shamokin, PA 17872;

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[5] The Jt. Stip. uses a date of August 27, 1987. This is not an apparent typographical error, but we are unable to understand where the date came from. Both the Notice of Appeal and pre-hearing memorandum use the date October 6, 1986. We have adopted this date.

(b) is the owner and operator of the Burnside Mine 8 and One Half Vein Underground Anthracite Coal Mine located in Coal Township, Northumberland County;

(c) initiated mining activity at Burnside Mine 8 and One Half Vein without first obtaining any type of permit from DER;

(d) received on March 22, 1985, a DER Order directing it to submit a complete application for a coal mining permit for the Burnside Mine 8 and One Half Slope;

(e) has never appealed the March 22, 1985 Order; and

(f) is appealing a DER Order received on September 30, 1986 (Jt. Stip. ¶12)

7. Greenwood Mining:

(a) is a sole proprietorship owned by William Lytle with offices at 119 Greenwood St., Trevorton, PA 17881;

(b) is the owner and operator of #4 Vein Underground Anthracite Mine in Zerbe Township, Northumberland County;

(c) has conducted mining activity at the #4 Vein without ever obtaining a permit from DER; and

(d) is appealing a DER Order received on October 6, 1986 (Jt. Stip. ¶15)

8. Tracey:

(a) is a sole proprietorship owned by Randy Rothermel, with a business address of R.D. 1, Klingerstown (Northumberland County), Pa. 17941;

(b) is engaged in the buiness of mining anthracite coal in Pennsylvania by the deep mining method;

(c) has been operating an underground anthracite coal mine in Frailey Township, Schuylkill County, since 1971, pursuant to Mine Drainage

Permit No. 5471305, which requires operations at the site to comply with the requirements of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (Clean Streams Law);

(d) submitted to DER on June 17, 1985, pursuant to a Compliance Order issued on March 19, 1985, Underground Mining Activity Permit Application No. 54851327 for reauthorization of underground coal mining activity at the site; and

(e) is appealing DER's December 5, 1986 denial of its Application and DER's Order ceasing mining activity at the site

(Tracey Stip. ¶5-9&11).

9. DER is an administrative department of the Commonwealth of Pennsylvania and has the responsibility and authority to enforce and administer, inter alia, the requirements of the Clean Streams Law; The Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.A. §§1396.1 et seq. (PA SMCRA); The Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §§30.51 et seq. (The Coal Refuse Disposal and Control Act); section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code); and the rules and regulations promulgated under said statutes (Jt. Stip. ¶1; Tracey Stip. ¶1).

10. Prior to August 3, 1977, an anthracite deep mine, such as those operated by Appellants, was permitted to operate if it had a Mine Drainage Permit issued under The Clean Streams Law. With respect to DER's regulation of such operation, the following was the case:

(a) the regulations governing underground anthracite coal mining activities were found in 25 Pa. Code Chapter 99: In addition, all mining

activities were and are subject to those regulations found in 25 Pa. Code Chapters 91, 92, 93, 95, 97, 102 and 105 as are applicable to coal mining activities;

(b) there was no general bonding requirement as a precondition for operation, either for haul roads, surface effects or otherwise;

(c) no liability insurance was required;

(d) the permit covered all surface discharges of water from the permit area, including discharges from the mine, and treatment ponds and/or settling ponds;

(e) the permit covered all surface activities such as earth movement, and the construction of erosion and sedimentation controls and water treatment facilities;

(f) an appropriate placard had to be displayed in a prominent place on the mine site; and

(g) the permit application had to contain a mine sealing plan (Jt. Stip. ¶2 & Exhibit A; Tracey Stip. ¶2).

11. Prior to August 3, 1977, and continuing until at least July 31, 1982, all Mine Drainage Permits for underground anthracite coal mines contained Standard Permit Conditions (Amend. Stip. ¶a. & Exhibit B).

12. On July 31, 1982, the Commonwealth of Pennsylvania was delegated primary jurisdiction to enforce the requirements of The Federal Surface Mining Control and Reclamation Act of 1977, Pub. Law. 95-87, 91 Stat., Title V Section 501 et seq., 30 U.S.C.A. §§1251 et seq. (Fed. SMCRA) and the regulations promulgated thereunder (Jt. Stip. ¶3); Tracey Stip. ¶3).

13. On July 31, 1982, The provisions of 25 Pa. Code Chapter 99 were deleted and replaced in relevant part with regulations found at 25 Pa. Code Chapters 86, 88 and 89 (Jt. Stip. ¶4).

14. All coal mining operations in Pennsylvania in existence on July 31, 1982 which desired to remain in operation were required by DER to obtain new permits complying with DER's then existing coal mining program's requirements (Repermitting) (Jt. Stip. ¶5; Tracey Stip. ¶4).

15. Appellants are small, anthracite, deep mine, coal companies, who at all times material hereto have been engaged in or have sought to continue to engage in the mining of anthracite coal by the deep mine method (Jt. Stip. ¶7).

16. By letters dated June 20 and July 28, 1986, DER requested Tracey to complete its permit application by submitting proof that it had secured liability insurance and a bond (Tracey Stip. ¶10).

17. When Tracey failed to submit the proof required, DER denied its application for a permit on December 5, 1986 (Tracey Stip. ¶11).[6]

DISCUSSION

The basic question to be decided is whether underground anthracite mine operators are subject to pertinent provisions of Chapters 86, 88 and 89 of DER's regulations at 25 Pa. Code. The parties have stipulated that Appellants have the burden of proof with respect to the alleged invalidity of the regulations. Normally, DER would have the burden of proof, according to 25 Pa. Code §21.101(b), in all of the appeals except 87-010 where Tracey would have the burden relating to a permit denial: 25 Pa. Code §21.101(c). Since our decision is not influenced by the placement of the burden, we will not attempt to resolve the conflict.

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[6] We have not adopted all of the parties' stipulations; we have eliminated those containing conclusions of law and those dealing with extraneous matters not relevant to our Adjudication.

Prior to August 3, 1977 coal mining in Pennsylvania was governed largely by Pennsylvania statutes. On that date, Fed. SMCRA was enacted to accomplish a variety of purposes, including protection of the environment from the adverse effects of surface coal mining operations: 30 U.S.C.A. §1202. This statute, which imposed detailed and far-reaching requirements, provided for state regulation (primacy) on the basis of a state program meeting or exceeding the federal standards: 30 U.S.C.A. §1253. To achieve primacy, the Pennsylvania Legislature in 1980 adopted amendments to four statutes regulating the mining industry. The two statutes pertinent to these appeals are the Clean Streams Law and Pa. SMCRA. The Environmental Quality Board then adopted comprehensive regulations which became effective on July 31, 1982 when the Secretary of the Interior approved the Pennsylvania program.

Fed. SMCRA focused on "surface coal mining operations", a term defined in 30 U.S.C.A. §1291(28) to include "activities conducted on the surface of land in connection with a surface coal mine or, subject to the requirements of section 1266 of this title, surface operations and surface impacts incident to an underground coal mine...." Section 1266, in unmistakable language, made the surface operations and impacts of underground coal mining subject to the regulatory standards of the statute but required the Secretary of the Interior to recognize the distinct difference between surface coal mining and underground coal mining in formulating regulations.

Fed. SMCRA also recognized a difference between the mining of anthracite coal and the mining of other types of minerals. Apparently satisfied with certain aspects of state regulation of anthracite mining, Congress directed the Secretary of the Interior in 30 U.S.C.A. §1279 to issue

separate regulations governing anthracite mining if such activity is already regulated by the environmental protection standards of the state where the mines are located. The section goes on to provide as follows:

> Such alternative regulations shall adopt, in each instance, the environmental protection provisions of the State regulatory program in existence on August 3, 1977, in lieu of sections 1265 and 1266 of this title. Provisions of sections 1259 and 1269 of this title are applicable except for specified bond limits and period of revegetation responsibility. All other provisions of this chapter apply and the regulation issued by the Secretary of Interior for each state anthracite regulatory program shall so reflect: Provided, however, That upon amendment of a State's regulatory program for anthracite mining or regulations thereunder in force in lieu of the above-cited sections of this chapter, the Secretary shall issue such additional regulations as necessary to meet the purposes of this chapter.

When the Pennsylvania Legislature amended the Clean Streams Law and Pa. SMCRA in 1980 for the purpose of obtaining primacy, it stated that, to the "full extent provided by" 30 U.S.C.A. §1279, "the surface mining of anthracite shall continue to be governed by the Pennsylvania law in effect on August 3, 1977" (section 5, Act of October 10, 1980, P.L. 894; section 16, Act of October 10, 1980, P.L. 835). The Legislature also inserted in both statutes a statement that, while it is in the public interest to secure primacy, it is the intent of the Legislature to "preserve existing Pennsylvania law to the maximum extent possible" (section 6, Act of October 10, 1980, P.L. 894; section 17, Act of October 10, 1980, P.L. 835).

Pursuant to provisions of Fed. SMCRA, the Secretary of the Interior promulgated initial regulations establishing performance standards for surface mining. 30 CFR Part 715 sets forth general performance standards; Part 716 sets forth special performance standards; and Part 717 sets forth performance

standards for the surface effects of underground mining. 30 CFR §716.5, dealing with anthracite coal mines, reads as follows:

> (a) Permittees of anthracite surface coal mining and reclamation operations[7] in those States where the mines are regulated by State environmental protection standards shall be subject to the environmental protection standards of the State regulatory program in existence on August 3, 1977, instead of Part 715 and Part 717 of this chapter.
>
> (b) The environmental protection provisions of Title 25, Rules and Regulations, Part 1, Department of Environmental Resources, Commonwealth of Pennsylvania, shall apply to reclamation of anthracite surface coal mining and reclamation operations in the Commonwealth of Pennsylvania instead of Part 715 and Part 717 of this chapter. In addition, the regulations of the Commonwealth of Pennsylvania pertaining to standards for air and water quality shall apply instead of the regulations of Part 715 and Part 717 of this chapter.
>
> (c) If a State's regulatory program or regulations for anthracite surface coal mining and reclamation operations in force at the time of this Act are amended, the Secretary, upon receipt of a notice of amendment, shall issue additional regulations as necessary to meet the purposes of this Act.

Appellants claim that this chain of statutory and regulatory provisions serves to exempt them entirely from the regulatory standards mandated by Fed. SMCRA and to subject them to Pennsylvania regulation only to the same extent as they were on August 3, 1977. While that regulation involved a permit - a Mine Drainage Permit issued under the Clean Streams Law - there was no requirement for a bond or liability insurance (see Finding of Fact No. 10). Appellants' argument depends on an interpretation of the

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[7] The definition of this term in 30 CFR §700.5 includes the surface effects of underground mining by incorporating the definition of "surface coal mining operations."

statutory and regulatory provisions that goes far beyond the language employed.

30 U.S.C.A. §1279, quoted previously, does not represent a wholesale adoption of the existing Pennsylvania program of regulation for anthracite mines. It embraces only the "environmental protection provisions" of the Pennsylvania program in lieu of the provisions of 30 U.S.C.A. §1265 and §1266, dealing with performance standards for surface mines and the surface effects of underground mines. The provisions of 30 U.S.C.A. §1259 and §1269 (dealing with bonds and bond forfeitures) continue to apply except for the specified bond amounts and the period of revegetation responsibility. Lest there be any doubt about its intent, Congress went on to state clearly that all other provisions of Fed. SMCRA apply.

The initial regulations adopted by the Secretary of the Interior are similarly limited. 30 CFR §716.5(a), quoted previously, refers to the "environmental protection standards" of the state regulatory program instead of Parts 715 and 717 of the regulations, dealing with performance standards for surface mines and the surface effects of underground mines. Subsection (b) of §716.5 adopts the "environmental protection provisions" of DER's regulations on anthracite mine reclamation and DER's regulations on air and water quality standards instead of Parts 715 and 717.

The requirement for a mining permit, set forth in 30 U.S.C.A. §1256; the contents of a permit application, detailed in 30 U.S.C.A. §1257 (including proof of liability insurance); and the necessity for posting a bond, established in 30 U.S.C.A. §1259 are just a few of the statutory provisions of Fed. SMCRA that continue to govern the surface effects of underground

anthracite mining, despite the partial exemption of §1279.[8] This conclusion is reinforced by the permanent regulations promulgated by the Secretary of the Interior. 30 CFR §785.11 provides as follows:

> (a) This Section applies to any person who conducts or intends to conduct anthracite surface coal mining and reclamation operations[9] in Pennsylvania.
>
> (b) Each person who intends to conduct anthracite surface coal mining and reclamation operations in Pennsylvania shall apply for and obtain a permit in accordance with the requirements of this Subchapter. The following standards apply to applications for and issuance of permits:
>
> (1) In lieu of the requirements of 30 CFR 816-817, the requirements of 30 CFR 820 shall apply.
>
> (2) All other requirements of this Chapter including the bonding and insurance requirements of 30 CFR 800.70, except the bond limits and the period of revegetation responsibility, to the extent they are required under Sections 509 or 510 of the Act, shall apply.
>
> (c) If the Pennsylvania anthracite permanent regulatory program in effect on August 3, 1977, is amended with respect to environmental protection performance standards, the Secretary shall issue additional regulations necessary to meet the purposes of the Act.

The "requirements of this Subchapter," as used in subsection (b) of the quoted regulation, refers to Subchapter G (encompassing Parts 772 through 785) which deals primarily with the contents of permit applications. Parts 816 and 817, setting performance standards for surface and underground

---

[8] The Pennsylvania Supreme Court acknowledged this in footnote 2 of its Opinion in Arsenal Coal Co. v. Commonwealth, Department of Environmental Resources, 505 Pa. 198, 477 A.2d 1333 (1984).

[9] Defined, as noted in footnote 7, to include the surface effects of underground mining.

mines, are supplanted by Part 820, performance standards for Pennsylvania anthracite mines. This latter Part, following its counterpart in the initial regulations (30 CFR §716.5), subjects anthracite mines to the environmental protection performance standards of the approved Pennsylvania program. 30 CFR §800.70, referred to in the quoted regulation, provides as follows:

> (a) All of the provisions of this Subchapter shall apply to bonding and insuring anthracite surface coal mining and reclamation operations in Pennsylvania except that -
>
> (1) Specified bond limits shall be determined by the regulatory authority in accordance with applicable provisions of Pennsylvania statutes, rules and regulations promulgated thereunder, and implementing policies of the Pennsylvania Department of Environmental Resources.
>
> (2) The period of liability for responsibility under each bond shall be established for those operations in accordance with applicable laws of the State of Pennsylvania, rules and regulations promulgated thereunder, and implementing policies of the Pennsylvania Department of Environmental Resources.
>
> (b) Upon amendment of the Pennsylvania permanent regulatory program with respect to specified bond limits and period of revegetation responsibility for anthracite surface coal mining and reclamation operations, any person engaging in or seeking to engage in those operations shall comply with additional regulations the Secretary may issue as are necessary to meet the purposes of the Act.

The Subchapter referred to in subsection (a) is Subchapter J, consisting of Part 800, setting requirements for bonds and insurance.

On the basis of the foregoing analysis, we conclude that the surface effects of underground anthracite coal mining in Pennsylvania are subject to the regulatory standards established by Fed. SMCRA and its regulations with respect to the necessity for (1) a mining permit, (2) a bond and (3) liability

insurance. Pennsylvania's regulatory program was deemed to measure up to the Fed. SMCRA standards after the Legislature adopted the 1980 amendments to the Clean Streams Law and Pa. SMCRA and after the Environmental Quality Board replaced the regulations in 25 Pa. Code Chapter 99 with those in Chapters 86, 88 and 89. Accordingly, the permit (including Repermitting), bond and liability insurance requirements of the CSL, Pa. SMCRA and Chapters 86, 88 and 89 of DER's regulations apply to the surface effects of underground anthracite coal mining in Pennsylvania.

Appellants seek to dispute the applicability of other requirements imposed upon mine operators by DER's regulations. Since the surface effects of underground anthracite coal mining in Pennsylvania are regulated, as far as environmental protection performance standards are concerned, by the Pennsylvania program in existence on August 3, 1977 and any lawfully-adopted amendments thereto (30 CFR §716.5 and Part 820), DER's imposition of specific performance standards may raise legitimate issues for litigation. Such issues are not present in these appeals, however, since DER merely directed the Appellants (except Tracey) to obtain mining permits and (with respect to Tracey) submit proof of bonding and liability insurance.[10] When Appellants comply with those directives and receive permits containing specific performance standards, the time will be ripe for litigating the precise issues raised by such action.

Conclusions of Law

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

---

[10] While the amounts of the bonds and liability insurance specified by DER in Tracey's application conceivably could be issues in this appeal, those amounts were not provided to us and no specific argument was made concerning them.

2. Fed. SMCRA and its regulations imposed regulatory standards on surface mining and on the surface effects of underground mining.

3. Fed. SMCRA (30 U.S.C.A. §1279) subjected the mining of anthracite coal to the following regulatory standards:

(a) the environmental protection performance standards of the state where the mine is located;

(b) the bonding standards of Fed. SMCRA, except for the bond limits and the period of revegetation responsibility; and

(c) all other regulatory standards of Fed. SMCRA.

4. Regulations adopted pursuant to Fed. SMCRA reflected the same approach to the mining of anthracite coal as the statute under which they were adopted.

5. The federal regulations at 30 CFR §716.5 and Part 820 adopt, with respect to anthracite coal, the environmental protection performance standards of the Pennsylvania regulatory program in existence on August 3, 1977 (and approved revisions thereto) in lieu of the performance standards of Fed. SMCRA and its regulations.

6. Although exempt from the performance standards of Fed. SMCRA, anthracite mine operators are subject to the Fed. SMCRA standards regarding the necessity for a permit, a bond and liability insurance.

7. Since Pennsylvania obtained primacy after the adoption of the 1980 amendments to the Clean Streams Law and Pa. SMCRA and after the adoption of Chapters 86, 88 and 89 of DER's regulations at 25 Pa. Code, anthracite mine operators are subject to the permit (including Repermitting), bond and liability insurance requirements established by this regulatory program.

8. Since the DER actions forming the basis of these appeals merely directed Appellants to secure permits, bonds and liability insurance, those are the only issues to be dealt with.

ORDER

AND NOW, this 31st day of August, 1990, it is ordered that the appeals filed by Appellants are dismissed.

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

Maxine Woelfling, Chairman, was recused and did not participate in this decision.

DATED: August 31, 1990

cc: See next page for service list.

EHB Docket No. 86-599-M

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M. DIANE SMITH
SECRETARY TO THE BC

PHILADELPHIA ELECTRIC COMPANY, et al.	:	
	:	
V.	:	**EHB Docket No. 88-309-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 31, 1990**

OPINION AND ORDER
SUR
REQUEST FOR ADDITIONAL EXPERT
TESTIMONY DISCOVERY AND TO
LIMIT EXPERT TESTIMONY

Robert D. Myers, Member

Synopsis

A request for additional expert testimony discovery is granted when Answers to Expert Witness Interrogatories and other documents do not adequately pinpoint the facts and opinions about which the expert witness will testify.

OPINION

Philadelphia Electric Company (PECO) filed a Motion for Sanctions on October 26, 1989 because of the failure of a coalition of organizations (Coalition), which are both appellants and intervenors in these consolidated appeals, to answer Expert Witness Interrogatories. North Penn and North Wales Water Authorities (NP/NW), because of similar difficulties with the Coalition, filed a Motion on November 13, 1989 to exclude the Coalition's expert testimony. In responses to these Motions, the Coalition stated that it would attempt to satisfy PECO's and NP/NW's complaints by furnishing additional documents. As a result, the Board issued an Order, dated January 12, 1990,

which (1) dismissed PECO's and NP/NW's Motions, (2) directed the Coalition to furnish the additional documents by January 25, 1990, and (3) gave PECO and NP/NW the option of requesting additional expert witness discovery after receipt of the documents. NP/NW made such a request by filing the instant Motion on February 9, 1990. PECO joined in the Motion on the same date. The Coalition answered the Motion on March 7, 1990.

In their Motion, NP/NW and PECO complain that the documents (1) shed no light on the proposed testimony of Jeannie Jenkins and (2) are ambiguous on the proposed testimony of Thomas Cahill, Thomas Punnett and Jonathan Phillippe. NP/NW and PECO request additional documents with respect to Jeannie Jenkins. With respect to the other three expert witnesses, they request that their testimony be limited to the facts and opinions set forth in certain specified documents. In its Answer, the Coalition simply maintains that NP/NW's and PECO's requests regarding Cahill, Punnett and Phillippe are at variance with the Board's January 12, 1990 Order and should be denied for that reason. No mention is made of Jeannie Jenkins.

Before entering upon a hearing in a case where technical and scientific evidence will be critical, all parties are entitled to be on an equal footing with respect to expert witness discovery. For reasons best known to themselves, some litigants attempt to thwart efforts of other parties seeking to establish the basis and parameters of expert opinions. These attempts can be nullified by allowing additional discovery, pursuant to Pa. R.C.P. 4003.5(a)(2). That is appropriate in this case.

ORDER

AND NOW, this 31st day of August, 1990, it is ordered as follows:

1. Within thirty (30) days after the date of this Order, the Coalition shall provide full and complete answers to NP/NW's Expert Witness

Interrogatories, to be signed by Jeannie Jenkins, or, in the alternative, shall provide an expert report prepared by her.

2. Within fifteen (15) days after the date of this Order, the Coalition shall confirm in writing that -

(a) Thomas Cahill's testimony will be limited to the facts and opinions regarding phosphorus which are set forth in documents EDF 21, 24 and 123 previously produced by the Coalition;

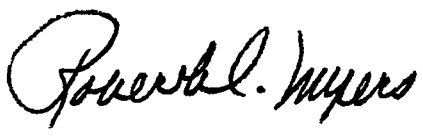
(b) Thomas Punnett's testimony will be limited to the facts and opinions regarding heavy metals which are set forth in document EDF 133 previously produced by the Coalition; and

(c) Jonathan Phillippe's testimony will be limited to the facts and opinions regarding turbidity which are set forth in document EDF 151 previously produced by the Coalition.

3. If the Coalition is unable to confirm any of the limits of testimony set forth in paragraph 2, it shall, within the same time limits, furnish such other documents and reports or Answers to Expert Witness Interrogatories, signed by the expert, that contain facts and opinions about which such expert will testify.

4. Failure of the Coalition to comply with the terms of this Order will result in the imposition of sanctions. Such sanctions could include an Order limiting or prohibiting entirely the testimony of such expert.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 31, 1990

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M. DIANE SMITH
SECRETARY TO THE BC

PHILADELPHIA ELECTRIC COMPANY, et al.	:	**EHB Docket No. 88-309-M**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES, et al.	:	**Issued: August 31, 1990**

OPINION AND ORDER SUR
JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis

Partial summary judgment is entered against a coalition of organizations challenging NPDES permits on several issues that are not relevant to the issuance of the permits. Summary judgment is denied with respect to several issues that are relevant and were adequately defined. Although two of the issues were not raised specifically in the Notice of Appeal, the coalition reserved the right to amend and has alleged that discovery was necessary to frame the issues.

OPINION

These consolidated appeals involve National Pollution Discharge Elimination System (NPDES) permits issued by the Department of Environmental Resources (DER) on July 14, 1988, to Philadelphia Electric Company (PECO), Industrial Permit No. PA-0052221, and to North Penn-North Wales Authorities

(NP/NW), Industrial Permit No. PA-0054909.[1] Appeals were filed by the permittees (docketed at 88-309 and 88-312, respectively), by Neshaminy Water Resources Authority (NWRA) (docketed at 88-311), and by a coalition of organizations (Coalition) (docketed at 88-314 and 88-315). The appeals were consolidated at 88-309 on February 15, 1989, and each of the various appellants was permitted to intervene in the appeals to which it was not otherwise a party.[2] NWRA's appeal originally docketed at 88-311 was dismissed on March 23, 1990.

On April 27, 1990, PECO and NP/NW filed a Joint Motion for Partial Summary Judgment or, in the Alternative, to Limit Issues as to Appeals Filed by the Environmental Organizations (Joint Motion). DER filed a Response, joining in the Joint Motion, on May 24, 1990. The Coalition filed an Answer on May 31, 1990, and a supplement on July 9, 1990.

The Joint Motion attacks a number of issues raised in the Coalition's pre-hearing memorandum.

Turbidity

While the Coalition's Notice of Appeal is somewhat ambiguous, it does raise a turbidity issue. The only relevant turbidity issue, however, pertains to the turbidity of the discharge water itself. Turbidity that may be created in the receiving streams is not a relevant issue and will not be considered.

---

[1] These permits are integral parts of the Point Pleasant Water Diversion Project and relate to the discharges of Delaware River water into the East Branch Perkiomen Creek and into the North Branch Neshaminy Creek, respectively.

[2] Some of the organizations making up the Coalition were dismissed or limited in their participation because of lack of standing: 1989 EHB 678.

Alternatives

The Coalition argues that DER was required to consider alternatives in processing the NPDES permits, but offers no statutory or court citations to support the point. We are unaware of any such requirement and, accordingly, decline to hear testimony on this issue.

Intake Placement

The placement of a cooling water intake structure is a relevant issue, under §316(b) of the Clean Water Act, 33 U.S.C.A. §1326(b), only with respect to NPDES Permit No. PA-0051926, issued to PECO on September 17, 1984, and relating to a discharge from the Limerick Nuclear Generating Station to the Schuylkill River. An appeal from this issuance was taken by Del-AWARE Unlimited, Inc., a member of the Coalition, and is pending before the Board at docket number 84-361. Further action on the appeal has been deferred until the character of the East Branch Perkiomen Creek (with the diversion water in it) can be determined: 1986 EHB 221. Since the issue bears no connection to the NPDES permits involved in these consolidated appeals, it will not be considered here.

Wasteload in the Receiving Streams

The Coalition has framed this issue in its pre-hearing memorandum, as follows:

> The Department [DER] failed to consider and address the impact of increased water use as a result of the diversion project on the waste load in the receiving streams.

The Coalition argues that this alleged secondary effect is relevant because of DER's supposed duty to consider alternatives. As already noted, there is no such duty on DER with respect to these permits. Consequently, we will not hear evidence on this issue.

Failure to Coordinate

This issue raises DER's alleged failure to "coordinate and communicate" within its various subdivisions during the processing of these permits. The Coalition cites no statutory or judicial authority imposing such a duty on DER; and it has been held that there is no such duty: Del-AWARE Unlimited, Inc. v. Commonwealth, Department of Environmental Resources, 96 Pa.Cmwlth. 361, 508 A.2d 348 (1986) at 356. Accordingly, we will not consider this objection.

Organic Compounds, Cadmium and Chromium, and Temperature

These issues are relevant and have been adequately stated (although the inclusion of organic compounds in the section entitled Heavy Metals is confusing. Two of the issues were not raised specifically in the Notice of Appeal; but the Coalition reserved the right to amend and has alleged that discovery was necessary to refine these issues. Consequently, we will consider them.[3]

O R D E R

AND NOW, this 31st day of August, 1990, it is ordered as follows:

1) The Joint Motion for Partial Summary Judgment, filed by PECO and NP/NW on April 27, 1990, is granted in part and denied in part in accordance with the foregoing Opinion.

---

[3] Because of the manner in which we have disposed of the issues in the foregoing Opinion, we find it unnecessary to rule on other arguments raised by the parties, including issue preclusion.

2) Summary judgment is entered against the Coalition on the following issues: Alternatives; Intake Placement; Wasteload in the Receiving Streams; and Failure to Coordinate.

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

Board Chairman Maxine Woelfling did not participate in this decision.

DATED: August 31, 1990

cc: See following page.

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M. DIANE SMITH
SECRETARY TO THE BO

PALISADES RESIDENTS IN DEFENSE OF THE ENVIRONMENT ("PRIDE")	:	
v.	:	**EHB Docket No. 86-366-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 5, 1990

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

By Maxine Woelfling, Chairman

Synopsis

The Department of Environmental Resources' (DER) summary rejection of a petition to designate a 900-acre tract as unsuitable for mining under §4(b) of the Non-Coal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S. §3304(b) ("NSMCRA"), must be sustained where there is no evidence to support the possibility of incidental extraction of coal during surface mining of other non-coal minerals on this tract.

Background

By letter dated June 27, 1986, Ernest F. Giovannitti, the Director of DER's Bureau of Mining and Reclamation, wrote to Palisades Residents in Defense of the Environment (PRIDE) advising it that its petition to designate a 900-acre tract in Nockamixon and Tinicum Townships in Bucks County as

unsuitable for the surface mining of argillite,[1] a non-coal mineral, was being rejected, pursuant to 25 Pa.Code §86.124(a), because of the lack of coal reserves beneath the tract. DER's letter advised PRIDE that it could appeal that decision to this Board. PRIDE's appeal was filed with us on July 28, 1986.

Thereafter, both sides engaged in discovery.

On November 17, 1986, PRIDE filed its pre-hearing memorandum with us. DER then sought and received from us an Order, dated December 3, 1986, which extended the deadline for DER to file its pre-hearing memorandum because DER indicated it would shortly file a motion for summary judgment in the case. Our Order directed that DER had to file any such motion by January 29, 1987.

On January 8, 1987, DER filed a Motion for Sanctions and an Extension of Time. This motion sought both a delay in the deadline for filing a DER motion for summary judgment, because of PRIDE's failure to file timely responses to DER's Requests for Admissions, and an Order deeming each DER Request for an Admission by PRIDE as admitted by PRIDE. PRIDE responded, opposing DER's Motion. By Order dated February 6, 1987, we gave DER an extension of the deadline for filing its motion for summary judgment and set a deadline for PRIDE's response to the Request for Admissions. PRIDE filed nearly timely responses to DER's Request for Admissions and, on March 16, 1987, DER filed its Motion for Summary Judgment, to which PRIDE responded on April 6, 1987.

By an Opinion and Order dated January 19, 1988, Board Chairman Woelfling denied DER's Motion for Summary Judgment because there remained a

---

[1] Webster's Ninth New Collegiate Dictionary (1984) defines argillite as "a compact argillaceous rock differing from shale in being cemented by silica and differing from slate in having no slaty cleavage." "Argillaceous" is, in turn, defined as "of, or relating to, or containing clay or clay minerals."

dispute between the parties over a material fact, i.e., the presence of coal in the area covered by PRIDE's Petition. Thereafter, DER filed its pre-hearing memorandum.

On July 7, 1989, there was a hearing on the merits of this appeal before Board Chairman Woelfling, the parties having filed their Stipulations with us on July 3, 1989. At the hearing on the merits, the attorneys for both parties agreed that the only issue which remained as of that date was whether "there can be incidental extraction of coal within the area of the Petition." (T-4)[2]

On July 28, 1989, after we had received a transcript of these hearings, we issued an Order directing the filing of post-hearing briefs of the two parties. After granting PRIDE an extension of time to prepare its brief, we received post-hearing briefs from both parties.

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

FINDINGS OF FACT

1. The Appellant is PRIDE, a citizens group with an address of Bunker Hill and Tabor Roads, Ottsville, PA 18942. (PRIDE's Notice of Appeal)

2. The appellee is DER, the executive agency of the Commonwealth of Pennsylvania vested with the duty and authority to administer 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); NSMCRA; and the rules and regulations promulgated pursuant thereto by the Environmental Quality Board.

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[2]T-__ in this adjudication is a reference to a page number in the hearing transcript. Stip. No. __ is a reference to a paragraph in the parties' joint stipulation filed with us on July 3, 1989. A-__ is a reference to a document introduced into the record by PRIDE and C-__ is a reference to documents introduced by DER.

3. On June 5, 1986, PRIDE filed a Petition with DER seeking a DER designation that a 900-acre area located in Tinicum and Nockamixon Townships, Bucks County, was unsuitable for surface mining. (Stip. No. 1)

4. Jane Earle (Earle), a water pollution biologist in DER's Bureau of Mining and Reclamation, conducted DER's preliminary review of the application. (Stip. No. 2, T-74-75)

5. Earle's review consisted of consulting with DER geologists Milton McCommons and Thomas Whitcomb, reviewing permits for surface mines in Bucks County, and reviewing the professional geological literature for rock formations in Bucks County. (T-76-77)

6. Based on her research, Ms. Earle recommended rejection of PRIDE's Petition. (T-80-81)

7. As a result of Earle's review, DER returned PRIDE's Petition as frivolous. (Stip. No. 3)

8. By letter dated June 27, 1986, and signed by Ernest F. Giovannitti, the Director of the Bureau of Mining and Reclamation, DER returned PRIDE's Petition for the reason that the area which PRIDE sought to have declared unsuitable for surface mining contained no identified coal reserves. (Stip. No. 4)

9. Thomas Whitcomb has a Bachelor of Science in geology which he received in 1970 from Dickinson College. He has worked as a geologist in DER and its predecessor (the Department of Mines and Mineral Industries) for nineteen years. (T-84)

10. From 1970 through 1978, Whitcomb was involved in geology on DER's behalf as it pertained to coal mining, and from 1979 to the present, he has worked as a geologist for DER as to mining sites for minerals other than coal. (T-85-87)

11. Whitcomb has done geological work for DER on a number of surface mine sites in Bucks County. (T-87)

12. PRIDE's Petition was the first seeking designation of an area outside the coal fields as unsuitable for mining. (T-89)

13. DER is unaware of any coal seams in Bucks County and has issued no permits for coal mines in Bucks County. (T-89)

14. The surface mining which occurs in Bucks County is limited to mining for argillite, diabase, sand and gravel. (T-90)

15. The main geologic formation in Bucks County is the Lockatong, and there is no known coal within the Lockatong formation in Pennsylvania. (T-90-91)

16. The Lockatong formation is one of three formations in the Newark/Gettysburg Triassic Basin. This is the largest Triassic Basin in North America and these formations are rocks with continental origins. (T-8)

17. If there were coal in Bucks County, it would outcrop somewhere, and there is no documentation of coal outcrops in the County. (T-92)

18. Whitcomb has visited an argillite quarry owned by Bucks County Crushed Stone which is adjacent to the tract covered by the Petition. (T-93-95) Whitcomb sampled the dark seam in that quarry, but it was calcareous. (T-93-94)

19. The book titled Groundwater Resources of Bucks County, Pennsylvania makes no mention of coal in Bucks county. (T-98)

20. The geologic map prepared by DER's Bureau of Topographic and Geologic Survey shows no coal in Bucks County. (T-96-97)

21. The only report of coal in this area is an 1891 paper by J. P. Lesley in the "Proceedings of the American Philosophical Society"; Lesley's report says that when a two-thousand-foot-deep hole was drilled seeking oil

and gas deposits, a nine-foot-thick seam of anthracite coal was found at a depth of 1569 feet below the surface. (A-2)

22. As Whitcomb reads Lesley's report, he believes Lesley also doubts the coal is present. Whitcomb concludes that Lesley was not present when the hole was drilled and did not personally do an analysis of the drill cuttings identified as coal. (T-100-102)

23. Even if the anthracite coal mentioned by Lesley is present, it is below the argillite, so it will not be removed incidental to mining the argillite because the quarry is only 200-250 feet deep. (T-102)

24. Carbonaceous materials in the Lockatong formation are uniformly very small. While some carbon may be in the formation, carbon is found everywhere, and this does not mean there is coal present. (T-110)

25. The United States Geologic Survey (USGS) Bulletin 828 reports that the strata in the Dark Hollow area of Bucks County was prospected for coal, but coal was not found there. (T-109)

26. The references in early geologic literature to coal in the Lockatong formation are not within the 900-acre area encompassed by the Petition, but lie a distance from it. Moreover, one cannot rely upon the references without verifying the presence of coal today, since these literature references fail to say how the existence of coal was established. (T-111-115)

27. A more detailed 1955 survey of Bucks County's geology does not support the early reports to the USGS of coal found in Bucks County. (T-112-113)

28. PRIDE's sole witness was John K. Adams, who has a Bachelor's degree, Master's degree and Ph.D. in geology. Adams has been teaching, consulting, and doing research in this field for 31 years. (T-7)

29. Adams has been to the Petition area on three or four occasions, and while he has not done any extensive work there, he is familiar with the geologic aspects of the area. (T-10)

30. Adams believes that conditions in some parts of the Petition area are consistent with geologic conditions which would lead to the presence of coal. (T-15)

31. Adams' review of geologic literature shows reports of carbonaceous shales in the Dark Hollow area and coal, but not mineable amounts of it, in the Lockatong formation. (T-20)

32. There was no evidence offered to the Board that Dark Hollow was within the Petition area.

33. Based on Lesley's report, Adams believes that it is possible that coal lies beneath the surface of the 900-acre tract. (T-29-30, 38, 49 and 50)

34. The depth of the coal reported by Lesley would change based upon the orientation of the plane of this bed of coal, with the result that in an up-dip situation, the coal bed might get shallower. (T-37-40)

35. Adams has not located any coal within the Petition area. (T-41-42)

36. Adams admits that Lesley's mention of this nine-foot-thick seam of coal is unique in geologic literature, there is no other such seam reported in any of the Lockatong formation, and some literature does not mention coal in this area at all. (T-43-46)

37. When geologic literature fails to mention coal, it is because it is not there or because it is not there to any degree. (T-46)

38. Adams has never observed any coal in Bucks County, but he has seen carbonaceous shales; however, he cautions that one cannot conclude coal exists in this area just because the shales exist there. (T-68-69)

39. Adams was not aware of any coal mines in Bucks County, and he has never seen coal in the several quarries he has visited. (T-49-50)

40. Adams recognizes that there are several serious problems with scientific reliance on Lesley's report of coal. (T-54-63)

41. If it were not for Lesley's report, Adams would not believe there is coal within the Petition area. (T-65)

42. Adams could form no opinion as to either the extent of the coal or its depth within the Petition area. (T-65)

DISCUSSION

The first issue to confront us in our review of DER's return of PRIDE's Petition is which party bears the burden of proof. 25 Pa.Code §21.101 does not specifically address appeals of the type before us here; however, this case is most akin to those where DER denies a permit and the applicant appeals. In those cases, §21.101(c)(1) places the burden on the applicant. Moreover, §21.101(a) also provides that the burden of proof generally is on the party asserting the affirmative. Here, PRIDE is asserting its right to have the Petition considered by DER, and is, thus, asserting the affirmative. Accordingly, under both theories, we hold that PRIDE has the burden of proof to demonstrate that DER abused its discretion in returning Pride's Petition as frivolous.

The next question for us is what is it that PRIDE must show. This question was answered in our Opinion and Order sur Motion for Summary

Judgment.[3] There we said:

> P.R.I.D.E.'s Petition was filed pursuant to Section 4.5 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4e. The Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. 3301 et seq. (Noncoal Act) generally superseded the SMCRA as it applied to surface mining of minerals other than bituminous or anthracite coal. But, Section 4 of the Noncoal Act provides:
>
> > (a) General rule.--Except as provided in subsection (b), all surface mining operations where the extraction of coal is incidental to the extraction of minerals and where the coal extracted does not exceed 16 2/3% of the tonnage of materials removed for purposes of commercial use or sale shall be subject to this act and shall not be subject to the act of May 31, 1945 (P.L. 1198, No. 418), known as the Surface Mining Conservation and Reclamation Act. For purposes of this section, coal extraction shall be incidental when the coal is geologically located above the mineral to be mined and is extracted in order to mine that mineral.
> >
> > (b) Certain provisions of Surface Mining Conservation and Reclamation Act applicable.--All surface mining operations where the extraction of coal is incidental to the extraction of minerals and where the coal extracted does not exceed 16 2/3% of the tonnage of materials removed for purposes of commercial use or sale shall be subject to section 4.5(a) to (g), inclusive, of the Surface Mining Conservation and Reclamation Act.
> >
> > (emphasis added)
>
> These provisions make the areas unsuitable provision of the SMCRA applicable to non-coal surface mining where there will be incidental extraction of coal.

---

[3]This opinion is reported as PRIDE v. DER, 1988 EHB 8.

We then went on to deny DER's Motion because of the material factual dispute introduced by PRIDE in response to DER's Motion. This factual dispute was created through an affidavit by Dr. Adams which raised the possibility that there was coal located geologically above the minerals (argillite) to be mined in the 900-acre area. Thus, at the hearing, the attorneys for both parties agreed this was the only remaining issue. (T-4)

Unfortunately, from PRIDE's perspective, the evidence it offered was insufficient to establish that there is any coal which will be disturbed by the surface mining of this tract. Indeed, except for one piece of historic evidence, there is no evidence to support the idea that there is any coal, even below the argillite, on this tract.

Adams' testimony was inconclusive as to coal on this tract. Adams looked at carbonaceous shales, but he conceded that these shales also exist where no coal is present. He testified he knows of no coal mines in Bucks County and he has never observed any coal in the walls of the several area quarries which he has visited. Adams testified on cross-examination that, but for the 1891 report by Lesley, he would not believe that there was any coal in the Petition area. He also said he could not render an opinion as to the extent of any coal in this Petition area or the depth it might be from the surface. Importantly, Adams also conceded some serious problems with reliance on Lesley's report to show coal in the area and then went on to admit Lesley's mention of the alleged nine-foot-thick seam of anthracite was unique in geologic literature.

Clearly, this testimony does not rise to the point where it meets the burden of proof, even if it were not rebutted. Whitcomb's rebuttal testimony on DER's behalf effectively seals the Petition's fate. While Adams has worked as a geologist for 31 years, Whitcomb has worked in the field for 19 years,

and, thus, is hardly a novice. Furthermore, Whitcomb has extensive experience with both coal and non-coal mining in Pennsylvania. He testified that DER is unaware of any coal seams in Bucks County and has not issued any permits for coal mines in the County. He has seen no outcrops of coal in the County and knows of no documentation of coal outcrops. Whitcomb has visited the argillite quarry located adjacent to the Petition area and has sampled the dark seam of material found in the quarry wall, but it was calcareous and not coal. According to Whitcomb, modern geologic literature makes no mention of coal in the Lockatong formation within Pennsylvania.

Both sides concede the only real indication of coal in this area is Lesley's 1891 report. This report, if it is to be believed despite its problems and the concerns with it raised by Whitcomb, places the coal at a depth of 1569 feet, while the quarry depth is only between 200 and 250 feet. Thus, even if we were to take Lesley's report as unquestionable, we would still be left with the coal being located over 1250 feet below the bottom of the quarry. Such coal could not be said to be likely to be removed incidentally during the course of the non-coal surface mining activity.

Accordingly, we must hold that on this issue, conceded by PRIDE to be the sole issue, PRIDE has not met its burden of proof. Indeed, the evidence establishes that there is no coal located between the argillite and the surface. This being the case, DER's return of the Petition as frivolous was not an abuse of discretion and we sustain DER's decision.

CONCLUSIONS OF LAW

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

2. PRIDE bears the burden of proof as to the existence of coal within its Petition area.

3. Section 4(b) of the NSMCRA allows a party to petition to have an area designated as unsuitable for surface mining only where there is coal above the non-coal mineral which will be removed incidental to the mining of the other mineral.

4. Under 25 Pa.Code §86.124(a), DER may return the Petition to the petitioning party if it fails to show that there is coal which will be removed incidental to the mining of other minerals.

5. PRIDE has failed to offer sufficient evidence to show the existence of coal within the Petition area which would be removed incidental to argillite quarrying.

6. DER's return of PRIDE's Petition as frivolous was not an abuse of discretion.

O R D E R

AND NOW, this 5th day of September, 1990, it is ordered that PRIDE's appeal is dismissed and DER's rejection of PRIDE's Petition to designate a tract as unsuitable for mining is sustained.

ENVIRONMENTAL HEARING BOARD

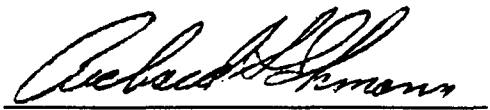
Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

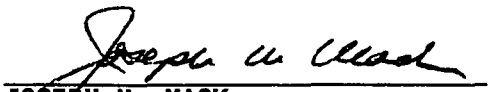
Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 5, 1990

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SECRETARY TO THE BC

WILLIAM FIORE, t/d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY	:	**EHB Docket No. 86-665-W (Consolidated)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 5, 1990

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

The Board grants Appellant's motion for summary judgment and denies the Department of Environmental Resources' (Department) motion for summary judgment in appeals of the Department's directive to Appellant to submit acceptable substitute collateral under a collateral bond submitted as a condition of obtaining a hazardous waste transporter's license. The Department cannot hold a transporter liable under his transporter's bond for violations 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.*, which were unrelated to his duties and responsibilities as a transporter. Consequently, the Department's directive to the transporter to submit acceptable substitute collateral was an abuse of discretion.

OPINION

This matter was initiated by the December 11, 1986, filing of a notice of appeal by William Fiore, t/d/b/a Municipal and Industrial Disposal

Company (Fiore), seeking review of a November 17, 1986, Department letter, which stated:

> We have been notified by Equibank that Letter of Credit No. 1261 will be cancelled effective February 10, 1987. Section 505(e) of the Solid Waste Management Act (35 P.S. 505(e)) and the Collateral Bond agreement authorize the Department to withhold the bond for failure to comply with any order of the Department.
>
> Since Municipal and Industrial Disposal Company has failed to comply with the consent order and agreement dated January 25, 1983, you are hereby advised to reinstate the subject Letter of Credit or provide an acceptable substitute Letter of Credit by December 14, 1986 or the Department will draw upon the subject Letter of Credit issued by Equibank and convert it into a cash collateral bond in accordance with the terms of this letter of credit.

The collateral bond was submitted by Fiore as part of the requirements under §505(e) of the SWMA for obtaining a license to transport hazardous waste. This appeal was docketed at Docket No. 86-665-W.

On December 7, 1987, Fiore filed a notice of appeal seeking review of the Department's November 23, 1987, letter, which stated:

> We have been notified by Equibank that Letter of Credit No. 1261 will be cancelled effective February 10, 1988. This letter of credit was part of the collateral bond submitted to obtain your company's hazardous waste transporter license. Section 505(e) of the Solid Waste Management Act requires that liability under the bond shall be for the duration of the license and for a period of one year after the expiration or voluntary termination of the license. 'This one year period of liability shall include, and shall be automatically extended for such additional time during which administrative or legal proceedings are pending involving a violation by the transporter of the Act or the rules and regulations promulgated thereunder, or the terms and conditions of the license to transport hazardous waste, or an order of the Department.'

> Municipal and Industrial Disposal Company is hereby advised to reinstate the subject Letter of Credit or provide an acceptable substitute Letter of Credit by December 23, 1987 or the Department will draw upon the subject Letter of Credit issued by Equibank and convert it into a cash collateral bond in accordance with the terms of this Letter of Credit.

This appeal was docketed at Docket No. 87-499-W.

By Board order dated June 8, 1988, the two appeals were consolidated at Docket No. 86-665-W.

On October 31, 1989, Fiore filed a motion for summary judgment contending that the Department is barred from holding the bond, threatening to draw on the letter of credit, or ordering him to provide alternative collateral because liability on the bond was terminated. Specifically, Fiore argues that under the SWMA liability under the bond terminated one year after license expiration, or on July 7, 1985, and thereafter, the Department had no right to threaten Fiore and Equibank with a draw on the letter of credit. In addition, Fiore alleges that because the bond clearly states as its purpose, "Bond for the Transportation of Hazardous Waste" it was not intended to secure liability for non-transporter related violations of the SWMA. Fiore also contends that the bond language specifying that the bond guarantees compliance with all aspects of the SWMA is an "ambiguity in the written contract" which must be construed against the Department.

On November 22, 1989, the Department responded to Fiore's motion with a cross-motion for summary judgment. The Department asserts that §505(e) of the SWMA and the language of the bond instrument itself condition the bond upon compliance with all provisions of the SWMA and not just those related to transporters and that, even if the collateral bond instrument is ambiguous on this point, the ambiguity should be construed against the obligor (Fiore). The Department then argues that since Fiore's transporter bond was conditioned

upon his compliance with all provisions of the SWMA and since Fiore failed to comply with a January 25, 1983, Consent Order and Agreement (COA) dealing with hazardous waste discharges from Fiore's disposal site in Elizabeth Township, Allegheny County,[1] the Department was authorized to withhold[2] the collateral bond. Finally, the Department contends that liability under the collateral bond continues until Fiore complies with the COA.

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. Franklin Township v. DER, EHB Docket No. 85-380-MJ (Opinion issued April 4, 1990).

Here, as the Department rightly points out in its memorandum of law in support of its motion, the parties do not dispute any of the material facts. Both parties agree that Fiore has committed no violations of the law relating to the transportation of hazardous waste and that the collateral bond is being withheld because of Fiore's violations of the COA (Exhibit Q to Fiore's motion for summary judgment, Paragraph 10 of the Department's cross-motion for summary judgment).[3] The dispute arises in the

---

[1] The Department previously denied Fiore's application for a hazardous waste transporter's license because of Fiore's failure to comply with this COA, and the Board affirmed the license denial at 1985 EHB 414.

[2] By "withhold" we believe the Department meant that it would not release the bond.

[3] The Department's November 23, 1987, letter, which is the subject of Fiore's appeal at Docket No. 87-499-W, does not proffer any reasons for requiring Fiore to submit substitute collateral other than the cancellation of the letter of credit by Equibank. However, in light of the parties' statements in their motions, we must conclude that Fiore's violations of the COA were as relevant to this letter as they were to the Department's November 17, 1986, letter, which is the subject of Fiore's appeal at Docket No. 86-665-W.

interpretation of the relevant law and its application to those facts.

In ruling on these cross-motions for summary judgment the Board must resolve the threshold question of whether the Department is authorized to withhold the release of a bond submitted pursuant to §505(e) of the SWMA to secure a license to transport hazardous waste where the licensee is in violation of provisions of the SWMA unrelated to the transporter provisions. Based on our holding in Chester A. Ogden, President, Coal Hill Contracting Company v. DER, 1984 EHB 374, aff'd 93 Pa.Cmwlth 153, 501 A.2d 311 (1985), we must answer this question in the negative.[4]

The Ogden case involved an instance where the Department forfeited bonds associated with two surface mining permits as a result of the operator's unpermitted mining of a three acre tract not covered by either of the mining permits. The Department asserted that it was entitled to forfeit the bonds because the terms of the bonds required the operator to abide by the terms of the applicable law, the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (SMCRA). In rejecting this theory, the Board held:

> The flaw in this argument lies in the fact that the bonds by their terms apply only to specifically designated acres covered by existing mining permits. The bond and permit of which it forms a part are contracts between DER and the operator. Southwest Pennsylvania Natural Resources v. DER, supra. This Board cannot extend liability on the bond beyond the terms agreed upon by the parties. The proper remedy for mining without a permit is contained in section 18.4 of the SMCRA, 52 P.S. §1396.22, the assessment of a civil penalty. Forfeiture of a

---

[4] Curiously, neither party has cited this case in its memorandum of law.

> bond for a permitted area on the basis that there was mining in an adjacent unpermitted area constitutes an abuse of DER's discretion.
>
> 1984 EHB at 356

The Department petitioned the Commonwealth Court for review of the Board's decision, and the Court upheld the Board, emphasizing that the bonds were tied to specific permits and were not intended to cover all mining being performed by a particular operator. In doing so, the Commonwealth Court recognized that an operator may be simultaneously conducting surface mining operations in several geographic locations under the authority of various mining permits.

Here, we must reach the same conclusion regarding Fiore's transporter bond. The language of the relevant statutory provisions in the SWMA and SMCRA is similar in that it prescribes compliance by the operator/licensee with all requirements of the SWMA/SMCRA.[5] Furthermore, the bond instruments in Ogden and this case designate the particular permit and license.[6] As the Board

---

[5] Section 4(d) of SMCRA conditions the bonds upon the mine operator's faithful performance of all the requirments of SMCRA and five other enumerated statutes. Section 505(e) of the SWMA conditions the bond upon the licensee's compliance with "every requirement of this act, rule and regulation of the department, order of the department and term and condition of the license...."

[6] The bonds at issue in Ogden provided:

> NOW THE CONDITION OF THIS OBLIGATION is such that if the principal shall faithfully perform all the requirements of (1) Act 418, (2) the Act of Assembly approved June 22, 1937, P.L. 1987, as amended, known as "The Clean Streams Law" (Act 394), (3) the applicable rules and regulations promulgated thereunder and (4) the provisions and *conditions of the permits issued thereunder* and designated in this bond (all of which are hereafter referred to as "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect in accordance with the provisions of the law. (emphasis added).
>
> (footnote omitted)
> 501 A.2d at 313-314

footnote continued

and Commonwealth Court held in Ogden, the bonds must be construed as contracts between the parties, applicable to the transporter license. And finally, as in Ogden, the Department has a number of other appropriate enforcement remedies to address the problems of Fiore's violations at his disposal site.

Since we hold for Fiore on this issue and since Fiore has committed no violations of the provisions of the SWMA relating to transporters, we need not reach the issue of the length of liability under the bond. In the absence of transporter-related violations, liability under the bond terminated one year after the expiration of Fiore's license, or, on July 7, 1985. And, because the Department cannot hold Fiore liable under his transporter bond for non-transporter related violations, it was an abuse of discretion for the Department to require Fiore to submit replacement collateral.

Consistent with the foregoing, we enter the following order.

---

continued footnote

Fiore's bond provided that:

> NOW THE CONDITION OF THIS OBLIGATION is such that if the Permittee shall faithfully perform all of the requirements of (1) the "Solid Waste Management Act", (2) "The Clean Streams Law", Act of June 2, 1937, P.L. 1987, No. 394, as amended, (3) the "Air Pollution Control Act", Act of January 8, 1960, P.L. 2119, as amended, (4) "The Dam Safety and Encroachments Act", Act of November 26, 1978, P.L. 1375, (5) Any other state or federal statute relating to environmental protection or to the protection of the public health, safety and welfare, (6) the applicable rules and regulations promulgated thereunder, (7) any order of the Department, and (8) the provisions and conditions of the license issued thereunder and designated in this bond (all of which are hereinafter referred to as the "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect.
>
> (Exhibits C and F, Appendix to Fiore's Motion for Summary Judgment)

O R D E R

AND NOW, this 5th day of September, 1990, it is ordered that:

1) William Fiore's motion for summary judgment is granted;

2) The Department's cross-motion for summary judgment is denied; and

3) Fiore's appeals at Docket Nos. 86-665-W and 87-499-W are sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann has recused himself from this matter.

DATED: September 5, 1990

cc: See following page

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M. DIANE SMITH
SECRETARY TO THE BC

HZL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 89-415-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 6, 1990**

OPINION AND ORDER SUR
PETITIONS TO INTERVENE

By Terrance J. Fitzpatrick, Member

Synopsis

Two petitions to intervene are denied where the petitioners base their request for intervention on a desire to raise issues which exceed the scope of the proceeding.

OPINION

This is an appeal by HZL Corporation (HZL) from a letter of the Department of Environmental Resources (DER) dated August 22, 1989, denying HZL's application for a municipal waste landfill on grounds that the application was incomplete. The site of the proposed landfill is a tract of land located in Ararat Township, Susquehanna County and Preston Township, Wayne County.

This Opinion and Order addresses petitions to intervene filed by the Boards of Commissioners of Susquehanna and Wayne Counties (Counties), the Boards of Supervisors of Ararat and Preston Townships (Townships), and by the Pennsylvania Gas and Water Company (PG&W). The Counties and Townships claim

an interest in this proceeding because a reversal of DER's decision would adversely impact upon the health, safety, and welfare of the residents of the Counties and Townships. If they are granted intervention, the Counties and Townships intend to present evidence regarding the impact of the landfill on their residents and the "scientific and environmental dangers" which will result if the application is granted, and to present the argument that under DER's regulations, HZL is barred from reapplying for a permit. The Counties and Townships claim that their interests may not be adequately represented by DER because DER may not present evidence regarding the scientific and environmental dangers of the landfill and because DER may not argue that HZL should be barred from reapplying for a permit.

PG&W states in its petition to intervene that it has an interest in this proceeding because the proposed landfill is located adjacent to PG&W's Dunn and Mud Ponds, which are tributaries to streams supplying potable water to the Forest City area, and because the landfill will endanger the watershed. PG&W, like the Counties and Townships, claims that it will present evidence regarding the scientific and environmental dangers of the landfill, and that it will argue that HZL should be precluded from reapplying for a permit.

HZL filed objections to both petitions to intervene. HZL claims that the issue in this proceeding is limited to whether DER erred in denying the application as "administratively incomplete," and that evidence regarding the substantive merits of the application is irrelevant. HZL also argues that the alleged impacts on residents of the Counties and Townships and on the customers of PG&W do not constitute a basis for intervention because those interests would only be affected by a decision on the merits of the application, whereas the instant proceeding only involves the issue of whether

the application was complete. Finally, HZL contends that any issue regarding its reapplication for a permit is beyond the scope of this proceeding.

The decision whether to grant intervention is discretionary. Keystone Sanitation Co., Inc. v. DER, 1989 EHB 1287, 1289. In ruling upon petitions to intervene, the Board considers the following factors:

1) the nature of the prospective intervenor's interest,

2) the adequacy of the representation of that interest by other parties,

3) the nature of the issues before the Board,

4) the ability of the prospective intervenor to present relevant evidence, and

5) the effect of intervention on administration of the statute under which the proceeding is brought.

City of Harrisburg v. DER, 1988 EHB 946, 947.

We will deny the petitions to intervene filed by the Counties and Townships, and by PG&W. We agree with HZL that the scope of this appeal is limited to the narrow question of whether the application was "incomplete." Therefore, the evidence the petitioners wish to introduce is not relevant to this proceeding, and the petitioners have failed to satisfy factor number four stated above.[1] See Douglas E. Barry, et al. v. DER, EHB Docket No. 90-109-W (August 16, 1990).

Our conclusion that the issue here is limited to evaluating the completeness (i.e. the form), rather than the substance of the application is

---

[1] In addition to the irrelevance of the proposed evidence, we also find that the argument that HZL should be barred from reapplying for a permit falls beyond the scope of this proceeding. If we were to address this argument, we would clearly be going beyond the scope of the DER action which led to this appeal.

buttressed by examining both HZL's notice of appeal and DER's regulations. HZL's notice of appeal contests only the conclusion that the application is not administratively complete; it does not contend that the application should be granted on the merits. Indeed, one of HZL's objections to DER's decision is that DER based its decision, in part, on the substantive merits of the application, which was inappropriate in conducting a completeness review (notice of appeal, para. 8). Likewise, DER's regulations provide for a separate review of the completeness of a landfill permit application. See 25 Pa. Code §271.202. The regulations explicitly provide for denial of the application on grounds that the application was incomplete. 25 Pa. Code §271.202(c).

If the Board were to determine that DER erred in denying the application as incomplete, the proper remedy would be to remand the application to DER for consideration of the substance of the application. Consideration of the merits of the application by the Board would not be appropriate because DER has not yet ruled on the substance of the application.[2] Therefore, the interests which the Counties, Townships, and PG&W seek to protect and the evidence they wish to introduce fall outside the scope of this proceeding, and do not provide a basis for granting intervention.

---

[2] We say this despite our observation that DER's denial letter appears to have strayed into the merits of the application. However, the fact that DER may have--inappropriately--ventured into the merits does not transform DER's denial for incompleteness into a denial on the merits.

ORDER

AND NOW, this 6th day of September, 1990, it is ordered that the petitions to intervene filed by the Boards of Commissioners of Susquehanna and Wayne Counties and the Boards of Supervisors of Ararat and Preston Townships, and by Pennsylvania Gas and Water Co., are denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 6, 1990

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M. DIANE SMITH
SECRETARY TO THE BOAR

DEER LAKE IMPROVEMENT ASSOCIATION et al.	:	
	:	
v.	:	**EHB Docket No. 90-148-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	**Issued: September 7, 1990**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
AMERIKOHL MINING, INC., Permittee	:	

OPINION AND ORDER
SUR MOTION TO LIMIT ISSUES

Synopsis

The Permittee's Motion To Limit Issues must be granted as to the new grounds for appeal raised for the first time in the Appellant's Pre-Hearing Memorandum, where grounds for an appeal nunc pro tunc as to these issues are not averred by Appellants and Appellants do not indicate that they were made aware of these new grounds for appeal as a result of their discovery activities.

OPINION

The instant appeal was commenced on April 10, 1990, when Deer Lake Improvement Association, Inc. and all of the owners of property in the Deer Lake plan of lots (collectively Deer Lake) appealed from DER's March 12, 1990 issuance of Surface Mining Permit 26890106 to Amerikohl Mining, Inc.

(Amerikohl). The permit is for a proposed 286 surface coal mine in Wharton Township, Fayette County which, not surprisingly, is also the location of the Deer Lake plan of lots. We issued our standard Pre-Hearing Order No. 1 to these parties on April 13, 1990.

On April 24, 1990, Deer Lake filed a Motion To Stay Proceedings based on the pendency of a zoning proceeding before the Wharton Township Zoning Board. DER took no position on the motion. Amerikohl opposed same. By an Opinion and Order dated May 17, 1990, we denied Deer Lake's Motion.

In the interim, on May 7, 1990, Amerikohl commenced discovery. Also while Deer Lake's Motion To Stay proceedings was pending and on May 14, 1990, we received Deer Lake's Motion To Stay Or For Protective Order Pursuant To Pa. R.C.P. 4013. This motion sought a stay of all discovery during the pending zoning board proceeding. Again, DER took no positon on this Motion, and again, Amerikohl opposed it. While we were evaluating this Motion and on May 24, 1990, we were advised by letter from counsel for Deer Lake that he had begun discovery as to Amerikohl's contentions. By Order of May 29, 1990, we denied Deer Lake's Motion.

On May 30, 1990, Deer Lake filed with this Board its Motion For Reconsideration By The Environmental Hearing Board En Banc Of Member Richard S. Ehmann's Denial Of Appellants' Motion To Stay. On June 5, 1990, Amerikohl filed its Objections to Deer Lake's Motion, and we were advised by letter of June 5, 1990 from DER's counsel that DER took no position on this motion.

By Order dated June 14, 1990, the Board En Banc denied Deer Lake's Motion because it sought reconsideration of an interlocutory order, failed to allege extraordinary circumstances and lacked merit.

On June 22, 1990, we granted Deer Lake's unopposed Motion for an extension of the deadline for filing its Pre-Hearing Memorandum. On July 13, 1990, Deer Lake filed its Pre-Hearing Memorandum, and, on July 27, 1990, we received Amerikohl's response. By letter of July 30, 1990, DER's counsel advised us he would file no Pre-Hearing Memorandum on DER's behalf but was joining in the factual and legal contentions in Amerikohl's Pre-Hearing Memorandum.

On August 2, 1990, twenty-one of the Appellants filed a Notice of Discontinuance of the appeal. On this same day, the appeal was scheduled for hearings to be held on September 24, 25, 26 and 27 of 1990.

On August 8, 1990, Amerikohl filed a Motion To Limit Issues. In it, Amerikohl argues that Deer Lake has raised issues in its Pre-Hearing Memorandum which were not previously contained in Deer Lake's Notice of Appeal and has failed to establish good cause for its failure to recite the new grounds for appeal in its Notice of Appeal. Amerikohl's Motion asks this Board to issue an order precluding Deer Lake from presenting evidence as to Deer Lake's objections to the permit based on air pollution, noise, the impact of mining on Braddock's Grave State Park, Amerikohl's compliance history and the deleterious health effects on some residents of the Deer Lake Community. Accompanying this Motion was a supporting brief. By letter of August 9, 1990, DER advised us it did not oppose the Motion.

On August 29, 1990, we received Deer Lake's Objections to the Motion and Memorandum In Support of Appellants' Objections. The objections state in sum: "Appellants contend that the Environmental Hearing Board (hereinafter referred to as "Board") should hear all issues raised by the Appellants in their Pre-Hearing Memorandum." Deer Lake's Memorandum argues that in its Notice of Appeal, it reserved the right to amend same to add grounds for appeal found in discovery; that this Board is not required to comply with rigid formalistic procedures which would bar these issues; that our own Pre-Hearing Order No. I implicitly authorizes expansion of issues; that good cause exists to hear these issues because the zoning proceeding in Wharton Township, where some of these issues were raised by some of the Appellants, is a different proceeding than the proceedings before the Board and was handled for those Appellants by a different lawyer; and that Amerikohl is not prejudiced by expanding the issues for a hearing.

The first issue which leaps out of this Motion and the Objections is the fact that Deer Lake makes no allegation that it raised any of the above listed issues in its original Notice of Appeal. It thus concedes that these issues did not occur to Deer Lake when the Notice of Appeal was filed and gives some validity to Amerikohl's contentions. Our reading of Deer Lake's six page Notice of Appeal, which sets forth 17 separate reasons for appeal, certainly confirms its specificity and its failure to mention air pollution, noise, any impact from mining on Braddock's Grave State Park, Amerikohl's compliance history, or the deleterious health effects which the mining operation may have on some residents in this plan of lots.

In response to Amerikohl's Motion, Deer Lake asserts in part that appeals to this Board are not bound by narrow formalistic rules. This is only correct insofaras we try to give each party a right to be heard on each properly raised issue. Where issues are raised for the first time in an appellant's Pre-Hearing Memorandum, Deer Lake is wrong to suggest we may be flexible and ignore the failure to put them in the Notice of Appeal. Our decisions in this area are required to conform to what we are instructed by the appellate courts. In Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources et al., 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd, 521 Pa. 121, 555 A.2d 812 (1989), the Commonwealth Court made clear that we do not have such flexibility. It said:

> "the failure to file specific grounds for appeal within the thirty-day period is a defect going to jurisdiction and the time period cannot be extended nunc pro tunc in the absence of a showing of fraud or breakdown in the [Board's] operation"

Id. at __, 509 A.2d at 886. See also ROBBI v. DER, 1988 EHB 500; James Kacer v. DER, 1989 EHB 914.

Based on this decision, the issues before us as to this Motion are relatively narrow. Deer Lake correctly points out that in its Notice of Appeal, it did reserve the right to amend its notice of appeal as to issues of which it became aware during discovery. Its Memorandum supporting its objections also says that after it took this appeal, it found additional deficiencies in Amerikohl's permit application and DER's review thereof. It then concludes, in error, that good cause is thus shown to deny the motion.

Deer Lake never says that the alleged additional deficiencies were those inserted in its Pre-Hearing Memorandum and objected to by Amerikohl. It does not allege that as to these grounds for appeal, they could only have become apparent through discovery. Finally, Deer Lake fails to aver (and our docket fails to disclose) any request by Deer Lake for leave to amend the Notice of Appeal to add these grounds based on this discovery. We would also have problems believing that all of these grounds for appeal could only have been found in discovery. For example, does Deer Lake expect us to believe that it could only have discovered the potentially deleterious impacts on the health of residents in this plan of lots through interrogatories addressed to Amerikohl? Some of these new grounds for appeal might have been "discovered", but it is also possible that they were just thought of after the appeal was filed. Perhaps the discovery reminded Deer Lake of previously overlooked grounds for appeal. We cannot deny Amerikohl's Motion, however, based on speculations by the Board produced as a result of a lack of necessary specific allegations in Deer Lake's Objections and Memoranda.

Under Pennsylvania Game Commission, supra, unless grounds exists to allow new reasons for appeal to be stated nunc pro tunc, we must grant the Motion. An alleged lack of prejudice to Amerikohl is not grounds for allowing these new issues to be raised and neither is the fact that there is a separate zoning proceeding on appeal in a Common Pleas Court. The same is true with Deer Lake's assertion that the language in Pre-Hearing Order No. 1 implicitly recognizes expansion of issues. That language can do no such thing because to interpret it in such a fashion would require us to concede that the

Board can expand its own jurisdiction, which we clearly are powerless to do. Further, the language cited by Deer Lake merely says a party may be deemed to have abandoned contentions not set forth in its Pre-Hearing Memorandum. As to appellants in general, if an issue in a Notice of Appeal is not covered in the Pre-Hearing Memorandum, too, then, in the appropriate case, this language allows us to rule that by failing to pursue it, an appellant has abandoned it. It does not imply expansion as suggested. Finally, a reading of Deer Lake's objections and its memorandum discloses no allegations of fraud or breakdown of the Board's operation. Thus, no nunc pro tunc basis for these new grounds for appeal are stated and we have no option but to grant the Motion.

O R D E R

AND NOW, this 7th day of September, 1990, Amerikohl's Motion to Limit Issues is granted. It is ordered that Deer Lake is barred from offering evidence in the hearing on the merits of its appeal regarding air pollution noise, the impact of mining on Braddock's Grave State Park, Amerikohl's compliance history, or the deleterious health effects on some residents of the Deer Lake Community. Provided further that Deer Lake may seek reconsideration of this order as to these issues prior to the hearing by promptly filing a Petiton For Leave To Amend its Notice of Appeal, if that Petition sets forth with specificty the grounds it wishes to add, when they first became known to any of the appellants, how discovery caused them to become known to appellants and why discovery was required before Deer Lake could have become aware of same.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 7, 1990

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

T & R COAL, INC. :
:
v. : **EHB Docket No. 87-426-MJ**
:
COMMONWEALTH OF PENNSYLVANIA : **Issued: September 10, 1990**
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER
SUR MOTION TO DISMISS

By Joseph N. Mack

Synopsis

The appeal of T & R Coal, Inc. ("appellant") will be dismissed where the appellant has not appeared for a pre-hearing conference and has not contacted the Board to explain its absence.

OPINION

This appeal, filed October 2, 1987, is from two Compliance Orders issued by the Department of Environmental Resources ("DER") on August 26, 1987 and September 3, 1987. The entire procedural history of this appeal is found in our earlier Opinion issued at the same docket number on June 13, 1990.

A pre-hearing conference was scheduled for July 24, 1990 at the office of Board Member Mack in the State Office Building in Pittsburgh, and notice thereof was sent to the parties by certified mail. The appellant did not make an appearance at the conference nor did it in any way contact the Board or

DER. Based upon the above, DER filed a motion on July 30, 1990 asking us to dismiss the appeal for failure to prosecute.[1] Written notice of this motion was sent by first class mail and by certified mail to T & R Coal, Inc. at the address indicated on the Notice of Appeal. These notices were returned to the Board with the notation of "no mail receptacle" on the face of the envelopes.

The Board may dismiss an appeal where the appellant demonstrates no intention to either prosecute or otherwise conclude its appeal. Allied Steel Products v. Commonwealth, DER, 1989 EHB 112.

In the instant case the Board has attempted to make contact by telephone on six different occasions and departed from its own business pattern to provide the appellant with ample opportunity to respond to the Board's attempt to schedule a hearing on this matter. The Board can go no further in requiring the appellant to go forward with its case, and here applies sanctions as authorized by 25 Pa. Code §21.124 by granting DER's Motion and dismissing this appeal for failure to prosecute the same.

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[1]It should be noted that the Board customarily holds its pre-hearing conferences by telephone and the "in person" conference was a departure to attempt to elicit some response from the appellant. Previous to the issuance of its order for the "in person" conference, the Board had, on six separate occassions, attempted to make contact by telephone with Ronald Reefer, the signatory on both the appeal and the Pre-Hearing Memorandum for the appellant. These calls originated from the Pittsburgh office of the Board to the phone number stated on the appeal form. On July 2, 1990, the Board attempted to contact Reefer twice with messages left on an answering machine. On July 3, a third message was left on the machine. On July 5, the Board reached a woman who said Reefer could no longer be reached at that number. Thereafter, on July 5 and 6, the Board tried a second number (from directory assistance) without being able to make contact. On July 9, the Board scheduled the "in person" conference at the Pittsburgh office and notified the appellant thereof by certified mail dated July 9, 1990. The certified receipt was returned to the Board, marked "unclaimed".

O R D E R

AND NOW, this 10th day of September, 1990, it is ordered that DER's Motion To Dismiss is granted and the appeal of T & R Coal, Inc. is dismissed as a sanction for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 10, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Western Region
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M. DIANE SMITH
SECRETARY TO THE BO/

JOHN PERCIVAL	:	
	:	**EHB Docket No. 83-094-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 13, 1990

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of the Department of Environmental Resources' (Department) issuance of a compliance order, forfeiture of bonds posted with mining permits, and denial of a surface mining operator's license is sustained in part and dismissed in part. The Board holds that it does not have jurisdiction over certain of the Department actions addressed in the hearing on the merits. The Board treats a paragraph of the parties' written stipulation regarding forfeiture of bonds posted for two of the permittee's operations as a notice of appeal under 25 Pa.Code §§21.51(a) and 21.52(a) and takes jurisdiction over the appeal of these bond forfeitures. The operator's appeal of surety bond forfeitures for one of his sites is dismissed for lack of jurisdiction where the bonds had been forfeited four years earlier, the operator had not filed a timely appeal, and the bonds had been referred to the Office of Attorney General for collection. The operator's appeal of the Department's denial of the renewal of his surface mining operator's license is dismissed for lack of jurisdiction.

A mine operator is responsible for all mine drainage on his permitted area and must treat it to meet the applicable effluent limitations, whether or not the mine drainage predated his operation of the mine. As a consequence, the Department's order to the operator to properly treat mine drainage on his permit area is sustained.

The Department's forfeiture of bonds posted with mining permits is sustained where violations are established on the mining permit area. Where liability under the bonds accrues in proportion to the acreage affected, the Department is entitled to forfeit only the minimum liability under the bond where it has not brought forth evidence as to the acreage affected. The Department's forfeiture of a bond where liability under the bond is for the entire amount is sustained where violations of the applicable statute and regulations are established.

INTRODUCTION

This matter was initiated by John Percival on May 12, 1983, with the filing of a notice of appeal seeking review of the Department's April 21, 1983, order requiring Percival to upgrade water treatment facilities at his surface mining operations in Tioga County so that discharges from them would meet the effluent limitations contained at 25 Pa.Code §87.102. A "request for approval of a supersedeas" accompanied Percival's appeal, and it was denied by the Board on May 16, 1983, for failure to conform with the Board's rules of practice and procedure. The Board, however, advised Percival that he could file another petition for supersedeas, and he did so on August 12, 1983.

A hearing on the merits was conducted by former Board Member Anthony J. Mazullo on October 17-21, 1983. The parties stipulated on the record of the hearing that Percival's appeal also encompassed the Department's decision not to issue Percival a 1983 surface mining operator's license, the Depart-

ment's July 27, 1983, letter informing Percival that it intended to forfeit the bonds posted for his operations in Sullivan and Tioga County, and the Department's September 15, 1983, notification to Percival that it was forfeiting his bonds. At the close of the hearing on the merits, Mr. Mazullo orally denied Percival's second petition for supersedeas.

On February 28, 1984, the Department filed its post-hearing brief, arguing that the water quality in Johnson Creek has been degraded considerably by the Percival mining operation and that Percival failed to treat water discharged from his treatment ponds to meet effluent limitations contained in his mining permit and 25 Pa.Code §87.102. The Department also contended that it had established the existence of numerous other violations which were sufficient to warrant a denial of Percival's surface mining operator's license and the forfeiture of the bonds posted for the surface mining sites. The Department maintained that Percival had not refuted these claims and that its issuance of the order, denial of the operator's license, and forfeiture of Percival's bonds was not an abuse of discretion.

Percival filed his post-hearing brief on July 2, 1984, arguing that pre-existing discharges on the mining site were not his responsibility, that there was no evidence that he had affected these discharges or caused the degradation of Johnson Creek, and that, in any event, he had made a good faith effort to treat the discharges. Percival alleged that comparative pre-mining water sampling was unreliable, since pre-mining samples were obtained during 1972, a year with abnormally heavy rainfall. Finally, Percival argued that bonds for the Sullivan site should not be forfeited since Percival intended to continue mining it.

Consistent with our precedent, the parties are deemed to have abandoned all issues not set forth in their post-hearing briefs. Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication issued May 11, 1990).

Mr. Mazullo resigned from the Board on January 31, 1986, without having prepared an adjudication. Chairman Maxine Woelfling thereafter advised the parties by letter dated May 6, 1986, that, barring their objection, the appeal would be reassigned to her for the purposes of preparing an adjudication. Neither party objected to her participation in the preparation of an adjudication. This adjudication has been prepared from a cold record. Lucky Strike Coal Co. and Louis J. Beltrami v. Dept. of Environmental Resources, ___ Pa.Cmwlth. ___, 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. Appellant is John P. Percival, a sole proprietor, who has been engaged in surface coal mining pursuant to License No. 201087, which was issued by the Department on February 3, 1982 (Stipulation,[1] N.T. 3).

2. Appellee is the Department, the agency with the authority 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.* (the Clean Streams Law), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (the Surface Mining Act), and the rules and regulations adopted thereunder, and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code).

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[1] The parties' Stipulation of Facts will be referred to as "Stipulation."

Tioga Site

3. On April 2, 1973, the Department issued Mine Drainage Permit No. 47725M7 (Tioga MDP) to Percival authorizing him to conduct strip mining in Hamilton Township, Tioga County (N.T. 4; Paragraph 4, Stipulation of Facts; Ex. C-1).

4. The Department amended the Tioga MDP (Amended Tioga MDP) on March 9, 1977 (Ex. C-1).

5. The Amended Tioga MDP contained a number of standard and special conditions which required Percival, *inter alia*, to

a) employ an automatic dispensing machine to add lime or other neutralizing agents to the mine drainage (Special Condition No. 11, Ex. C-1);

b) amend his mining plan to prevent pollution if field inspection after the commencement of operations reveals geologic conditions that necessitate a change in his mining plan (Special Condition No. 13, Ex. C-1);

c) neutralize and dewater all pools encountered during operation (Special Condition No. 14, Ex. C-4);

d) treat to neutrality any gravity drainages from previous mining which are encountered (Special Condition No. 15, Ex. C-1);

e) if during the course of mining, deep mine workings used as drainage courses or containing impounded water are encountered or disturbed, cease strip mining until an amended mining plan is approved by the Department (Special Condition No. 33, Ex. C-1);

f) assure that any mine drainage discharged has a pH which is not less than 6.0 or greater than 9.0 (Standard Condition No. 10, Ex. C-3[2]);

g) assure that any mine drainage discharged does not exceed 7.0 milligrams per liter (mg/l) of iron in concentration (Standard Condition No. 11, Ex. C-3);

h) assure that acidity of any mine drainage discharged does not exceed the alkalinity (Standard Condition No. 12, Ex. C-3);

i) backfill concurrent with stripping to the highest degree possible (Standard Condition No. 15, Ex. C-3); and

j) properly maintain and operate the treatment works authorized by the permit (Standard Condition No. 19, Ex. C-1).

6. The Department issued six mining permits (MPs) for the area encompassed by the Tioga MDP:[3]

a) MP 1087-1 covered 10 acres;

b) MP 1087-2 covered 10 acres;

c) MP 1087-2(A) covered 6.4 acres;

d) MP 1087-2(A-2) covered 33 acres;

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[2] Although Ex. C-1 incorporated the March 31, 1967, Mine Drainage Standard Conditions, the exhibit did not have the standard conditions attached to the permit. We have taken the language of the standard conditions from Ex. C-3, Mine Drainage Permit 5774SM2 (Sullivan MDP) which authorized Percival to conduct surface mining operations on a site in Colley Township, Sullivan County.

[3] Because the MPs for the Tioga and Sullivan sites were not introduced into evidence, we cannot ascertain when they were issued.

e) MP 1087-5 covered 26 acres; and

f) MP 1087-5(A) covered 10 acres.

(Paragraph 9(a), Stipulation; N.T. 22)

7. During the course of operations on the Tioga site, Percival mined the D (Lower Freeport), C (Middle Kittanning), and upper split of the B (Lower Kittanning) coal seams (N.T. 88, 484).

8. The upper split of the B seam is colloquially known as the Bloss Vein, while the lower split of the B seam is colloquially known as the Bear Creek Vein (N.T. 88, 484).

9. The Tioga site has three hills, Hill No. 1, the northernmost hill; Hill No. 2, the middle hill; and Hill No. 3, the southernmost hill (N.T. 101).

10. The dip of the coal on the Tioga site is toward the northwest, 2.5 degrees from north (N.T. 93, 95; Ex. C-2).

11. Groundwater on the Tioga site flows primarily to the northwest; it enters several tributaries and eventually goes into Johnson Creek (N.T. 118).

12. Percival mined the Tioga site from 1973 to 1979 (N.T. 376).

13. The Tioga site became inactive in 1979 because of financial problems, and equipment was removed; the equipment was brought back for back-filling in late 1979 and early 1980 (N.T. 380).

14. By letter dated June 24, 1980, John P. Varner, a Department Mine Conservation Specialist, informed Percival that water samples collected at the Tioga site showed that the Percival operation had degraded the water quality of several pre-existing deep mine discharges and, in addition, had created several other acid mine drainage discharges. The letter ordered Percival to submit plans for the interim treatment and permanent abatement of all dis-

charges that did not meet applicable state and federal effluent limits (N.T. 235; Ex. C-4).

15. Percival wanted to reactivate the Tioga site under MP 1087-5(A) (N.T. 203-204).

16. Through a subcontractor, Percival began mining on MP 1087-5 in July, 1982 (N.T. 382-383).

17. Before the Percival operation, the three hills had been extensively deep-mined on the Bloss Vein (N.T. 325).

18. The deep mine operators drilled down to the Bear Creek Vein, thereby creating a "French drain" so that water accumulating in the deep mines would discharge through the Bear Creek Vein (N.T. 332).

19. Hills No. 2 and 3 had been partially stripped by another operator prior to the Percival operation (N.T. 325).

20. Prior to the Percival mining operation, numerous discharges existed on the Tioga site, some of which were from the openings on the Bear Creek Vein; all of these discharges flowed to Johnson Creek through several branches of a tributary of Johnson Creek (N.T. 343).

21. Percival's operations affected all of Hills No. 2 and 3 and part of Hill No. 1 (N.T. 422).

22. Water quality analyses were performed on various samples taken from monitoring points in Johnson Creek, a tributary to Johnson Creek, several branches of the tributary to Johnson Creek, and various discharge points on the Tioga site; a water quality analysis was also done on a sample of water

taken from an open pit on the Tioga site.[4]

23. Monitoring Point P-2 was located near a pre-existing deep mine discharge to the west of Hill No. 3 and on the third branch of the main tributary to Johnson Creek (N.T. 122, 123; Stipulation, Table B; Ex. C-6).

24. Monitoring Point P-2 was to the northwest of Hill No. 2, and water at Monitoring Point P-2 eventually discharged into treatment ponds installed by Percival on the western border of Hills No. 2 and No. 3 (N.T. 126; Ex. C-6).

25. Although Monitoring Point P-2 was not in the area that Percival mined, it was within the Tioga MDP and hydrologically linked to the Percival operation (N.T. 125, 128).

26. The first sample at Monitoring Point P-2 was taken on November 15, 1972, prior to Percival's mining and shortly after a heavy rainfall. The sample had a laboratory pH of 3.4, zero alkalinity, 26 milligrams per liter (mg/l) acidity, .4 mg/l iron, and 60 mg/l of sulfates (Exhibits to Stipulation).

27. After Percival began mining the Tioga site, eight samples were taken at Monitoring Point P-2 between October 16, 1979, and February 14, 1983. The range of parameters for these samples was as follows:

Parameter	Low	High
pH	2.6	3.5
Alkalinity	0	
Acidity	760 mg/l	6100 mg/l
Iron	47.3 mg/l	848.1 mg/l
Manganese	72.09 mg/l	256.8 mg/l
Aluminum	64 mg/l	422.4 mg/l
Sulfates	1260 mg/l	8400 mg/l

(Exhibits to Stipulation)

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[4] The parties stipulated as to the authenticity and accuracy of the analyses of certain samples, and this adjudication only considers the stipulated analyses.

28. The samples that were purported to be taken at Monitoring Point P-2 on June 29, 1978, and August 16, 1978, were not taken at the same point as the other samples at Monitoring Point P-2, and, therefore, were not representative of the water quality at Monitoring Point P-2 (N.T. 122).

29. All eight of the samples taken between October 16, 1979, and February 14, 1983, significantly exceeded the effluent limitations at 25 Pa.Code §87.102 and the effluent limitations contained in the Tioga MDP (Exhibit to Stipulation).

30. Monitoring Point P-3 was located approximately 300 to 400 feet northeast of Monitoring Point P-2, adjacent to the main access road, and at a point where the pre-existing deep mine discharge flows into a tributary of Johnson Creek (N.T. 128, Ex. C-6).

31. Monitoring Point P-3 is hydrologically linked to the Percival mining operation (N.T. 132).

32. Three samples were taken from Monitoring Point P-3. The concentrations of the various parameters analyzed in these samples were as follows:

Parameter	August 30, 1982	September 30, 1982	November 29, 1982
pH	3.8	2.7	2.8
Alkalinity	0 mg/l	0 mg/l	0 mg/l
Acidity	716 mg/l	5276 mg/l	2983 mg/l
Iron	0.57 mg/l	130 mg/l	312 mg/l
Manganese	184.9 mg/l	373 mg/l	206 mg/l
Aluminum	46.36 mg/l	32.0 mg/l	133 mg/l
Sulfates	1290 mg/l	10400 mg/l	4100 mg/l

(Exhibits to Stipulation)

33. A sample from Monitoring Point P-3, identified as "4853" was taken on June 19, 1968; it was taken at a point at least 500 feet upstream from where the other samples from Monitoring Point P-3 were taken and was of water collected in unreclaimed strippings (N.T. 532). Sample 4853 will be disregarded by the Board in reaching this adjudication.

34. The quality of the samples at Monitoring Point P-3 exceeded the effluent limitations in 25 Pa.Code §87.102, with the quality of the water in the two most recent samples being significantly worse than the quality of the earliest sample (Exhibit to Stipulation).

35. Monitoring Point P-4 was located downstream from Monitoring Points P-2 and P-3 and several treatment ponds installed by Percival. Water flowing from Monitoring Points P-2 and P-3 flowed into the treatment ponds on the western border of Hills No. 2 and No. 3 and eventually to Monitoring Point P-4, which was the location of a weir installed by Percival (N.T. 139; Ex. C-6).

36. On January 24, 1983, Mr. Varner advised Percival that before the Department would consider issuing Percival his 1983 mining license, he would have to improve his water treatment facilities on the Tioga site in order to obtain nine consecutive water samples meeting the Department's effluent standards (N.T. 320-322; Ex. C-1).

37. There was a wide fluctuation in the quality of the samples taken at Monitoring Point P-4 because of Percival's various attempts at treating the discharges from Monitoring Points P-2 and P-3 (N.T. 320-322).

38. Of the twenty samples taken at Monitoring Point P-4 from August 31, 1982, through September 20, 1983, only one sample, the one taken on February 17, 1983, met the effluent limitations at 25 Pa.Code §87.102 (Exhibit to Stipulation).

39. Percival's final attempt at treating the discharges at Monitoring Points P-2 and P-3 involved various steps. The discharges were conveyed to the first of three treatment ponds through collection ditches. At the lower end of the first pond a pump mixed hydrated lime with the collected mixture, and then forced it into a spray aeration area from which the mixture

was then collected and moved to a second treatment pond. In the second pond, the collected mixture was treated with soda ash, and then it was moved to a third pond for final settling. The mixture was then discharged and monitored at the weir at Monitoring Point P-4 (N.T. 539-541).

40. Some of the water that should have flowed into the treatment ponds bypassed them because of breaches in the ponds (N.T. 142, 215).

41. Between February 15 and 24, 1983, Percival attempted to obtain nine consecutive samples from Monitoring Point P-4 which met the applicable effluent limitations; only the sample taken on February 17, 1983, met the limitations (N.T. 322, 541-542).

42. The three pond treatment system used by Percival failed, in the estimation of his consultant, Edwin Koppe, because of inadequate retention time (N.T. 541-542).

43. When the three pond treatment system failed, Percival made no further attempts to treat the discharges from Monitoring Points P-2 and P-3 because of his belief that there was no economically feasible way of providing treatment (N.T. 391-392).

44. Monitoring Point L was located on a tributary between Hill Nos. 1 and 2 and received, at one time or another, drainage from pre-existing deep and strip mines (N.T. 142-145; Ex. C-6).

45. Six samples were taken at Monitoring Point L from November 15, 1972, through May 2, 1980; the range of the concentrations of the parameters was as follows:

Parameter	Low	High
pH	2.9	3.2
Alkalinity	0	
Acidity	88 mg/l	2440 mg/l
Iron	1.4 mg/l	38.25 mg/l
Manganese	84.69 mg/l	155.16 mg/l
Aluminum	121.99 mg/l	194.46 mg/l
Sulfates	170 mg/l	4515 mg/l

(N.T. 149; Exhibits to Stipulation)

46. None of the six samples taken from Monitoring Point L met the effluent limitations at 25 Pa.Code §87.102; the five samples taken after Percival began mining the site were significantly worse in quality than the sample taken prior to Percival's mining (N.T. 149; Exhibits to Stipulation).

47. Monitoring Point S was at a point 20 to 40 feet up into Percival's backfill and collected water being discharged from the toe of Percival's mining spoil (N.T. 150-151, 524-526).

48. Five samples were taken at Monitoring Point S, one before and four after Percival's commencement of surface mining operations; the pre-mining sample, which was taken on June 19, 1968, showed a pH of 3.7, alkalinity of -92 mg/l, iron of 1.3 mg/l, and sulfates of 20 mg/l (Exhibits to Stipulation).

49. The concentrations of parameters analyzed in the samples taken at Monitoring Point S after Percival initiated mining were:

	Aug. 16, 1978	May 2, 1980	Sep. 2, 1981	Sep. 20, 1983
pH	3.2	2.3	3.1	3.0
Acidity (mg/l)	352	390	994	428
Alkalinity	--	0	0	0
Iron (mg/l)	7.75	6.15	80.5	12.16
Manganese	--	83.34	108	83.6
Aluminum (mg/l)		58.85	95.1	
Sulfates (mg/l)	935	1020	2220	1170

50. The water sampled at Monitoring Point S did not meet the applicable effluent limitations for pH, acidity, iron, and manganese and showed elevated levels of aluminum and sulfates (Exhibits to Stipulation).

51. Monitoring Point P-6 was located to the west of the Percival operation on the northernmost tributary to the main tributary to Johnson Creek; it was a monitoring station that Percival installed with a weir to gauge flows (N.T. 162; Ex. C-6).

52. Monitoring Point P-6 received drainage from a hollow between Hill No. 1 and the boundary of the Tioga State Forest (N.T. 163).

53. Six samples were taken at Monitoring Point P-6 between September 30, 1982, and September 21, 1983; the range of concentrations for the parameters was as follows:

Parameter	Low	High
pH	2.6	2.9
Alkalinity	0	
Acidity	1116 mg/l	3303 mg/l
Iron	61.18 mg/l	357 mg/l
Manganese	.10 mg/l	240 mg/l
Aluminum	106 mg/l	197 mg/l
Sulfates	1890 mg/l	5100 mg/l
Suspended Solids	10 mg/l	16 mg/l

(Exhibits to Stipulation)

54. Monitoring Point 1300 received drainage from between Hills No. 2 and 3 (N.T. 162-166).

55. Two samples were taken from Monitoring Point 1300 prior to Percival's mining the Tioga site; the concentrations of the parameters were as follows:

Parameter	June 19, 1968	Nov. 15, 1972
pH	3.5	3.2
Alkalinity	- .108 mg/l	0 mg/l
Acidity	not analyzed	240 mg/l
Iron	.9 mg/l	4.5 mg/l
Sulfates	89 mg/l	500 mg/l

(Exhibits to Stipulation)

56. Five samples were taken from Monitoring Point 1300 between June 28, 1978, and September 21, 1983; the samples had the following range of concentrations for the parameters analyzed:

Parameter	Low	High
pH	2.3	2.8
Alkalinity	0	
Acidity	Less than 2000 mg/l	5100 mg/l
Iron	2.43 mg/l	528.75 mg/l
Sulfate	2730 mg/l	6615 mg/l

(Exhibits to Stipulation)

57. Manganese was analyzed in only the three most recent samples of Monitoring Point 1300; the concentrations were 171.7 mg/l, 295 mg/l, and 145.92 mg/l (Exhibits to Stipulation).

58. Aluminum was analyzed in only the May 2, 1980, and September 2, 1981, samples of Monitoring Point 1300; the concentrations were 186.3 mg/l and 315 mg/l (Exhibits to Stipulation).

59. The quality of the five samples taken at Monitoring Point 1300 after Percival began operating was significantly worse than the quality of the two samples taken prior to Percival's operations (N.T. 162-166; Exhibits to Stipulation).

60. Monitoring Point 1301 consisted of strip and deep mine discharges that flowed to the northernmost tributary of the main tributary to Johnson Creek, and eventually passed through Monitoring Point P-6 (N.T. 166).

61. A sample was taken from Monitoring Point 1301 on November 15, 1972, prior to Percival's mining the Tioga site; the parameters measured had the following concentrations:

Parameter	Concentration
pH	3.1
Alkalinity	0
Acidity	468 mg/l
Iron	5.0 mg/l
Sulfates	800 mg/l

(Exhibits to Stipulation)

62. Samples were taken from Monitoring Point 1301 on September 21,

1983, after Percival had mined the site; the concentrations of the parameters analyzed were as follows:

Parameter	Concentration
pH	2.6
Alkalinity	0
Acidity	1598 mg/l
Iron	73.72 mg/l
Manganese	2730 mg/l
Sulfates	162.83 mg/l

(Exhibits to Stipulation)

63. On April 18, 1983, a sample of water was taken from a pit on the active Percival operation located east-southeast of the Tioga State Forest boundary (N.T. 167-168).

64. The concentrations of the parameters analyzed in the April 18, 1983, pit water sample were as follows:

Parameter	Concentration
pH	3.2
Alkalinity	0 mg/l
Acidity	700 mg/l
Iron	105.07 mg/l
Manganese	50.54 mg/l
Aluminum	28.35 mg/l
Sulfates	810 mg/l

(Exhibits to Stipulation)

65. Acid-producing pyrite was present throughout the Tioga mining site (N.T. 168-169).

66. The coal seams that were mined by Percival are generally considered to be acid-producing coal seams (N.T. 170-171).

67. During a July 2, 1982, inspection, Inspector Henry Daniels found inadequate erosion and sedimentation controls, no treatment facilities, water accumulated in the pit, no highwall safety barrier, and no perimeter markers on the Tioga site (Ex. C-14).

68. By letter dated July 12, 1982, John Varner informed Percival that all violations noted in Mr. Daniels' July 2, 1982, inspection report were to be corrected by September 10, 1982, or a cessation order would be issued and civil penalties would be assessed against Percival (Ex. C-14).

69. The Department issued Percival a cease order on September 13, 1982, as a result of Percival's failure to treat the discharge next to the boundary of the Tioga State Forest and his failure to fully implement the required erosion and sedimentation controls (N.T. 204).

70. By letter dated September 21, 1982, John Meehan, District Mining Manager of the Department's Hawk Run office, informed Percival that the Tioga operation would remain ceased until an acceptable erosion and sedimentation control plan was submitted, approved, and implemented; the discharges met effluent criteria; and Percival submitted either an abatement plan or demonstrated that the discharges were not his responsibility (Ex. C-14).

71. By letter dated September 24, 1982, Percival informed the Department that he was not responsible for the discharges because he had stripped the two seams of coal above the Bear Creek Vein in Hills No. 1, 2, and 3; had completely backfilled and seeded the pre-existing strippings; and had daylighted the old Bloss Vein deep mines, thereby eliminating the discharges from these mine openings and reducing the flow from the Bear Creek workings by approximately 50 per cent (Ex. A-16).

72. Although Percival disclaimed responsibility for the discharges, he still submitted a temporary abatement plan (N.T. 387).

73. On April 21, 1983, the Department issued Percival the order which is the subject of this appeal. The order cited Percival for his failure to adequately treat discharges on the Tioga site and for his failure to pump and treat water accumulated in the pit (Attachment to Notice of Appeal).

74. The order directed Percival to upgrade his water treatment facilities to meet applicable effluent limitations, to undertake weekly monitoring of the discharges, to pump and treat the pit water accumulations, and to partially backfill the pit to prevent future water accumulations (Attachment to Notice of Appeal).

75. The pit water accumulation to which the April 21, 1983, order referred was the pit north of Hill No. 1 where Percival still wanted to mine (N.T. 343).

76. Percival affected the groundwater hydrology on the Tioga site by the following activities during the course of his operations:

a) Percival drilled through the Bloss Vein in order to locate the Bear Creek Vein and, as a result, allowed water from the Tioga site to be discharged through the Bear Creek discharges (N.T. 487).

b) Percival covered several pre-existing discharges on Hill No. 3, rather than treating and/or eliminating them, as required by Special Condition 9 of the Tioga MDP (N.T. 343, 350, 479; Ex. C-1).

c) Percival was required by Special Condition 14 of the Tioga MDP to put clay seals between highwalls, and he obtained the clay by removing the clay barrier beneath the Bloss Vein. This, in turn, allowed water to percolate down to the Bear Creek Vein and discharge toward Monitoring Points P-2, P-3, and P-4 (N.T. 485, 487, 490, 498, 565; Ex. C-1).

d) Percival mixed toxic binders between the coal seams into the backfill material (N.T. 488).

77. In compliance with the April 21, 1983, order, Percival did pump the water into a treatment pond and filled the pit using a bulldozer (N.T. 393).

78. An inspection conducted by Inspector Daniels on June 9, 1983, revealed that although erosion and sedimentation controls were adequate, the discharges on the Tioga site were not being treated, no equipment was on the site, and there were approximately ten to fifteen acres of non-concurrent backfill (N.T. 208-210; Ex. C-12).

79. By letter dated July 27, 1983, John Varner informed Percival that the Department intended to forfeit the bonds on the Tioga site because backfilling was still not current with mining, backfilling equipment had been removed from the site, there were inadequate water treatment facilities, and Percival had failed to comply with the abatement order issued on April 21, 1983. The letter notified Percival that if the violations were not corrected within 30 days, the Department would forfeit the bonds (N.T. 237-238; Ex. C-14).

80. During a September 12, 1983, inspection, Inspector Daniels found that the violations existing on the Tioga site during his June 9, 1983, inspection were uncorrected and that, in addition, toxic material was exposed on the site (Ex. C-12).

81. On September 15, 1983, the Department notified Percival that it intended to forfeit the bonds posted for MPs 1087-1, 1087-2, 1087-2(A), 1087-2(A-2), 1087-5, and 1097-5(A) because of outstanding violations on the Tioga site (Paragraph 9, Stipulation).

82. During his October 14, 1983, inspection, Inspector Daniels again found that the June 9, 1983, violations were uncorrected and, in addition,

that water was leaching out through the breastwork of one of the treatment ponds (Ex. C-12).

83. Aetna Casualty Surety Bond No. 57 SB 021622 in the amount of $5,750 was posted in connection with MP 1087-1; liability under the bond was to accrue in the amount of $500/acre, with a minimum liability of $5000 (Stipulation; Exhibits to Stipulation).

84. Aetna Casualty Surety Bond No. 57 SB 022745 in the amount of $5000 was posted in connection with MP 1087-2; liability under the bond was to accrue in the amount of $500 per acre, with a minimum liability of $5000 (Stipulation; Exhibits to Stipulation).

85. Aetna Casualty Surety Bond No. 57 SB 024660BCA in the amount of $3200 was posted in connection with MP 1087-2(A); liability was to accrue in the amount of $500 per acre (Stipulation; Exhibits to Stipulation).

86. Aetna Casualty Surety Bond No. 57 SB 028120 in the amount of $33,000 was posted in connection with MP 1087-2(A-2); liability under the bond was to accrue in the amount of $1000 per acre, with a minimum liability of $5000 (Stipulation; Exhibits to Stipulation).

87. Aetna Casualty Surety Bond No. 57 SB 031830BCA in the amount of $13,000 was posted in connection with MP 1087-5; liability was to accrue in the amount of $500 per acre, with a minimum liability of $5000 (Stipulation; Exhibits to Stipulation).

88. A collateral bond in the amount of $13,000 was posted in connection with MP 1087-5(A); liability under the bond was to accrue in the amount of $1000 per acre, with a minimum liability of $5000 (Stipulation Exhibits).

89. All of the bonds were conditioned upon Percival's faithful performance of his obligations under the Clean Streams Law, the Surface Mining Act, the applicable rules and regulations promulgated thereunder, and the

provisions and conditions of the permits issued thereunder (Stipulation Exhibits).

90. On July 2, 1982, Inspector Henry Daniels conducted an inspection of MPs 1087-1, 1087-2, 1087-2(A), 1087-5, and 1087-5(A); he found a lack of erosion and sediment controls in violation of 25 Pa.Code §87.106 on all the MPs inspected and an absence of required treatment facilities on MP 1087-2(A) in violation of 25 Pa.Code §87.102 (Ex. C-12).

91. The remainder of the violations found by Inspector Daniels - no highwall safety barrier and water accumulating in the pit in violation of §4.2 of the Surface Mining Act, and no perimeter signs, in violation of 25 Pa.Code §87.92 - were not attributed to a specific MP on the inspection report (Ex. C-12).

92. Inspector Daniels conducted another inspection of the Tioga site on September 13, 1982; his inspection report designated MP 1087-5(A) as the MP inspected (Ex. C-12).

93. During the course of a June 9, 1983, inspection, Mr. Daniels found that discharges on the Tioga MDP were not being treated as required by the April 21, 1983, order and that there was an absence of backfilling equipment on the site and non-concurrent backfilling in violation of 25 Pa.Code §§87.140 and 87.141 (N.T. 208-210).

94. Although Mr. Daniels' June 9, 1983, inspection report noted MPs 1087-2 and its "Amends," 1087-4, 1087-5, and 1087-5(A) as the MPs inspected,[5] none of the violations were specific to any of the MPs (Ex.. C-12).

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[5] Mr. Daniels' inspection report also referred to MP 1087-4, which is part of the Sullivan site. See Finding of Fact 100, *infra*.

95. Mr. Daniels conducted another inspection on July 6, 1983, and his inspection report was similar to the June 9, 1983, inspection report (Ex. C-12).

96. Mr. Daniels conducted inspections of the Tioga site on September 12 and October 14, 1983, and found the same violations that he found on June 9, 1983; in addition, he found toxic materials exposed on the site on September 12, 1983, in violation of 25 Pa.Code §87.110, and water leaching through the breastwork of the treatment ponds on October 14, 1983 (Ex. C-12).

97. The September 12, 1983, inspection report indicated the permit inspected as the Tioga MDP and the phase being mined as MP 1087-5(A), but it did not associate the noted violations with any particular MP (Ex. C-12).

98. The Department presented no evidence concerning the acreage affected by Percival on MPs 1087-1, 1087-2, 1087-2(A), 1087-2(A-2), 1087-5, and 1087-5(A).

Sullivan Site

99. The Sullivan MDP contained the same standard and special conditions set forth in Finding of Fact No. 5, except for Special Condition 33 (Ex. C-1, C-3).

100. The Department issued four MPs[6] for the area encompassed by the Sullivan MDP:

a) MP 1087-3 covered 10 acres;

b) MP 1087-3(A) covered 28 acres;

c) MP 1087-4 covered 10 acres; and

d) MP 1087-6 covered 10 acres.

(Stipulation Exhibits)

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[6] As with the MPs for the Tioga site, the MPs for the Sullivan site were not introduced into evidence.

101. For a period extending from February 28, 1979, to September 1, 1979, Percival discontinued all surface mining operations on MPs 1087-3, 1087-3(A), and 1087-4 (Stipulation - Consent Order and Agreement (COA)).

102. On May 21, 1979, backfilling equipment needed to complete the restoration of MPs 1087-3, 1087-3(A), 1087-4, and 1087-6 was removed in violation of §4.2 of the Surface Mining Act, 25 Pa.Code §77.92(f)(2), and the terms and conditions of the Sullivan MDP (Stipulation - COA).

103. From sometime before May 29, 1979, until April 6, 1981, Percival discontinued all operations on MP 1087-6 (Stipulation -COA).

104. From May 29, 1979, until April 6, 1981, Percival failed to cover coal measures exposed on MPs 1087-3, 1087-3(A), 1087-4, and 1087-6 in violation of §4.2(a) of the Surface Mining Act, 25 Pa.Code §77.92(a)(4), and the terms and conditions of the Sullivan MDP (Stipulation - COA).

105. Aetna Casualty Surety Bond No. 57 SB 027455 in the amount of $10,000 was posted in connection with MP 1087-3; liability under the bond was to accrue at a rate of $1000 per acre, with a minimum liability of $5000 (Stipulation Exhibits).

106. Aetna Casualty Surety Bond No. 57 SB 029865 in the amount of $4000 was posted in connection with MP 1087-3(A); liability under the bond was to accrue at the rate of $500 per acre (Stipulation Exhibits).

107. Aetna Casualty Surety Bond No. 57 SB 027444 in the amount of $10,000 was posted in connection with MP 1087-4; liability under the bond was to accrue at the rate of $1000 per acre, with a minimum liability of $5000 (Stipulation Exhibits).

108. Certificate of Deposit No. 65315 (collateral bond) drawn on the First Bank of Troy and in the amount of $5750, was posted in connection with

MP 1087-6; liability under this collateral bond was to accrue at the rate of $575 per acre, with a minimum liability of $5000 (Stipulation Exhibits).

109. On September 21, 1979, the Department, pursuant to §4(h) of the Surface Mining Act, forfeited the bonds for MPs 1087-3, 1087-3(A), 1087-4, and 1087-6 as a result of Percival's violations of §4.2(a) of the Surface Mining Act and 25 Pa.Code §§77.92(a)(4) and (2) (Stipulation - COA).

110. Notice of the bond forfeitures was sent to both Percival and Aetna Casualty in letters from the Department dated September 21, 1979; the letters advised Aetna Casualty and Percival of their right to appeal the bond forfeitures to the Environmental Hearing Board (Stipulation - COA).

111. Neither Aetna Casualty nor Percival appealed the bond forfeitures to the Environmental Hearing Board within the prescribed 30 day appeal period (Stipulation - COA).

112. On December 20, 1979, at the request of Percival, Donald Zutlas, Chief of the Bonding Division of the Bureau of Mining and Reclamation, directed Joseph Strain, Deputy Attorney General, Collections Division of the Office of Attorney General, to withhold collection on the surety bonds forfeited in connection with MPs 1087-3, 1087-3(A), and 1087-4 (Stipulation - COA).

113. On December 27, 1979, Percival appealed the forfeiture of the collateral bond posted in connection with MP 1087-6 to the Environmental Hearing Board; the appeal was docketed at EHB Docket No. 79-198-W (Stipulation - COA).

114. On February 19, 1980, the Department issued a cease and desist order to Percival for mining without bonds on MPs 1087-3, 1087-3(A), 1087-4, and 1087-6 (Stipulation - COA).

115. On February 4, 1980, Percival filed a petition for allowance of appeal *nunc pro tunc* at EHB Docket No. 79-198-W; the petition covered all bonds posted in connection with the Sullivan MDP (Stipulation - COA).

116. On April 6, 1981, Percival and the Department executed a COA relating to the Sullivan site (Stipulation - COA).

117. The COA required Percival, *inter alia*, to commence mining and reclamation on the area of MP 1087-6 within 10 days after the signing of the COA and not resume mining on areas covered by MPs 1087-3, 1087-3(A), and 1087-4 unless and until bonds complying with the new bonding schedules were submitted and approved for those areas (Stipulation - COA).

118. Percival agreed to comply with the COA and to waive his right to appeal the Order to the Board (Stipulation-COA).

119. The Department agreed in the COA to forbear from collecting the forfeited surety bonds so long as Percival complied with the provisions of the COA (Stipulation-COA).

120. The Department did, however, collect the collateral bond posted for MP 1087-6. Percival appealed the Department's collection of the collateral bond to the Board of Finance and Revenue (Board of Finance), and the Board of Finance sustained the Department's action (Board of Finance Decision, Stipulation).

121. In accordance with the provisions of the COA, Percival withdrew his appeal at EHB Docket No. 79-198-W on July 14, 1981 (Stipulation-COA).

122. After entering into the COA, Percival contracted with Sullivan County Mining Company to work on MP 1087-6; Sullivan County Mining Company worked the site until sometime in the fall of 1981, when it removed its equipment (N.T. 304, 310).

123. On or about April 8, 1981, Percival rebonded MP 1087-6A[7] by submitting a collateral bond of $40,000 in the form of a certified check drawn upon the Central Pennsylvania National Bank; liability under the bond was for the entire amount (Stipulation Exhibits).

124. Although the COA required completion of an artificial pond on MP 1087-3(A) by June 1, 1982, Percival believed that the completion of this pond was contingent upon the completion of mining on MP 1087-6A, and this could not be accomplished by June 1, 1982, because of the poor coal market conditions (N.T. 308).

125. The length of the pit on MP 1087-6A exceeded 1500 feet because Percival changed the direction of mining so that the pit on MP 1087-6A would intersect the open pit on MP 1087-3(A), thus facilitating the completion of the artificial pond on MP 1087-3(A) (N.T. 314-315).

126. Percival believed that Department Inspector George Lokitis gave him permission to extend the pit length on MP 1087-6A; counsel for the Department stipulated that Percival requested permission to extend the pit on MP 1087-6A, but this permission was never granted (N.T. 315-316).

127. Department Inspector Terry Confer made numerous inspections of MP 1087-6A (N.T. 37-39).

128. During the course of a September 28, 1982, inspection, Mr. Confer found that an L-shaped open cut of 2200 feet by 90 feet existed on MP 1087-6A, water was impounded in pits, backfilling was not concurrent, adequate treatment of drainage was not being provided, there were exposed coal

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[7] The bond instrument indicates that the bond was posted in connection with MP 1087-6A and denotes that it is for acreage additional to MP 1087-6; the parties' stipulation indicates that it was posted for MP 1087-6C. We will refer to the area covered by the $40,000 collateral bond as MP 1087-6A in order to avoid any confusion with the area covered by the $5,750 collateral bond.

measures, no backfilling equipment was present, the permit area was not adequately marked, the erosion and sedimentation controls were inadequate, and pit lengths were excessive (N.T. 38-39; Ex. C-8).

129. Percival was advised of the violations on the Sullivan site by a letter from the Department dated October 6, 1982 (Ex. C-11).

130. Inspector Confer conducted inspections of the Sullivan site on October 20, November 15, and December 6, 1982, and found the same conditions that he found on September 28, 1982 (N.T. 40-41; Ex. C-8).

131. Percival was again notified of the violations on the Sullivan site by Department letter dated January 3, 1983 (Ex. C-11).

132. During the course of his December 20, 1982, and January 18, 1983, inspections, Mr. Confer found that although Percival had brought a bulldozer onto MP 1087-6A and was backfilling the southern end of the pit, there was not adequate equipment to reclaim the other MP areas (N.T. 41-42).

133. Percival met with representatives of the Department on January 3, 1983, to discuss the Sullivan site and promised to correct violations on the site; Percival was unable to meet certain commitments made during that meeting allegedly because Sullivan County Mining Company failed to meet its commitments to Percival (N.T. 450).

134. The Department advised Percival of the violations on the Sullivan site in a January 20, 1983, letter (Ex. C-11).

135. Inspector Confer found on his March 9, May 7, and June 2-3, 1983, inspections that although the bulldozer was on the Sullivan site, it was not working (N.T. 42).

136. When Inspector Confer visited the Sullivan site on July 5, 1983, the bulldozer was removed (N.T. 44).

137. Although Percival did backfill about 100 yards on MP 1087-6A, the permit area was not totally reclaimed (N.T. 56).

138. The treatment pond on MP 1087-6A was not completed, there was no discharge pipe, and it appeared that the pond would not hold water (N.T. 58).

139. The Department notified Percival of the violations on the Sullivan site in a letter dated July 27, 1983 (Ex. C-11).

140. Mr. Confer last visited the Sullivan site on October 13, 1983, and found that all of the previous violations were still outstanding (N.T. 59).

141. Percival admitted that backfilling equipment was removed from the Sullivan site before October 6, 1982 (N.T. 322).

142. Percival admitted that he had exposed coal measures on MP 1087-6A (N.T. 310-313).

143. On September 15, 1983, the Department notified Percival of its intent to forfeit the bonds posted for the Sullivan site (Stipulation).

License Denial

144. By letter dated January 3, 1983, John Varner informed Percival that a hearing would be held on January 20, 1983, with regard to issuance of his 1983 surface mine operator's license (Ex. C-11).

145. On January 20, 1983, the Department held an informal hearing concerning Percival's mine operator's license (Ex. C-11).

146. In a letter dated January 24, 1983, John Varner advised Percival, in confirmation of the Department's oral representations at the January 20, 1983, hearing, that the Department would not issue Percival a 1983 operator's license because certain corrective work had not been accomplished on both the Tioga and Sullivan sites. Varner further informed Percival that

if specified corrective work was accomplished, DER would "consider issuing" Percival a 1983 mining license (Ex. C-11).

DISCUSSION

Jurisdiction

Before we proceed to discuss the merits of this case, we must first address the issue of whether we have jurisdiction to review the Department's intention to forfeit the bonds associated with the Tioga and Sullivan MDPs and its decision not to issue Percival a surface mine operator's license for 1983. The Board may, *sua sponte*, raise the issue of its jurisdiction at any point in a proceeding, Board of Pensions and Retirement of the City of Philadelphia v. Jackson, ___ Pa.Cmwlth ___, 560 A.2d 310 (1989).

During the initial portion of the hearing on the merits in this matter, counsel for the parties read a stipulation into the record and engaged in a commentary on certain provisions in that stipulation. With respect to the issue of our jurisdiction over the Department's forfeiture of the bonds posted with the Sullivan and Tioga MPs and its denial of Percival's 1983 surface mine operator's license, the following passages from that interchange are relevant:

> MR. BROWN: Fine.
>
> Paragraph 11: "In addition to the appeal of the DER Order of April 21, 1983, Percival hereby appeals the DER decision to not issue a license to Percival and the DER forfeiture of the above-referenced bonds."
>
> End of Stipulation.
>
> * * * * *
>
> MR. FENICLE: Item 11, that is correct, this is an appeal of the DER Order of April 21, 1983, and also the failure to issue a license; even though Mr. Percival has never had a formal letter saying that the issuance of a license for '83 is denied, it has been stipulated that this

is an appeal of their denial of issuance of that license.

MR. BROWN: Yes.

MR. FENICLE: And they have not, in fact, taken the next step to forfeit these bonds, but, again, we are agreeing, stipulating, that this is an appeal of their forfeiture.

MR. BROWN: I would point out that the Consent Order and Agreement actually forfeits the bonds for the Sullivan County site; and we agree in there that, providing that has been complied with, to not collect those bonds.

I think your point is simply --

MR. FENICLE: Well, you sent a letter saying that you were going to forfeit the bonds.

MR. BROWN: Yes; that's correct.

MR. FENICLE: So this is an appeal of that forfeiture action.

MR. BROWN: Yes.

(N.T. 6-8)

The appellate courts of this Commonwealth have long held that mere agreement of the parties will not vest jurisdiction where it otherwise might not be, and the Board has applied that rule, as it is bound to do, in its decisions. Clay v. Advanced Computer Applications, ___ Pa.Super. ___, 536 A.2d 1375 (1988) and Hatfield Township Municipal Authority v. DER, 1988 EHB 122. Thus, if there is evidence in the record of this matter that Percival did not file timely appeals of these Department actions, we are then without jurisdiction to review them, despite the parties' stipulation.

The May 12, 1983, notice of appeal filed by Percival contains this statement:

> 2. (a) Specify the action for which review is sought, the Department officials who took said actions, and the location of the proposed project including the municipality and county. Also,

attach a copy of the letter, order or notification from which you are appealing. (b) Specify the date when the order or notice of the action appealed was received.

(a) Abatement Order HRO 83-18
John E. Meehan, District Mining Manager
Blossburg, PA; Hamilton Township, Tioga County

(b) April 22, 1983

There is no mention in the notice of appeal of the Department's January 24, 1983, letter notifying Percival that it would not issue him a 1983 surface mine operator's license, nor is there any reference in HRO 83-18, the compliance order at issue in this appeal, to the Department's decision concerning the license renewal.[8] Since the license renewal denial was not specified in Percival's notice of appeal, we are without jurisdiction to review it, ROBBI v. DER, 1988 EHB 500.

Regarding the bond forfeitures, the first notice of the Department's intent to forfeit Percival's bonds for the Sullivan and Tioga sites was in a July 27, 1983, letter, which Percival, according to the return receipt, received on July 28, 1983 (Ex. C-11). Obviously, since the Department's statement of intent to forfeit the bonds occurred months after the filing of the notice of appeal at Docket No. 83-094-M, the notice of appeal could not have encompassed the July 27, 1983, letter. However, this is irrelevant, for the letter was not reviewable by the Board. Examining the language of this letter, it is clear that it was not a final action of the Department, as it expressly gave Percival 30 days to correct the violations on the Sullivan and

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[8] The Department's pre-hearing memorandum, which was filed with the Board on October 5, 1983, does allude in the statement of facts to the informal licensing hearing, but not the January 24, 1983, letter. Obviously, if an appellant does not challenge a Department action, the Department cannot do so on its behalf.

Tioga sites before bond forfeiture would be initiated by the Department. Because this letter was not a final action of the Department, we have no jurisdiction to review it, New Hanover Corporation v. DER, 1989 EHB 1075.

The Department's September 15, 1983, action regarding bond forfeiture is another matter, for it was the follow-up to the Department's July 27, 1983, notice to Percival. The Department inspected the Tioga site on September 12, 1983 (Ex. C-12), to determine whether the previous violations noted in its July 27, 1983, notice of intent to forfeit had been corrected. Finding that they had not been corrected, Inspector Daniels stated on his inspection report that "Recommendation is the only one left that Bond Forfeiture be initiated." The parties stipulated on the record of the October 17, 1983, hearing on the merits that the Department notified[9] Percival of its intention to forfeit his bonds for the Percival and Sullivan sites on September 15, 1983 (N.T. 6; Stipulation). This, we believe, was a final action of the Department. For Percival to have filed a timely appeal of the Department's action, he would have had to do so by October 17, 1983.[10]

The parties introduced a written stipulation on the record of the hearing on the merits of October 17, 1983. That stipulation indicated that Percival was appealing the Department's notification that it was going to forfeit Percival's bonds. The Board will regard Paragraph 11 of the parties'

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[9] No document to this effect was introduced into evidence.

[10] The last day of the appeal period, October 15, 1983, fell on a Saturday, so the appeal period was extended to Monday, October 17, 1983. §§1502(a)(1)(ii) and 1908 of the Statutory Construction Act, 1 Pa.C.S.A. §§1502(a)(1)(ii) and 1908.

written stipulation[11] as a notice of appeal of the Department's forfeiture of the bonds by Percival and, as a result, finds that Percival timely appealed the bond forfeitures.

The forfeiture of the bonds associated with the Sullivan site presents another set of jurisdictional problems. In examining the Department's forfeiture of the bonds associated with the Sullivan MPs, we must separately review those bonds covered by the provision of the COA (specifically, those associated with MPs 1087-3, 1087-3(A), and 1087-4) and the bond associated with MP 1087-6. The bonds associated with all four MPs were forfeited by the Department on September 21, 1979 (Stipulation - COA), but, thereafter, the sequence of events took divergent paths.

Neither Percival nor Aetna Casualty took a timely appeal of the bond forfeitures to the Board (Stipulation - COA). However, the Department then requested the Office of Attorney General to withhold collection on the bonds posted for MPs 1087-3, 1087-3(A), and 1087-4 (Stipulation - COA). Percival then, on December 7, 1979, filed an appeal with the Board of the Department's forfeiture of the collateral bond posted with MP 1087-6, and that appeal was docketed at EHB Docket No. 79-198-W (Stipulation - COA). Then, on February 4, 1980, Percival filed, at Docket No. 79-198-W, a petition for allowance of an appeal *nunc pro tunc* of all the bonds posted with the Sullivan MPs (Stipulation - COA). The parties then apparently engaged in negotiations which culminated in the April 6, 1981, COA. As a condition of the COA,

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[11] This stipulation was not separately docketed by the Board, but in view of the Board's practice of accepting virtually any written document containing a written declaration of intent to appeal, the Board cannot treat Paragraph 11 of the Stipulation otherwise.

Percival withdrew his appeal at Docket No. 79-198-W and the Department agreed to forbear from collecting the surety bonds posted with MPs 1087-3, 1087-3(A), and 1087-4 so long as Percival complied with the COA (Stipulation - COA).

The Department now argues that we cannot review the forfeiture of the bonds posted with MPs 1087-3, 1087-3(A), and 1087-4 (surety bonds) and the $5750 collateral bond posted with MP 1087-6. Thus, we must determine whether the Department's September, 1983, action regarding the bonds posted with the Sullivan site is reviewable by the Board.

Section 4(h) of the Surface Mining Act provides, in pertinent part, that...

> If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited and shall certify the same to the Department of Justice, which shall proceed to enforce and collect the amount of liability forfeited thereon...any operator aggrieved by reason of forfeiting the bond..., as herein provided, shall have a right to contest such action and appeal therefrom as herein provided.

As for the Department of Justice, which is now the Office of Attorney General, §204(c) of the Commonwealth Attorneys Act, the Act of October 15, 1980, P.L. 950, as amended, 71 P.S. §732-204(c) (Commonwealth Attorneys Act),[12] provides that:

> ...The Attorney General shall collect, by suit or otherwise, all debts, taxes, and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency; the Attorney General shall keep a proper docket or dockets, duly

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[12] The power of the Attorney General to collect debts, taxes, and accounts due the Commonwealth was previously set forth in substantially the same terms in §903(a) of the Administrative Code, 71 P.S. §293(a). That section of the Administrative Code was repealed in 1980 with the passage of the Commonwealth Attorneys Act.

> indexed, of all such claims, showing whether they are in litigation and their nature and condition...

Once the forfeiture of a bond is final, the Department has a duty to refer it to the Office of Attorney General for collection, which, in this case, it did sometime in late 1979. When the matter is in the Attorney General's hands for collection, this Board has no further role to play. The issue of whether the Department violated its agreement not to seek collection of the surety bonds so long as Percival complied with the COA must be raised in the appropriate forum when the Attorney General proceeds with collection of the surety bonds. Thus, Percival's appeal of the forfeitures of MPs 1087-3, 1087-3A, and 1087-4 is dismissed for lack of jurisdiction.

As for MP 1087-6, the Department did collect on the $5750 collateral bond posted with it and that bond is not within our jurisdiction, but Percival, as permitted by the COA, then rebonded this permit (MP 1087-6A) on or about April 8, 1981, by submitting a collateral bond in the amount of $40,000 (Stipulation Exhibits). Since Percival timely challenged the Department's September 15, 1983, forfeiture of this bond,[13] we may examine the propriety of the Department's forfeiture.

In summary, our jurisdictional rulings are as follows. The Board is dismissing Percival's appeal of the Department's license denial for untimeliness. Percival's appeal of the Department's July 27, 1983, letter regarding bond forfeiture is dismissed because the letter was not a final action of the Department. And, Percival's appeal of the Department's September, 1983 forfeiture of the surety bonds associated with the Sullivan site is dismissed, because the Department's 1979 forfeiture of those bonds was referred to the Office of Attorney General for collection. We have

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[13] Percival's appeal of the Sullivan collateral bond forfeiture was timely for the same reason that his appeal of the Tioga bond forfeitures was timely.

jurisdiction over Percival's appeals of HRO 83-18, the Tioga site bond forfeitures, and the forfeiture of the $40,000 collateral bond posted for MP 1087-6A on the Sullivan site.

Burden of Proof

Having disposed of the threshold jurisdictional issues, our discussion of this matter necessarily begins with a discussion of the burden of proof. In the appeal of the compliance order relating to the Tioga site, the Department bears the burden of proving by a preponderance of the evidence that it has not abused its discretion, 25 Pa.Code §21.101(b)(3) and Kerry Coal Company v. DER, EHB Docket No. 86-640-M (Adjudication issued March 9, 1990). Similarly, with regard to the bond forfeitures, the Department bears the burden of proving by a preponderance of the evidence that conditions on the Tioga and Sullivan sites justify bond forfeiture, and, in the case of bond instruments with a per acre liability, that it forfeited the proper amount of bond. James E. Martin and American Insurance Company v. DER, 1988 EHB 1256, aff'd ___ Pa.Cmwlth ___, 570 A.2d 122 (1990).

We hold that the Department has sustained its burden of proof with regard to issuance of the order relating to the Tioga site and has sustained its burden with regard to the propriety of the bond forfeitures for both the Tioga and Sullivan sites, but, has failed to sustain its burden regarding the amount of the bond forfeitures for the Tioga site.

April 21, 1983, Compliance Order for the Tioga Site

In appealing the Department's April 21, 1983, order to treat mine drainage discharges at the Tioga site to meet applicable effluent limitations and to pump and treat water accumulating in the pit, Percival contends that the discharges pre-dated his mining activities and that, as a result, he cannot be held responsible for treating the discharges to meet applicable

effluent limitations unless he has somehow affected the discharges. While the Department asserts that Percival is responsible for treating any non-complying discharges on his permit area regardless of whether he has affected those discharges, the Department argues that, in any event, Percival has affected the discharges and is, therefore, responsible for them.

We have recently addressed the law interpreting §315 of the Clean Streams Law in Ingram Coal Company, et al. v. DER, EHB Docket No. 88-291-F (Opinion issued April 17, 1990), wherein we held, at pages 6-7, that:

> 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. ... 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 Co., 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. 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. 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.
>
> (footnote omitted)

Here, we again hold that Percival, as the permittee of the Tioga site, may be held liable under §315 of the Clean Streams Law for treating the discharges on the site regardless of whether he affected them. However, as in the McIntire, *supra*, adjudication, we do find that Percival affected the discharges on the Tioga site.

The evidence clearly establishes that there are numerous discharges on the Tioga site which do not meet the effluent limitations set forth at 25 Pa.Code §87.102 and contained in the terms and conditions of the Tioga MDP and that those discharges have, over time, degraded in quality.

We will first address the trends and indications in the water quality data and then address other evidence establishing that Percival affected the Tioga site. In assessing the water quality data, we will focus on Monitoring Points P-2, P-3, P-4, 1300, 1301, and L, which are all within the Tioga MDP boundaries (Stipulation Exhibits) and then Monitoring Points S and P-6, which are near the boundaries. This data must be analyzed in the context of applicable effluent limitations at Pa.Code §87.102[14] and Special Condition 25 of the Tioga MDP.[15]

A sample of water taken on April 18, 1983, from the pit on the then-active portion of the Tioga site at a point east-southeast of the Tioga State Forest boundary showed significant exceedances of 25 Pa.Code §87.102: pH of 3.2, acidity of 706 mg/l, iron of 105.07 mg/l, and manganese of 50.54 mg/l.

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[14] This regulation prohibits the discharge of water which is acid and requires that the pH shall be 6 to 9, that iron shall not exceed 7.0 mg/l, and that manganese shall not exceed 4.0 mg/l.

[15] Special Condition 25 requires that the pH of any discharge shall be from 6.0 to 9.0 and that the iron concentration shall not exceed 7.0 mg/l.

Monitoring Point P-2 is located on the third branch of the main tributary to Johnson Creek (N.T. 120) and eventually drains into a treatment pond (N.T. 126; Ex. C-6). Water sampled from Monitoring Point P-2 exhibited quality which did not meet the effluent limits set forth at 25 Pa.Code §87.102; indeed, the lowest concentrations of the parameters measured during the course of Percival's mining significantly exceeded the applicable effluent limitations and Special Condition 25 in the Tioga MDP (Exhibits to Stipulation).

Monitoring Point P-3 is located on the Tioga MDP approximately 300 to 400 feet northeast of Monitoring Point P-2 (N.T. 128; Ex. C-6). Although it was part of a pre-existing deep mine discharge (N.T. 128), it exhibited degradation over time in the three samples taken during the course of Percival's operations, and the quality of the samples did not meet the effluent limitations at 25 Pa.Code §87.102 and Special Condition 25 of the Tioga MDP (Exhibits to Stipulation).

Monitoring Point P-4 collected water from treatment ponds which, in turn, received water from Monitoring Points P-2 and P-3 (N.T. 139). Of the twenty samples taken of Monitoring Point P-4, only one sample met the applicable effluent limitations for pH, alkalinity, acidity, iron, and manganese (Exhibit to Stipulation), with the quality varying widely.

Monitoring Point 1300 received drainage from between Hills No. 2 and 3. Although samples taken in 1968 and 1972 indicated some acid production, later sampling showed increases in acidity and sulfates and fluctuations in iron (N.T. 164-165).

Monitoring Point L was located on a tributary between Hills 1 and 2 and received, at one time or another, drainage from previous deep and strip mining on the Tioga site (N.T. 142-145). There were six samples taken at

Monitoring Point L from November 15, 1972, through May 15, 1980 (N.T. 148). None of the six samples met the applicable effluent limits at 25 Pa.Code §87.102 or Special Condition 25, and the five samples taken subsequent to the initiation of surface mining operations by Percival showed a decrease in quality.

Two other monitoring points in close proximity to the boundary of the Tioga MDP also exhibited serious degradation and/or violations of the applicable effluent limitations. Monitoring Point S was 20 to 40 feet into Percival's backfill and collected toe of spoil discharges draining downslope from the Tioga site (N.T. 149-150). The samples did not meet the applicable effluent limitations for pH, iron, acidity, and manganese (N.T. 152) and demonstrated elevated concentrations of aluminum and sulfates. Similarly, the analyses of the water sampled at Monitoring Point 6 showed substantial exceedances of the effluent limitations at 25 Pa.Code §87.102.

Thus, all of this evidence demonstrates both violations of the applicable effluent limitations and degradation of the discharges. As if this analytical data were not sufficient to establish liability, other evidence presented by the Department and admissions made by Percival establish that Percival affected the discharges in numerous other ways.

While the pit was open, Percival drilled through the Bloss Vein in order to determine where the Bear Creek Vein was located. Although he covered the drill hole with 25 to 30 feet of dirt, water from his operations was still discharged through the Bear Creek Vein discharges (N.T. 329, 331, 343, 487). Percival also mixed gob materials into the backfill (N.T. 488).

Percival daylighted all pre-existing deep mines that he encountered on the Bloss Vein (N.T. 493). In doing so, he displaced certain discharges and redirected them (N.T. 497-498). Percival also removed the clay barriers

underneath the Bloss Vein, which allowed water to percolate through opened fracture joints and discharge in greater quantities at Monitoring Points P-2 and P-3 (N.T. 485, 487, 498, 565-566). Finally, Percival constructed clay barriers within the pit in a manner that shifted water flow direction toward Monitoring Point P-2 (N.T. 565).

There was substantial evidence in the record to support a finding that Percival affected the discharges on the Tioga site. Percival did not contradict this testimony; his only defense to these documented violations of effluent limitations was that he was not responsible for them (N.T. 385, 387) and that the abnormally high rainfall and flooding in 1972 invalidated any water samples taken before his operations. Percival presented no evidence to support his claims that the pre-mining samples were invalid. Even if one were to disregard the pre-mining samples, the samples taken during the course of Percival's operations establish violations of 25 Pa.Code §87.102 and demonstrate a degradation in quality over time.

Having found these violations by Percival of 25 Pa.Code §87.102 and the terms and conditions of the Tioga MDP and having found that Percival was responsible for these violations as permittee and as a result of affecting the discharges, we must find that the Department did not abuse its discretion in issuing the April 21, 1983, order to Percival.

Forfeiture of the Bonds Posted with the Tioga MPs

In arguing that its forfeiture of the bonds for the Tioga MPs was not an abuse of discretion, the Department maintains that it has proven violations by Percival of the Surface Mining Act, the Clean Streams Law, the rules and regulations adopted thereunder, and the terms and conditions of Percival's

permits and that Percival has not disputed these violations. Percival's defense to the bond forfeiture is that he is not responsible for the discharge violations and that reclamation on the Tioga site was almost completed.

The Department is mandated by §4(h) of the Surface Mining Act to forfeit bonds where the operator has failed to comply with the requirements of the Surface Mining Act. Morcoal Co. v. Department of Environmental Resources, 74 Pa.Cmwlth 108, 459 A.2d 1303 (1983). However, in reviewing a forfeiture, the Board's task does not end with determining whether violations of the Surface Mining Act have been established by the Department. We must examine the language of the bond instruments, as that language controls the obligations of the parties, Yellow Run Energy Co. v. DER, 1986 EHB 171. In particular, we must be concerned with the manner in which liability accrues under the bond - i.e., whether it accrues per acre affected or whether liability is for the entire amount. James E. Martin, *supra*. In reviewing the Department's September 15, 1983, action, we must conclude that the Department satisfied its burden of demonstrating the existence of violations of the Surface Mining Act on the Tioga site, but did not satisfy its burden of demonstrating that the violations were associated with particular MPs or that it was entitled to the entire amount of the forfeited bonds in the case of those MPs where forfeiture was mandated.

We have already found, *supra*, that Percival had violated the Surface Mining Act, the Clean Streams Law, the rules and regulations adopted thereunder, and the terms and conditions of the Tioga MDP as a result of the mine drainage being generated by the Tioga site and that the Department's issuance of the April 21, 1983, order to Percival was not an abuse of discretion. Other evidence presented by the Department establishes that Percival did not comply with the requirements of the April 21, 1983, order and

committed other violations of the Surface Mining Act, the Clean Streams Law, the rules and regulations adopted thereunder, and the terms and conditions of the Tioga MDP and MPs.

On July 2, 1982, Henry Daniels, a Department inspector, found numerous violations, among them a lack of erosion and sedimentation controls on the Tioga MPs in violation of 25 Pa.Code §87.106; no water treatment facilities on MP 1087-2(A) in violation of 25 Pa.Code §87.102; no highwall safety barrier in violation of §4.2 of the Surface Mining Act; no perimeter signs in violation of 25 Pa.Code §87.92; and water accumulating in the pit in violation of §4.2 of the Surface Mining Act.[16]

Inspector Daniels visited the Tioga site on June 9, 1983, approximately a month and a half after the issuance of the order, and found that the discharges on the Tioga MDP were not being treated as required by the April 21, 1983, order; in addition, he found no equipment on the site and ten to fifteen acres of non-concurrent backfilling in violation of 25 Pa.Code §§87.140 and 87.141(c)(1) (N.T. 208-210).

Three days before the Department's September 15, 1983, bond forfeiture action, Mr. Daniels again inspected the Tioga site; he found that the violations he identified during his June 9, 1983, inspection were still present and that, in addition, toxic material was exposed, in violation of 25 Pa.Code §87.110 (Ex. C-12). The conditions found in Mr. Daniels' June 9, 1983, inspection were still uncorrected when Mr. Daniels inspected the site on October 14, 1983, three days before the hearing on the merits; he also found water leaching through the breastwork of the treatment ponds (Ex. C-12). The violations of the April 21, 1983, order constitute unlawful conduct by virtue

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[16] All of Inspector Daniels' inspection reports are contained in Ex. C-12.

of §18.6 of the Surface Mining Act, 52 P.S. §1396.24. These violations and the other violations found by Inspector Daniels did provide more than a sufficient basis for forfeiture of the bonds posted with the Tioga MPs.

However, if the Board is to sustain the forfeiture it is not sufficient to establish violations of the Tioga MDP, for the bonds are tied to specific MPs. The bond instruments are conditioned upon Percival meeting the requirements of the Clean Streams Law, the Surface Mining Act, the rules and regulations promulgated thereunder, and the terms and conditions of "the permits issued thereunder and designated in this bond." The MDP and the MP are designated on all the bond instruments for the Tioga site, with each bond relating to a particular MP. Thus, we cannot sustain a forfeiture of a bond relating to a particular MP unless we find violations on that MP. The Rondell Company v. DER, 1988 EHB 1044.

The evidence presented by the Department relating to particular MPs breaks down as follows. Inspector Daniels' July 2, 1982, inspection report indicates MPs 1087-1, 1087-2, 1087-5, and 1087-5(A) as the MPs inspected; he notes the absence of any erosion and sediment control measures on all the MPs and the lack of required treatment facilities on MP 1087-2(A). His September 13, 1982, inspection report designates only MP 1087-5(A) as the MP inspected. His June 9, 1983, inspection report designates MPs 1087-2 and its "Amends," 1087-4,[17] 1087-5, and 1087-5(A), but none of the violations noted is to a specific MP. The July 6, 1983, inspection report is labeled in the same fashion and also does not differentiate among the various MPs. Mr. Daniels took a series of slides (Ex. C-13-1 to 13-8, 13-11 to 13-21) during his July 6, 1983, inspection and indicated the location of the slides on Ex. C-6 (N.T.

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[17] MP 1087-4 relates to the Sullivan site.

208, 211). All of the slides except Ex. C-12-2 to 13-4 and 13-6 to 13-8 were indicated on MPs 1087-5 and 1087-5(A); the remainder were on MP 1087-2(A-2).[18] The September 12, 1983, inspection report indicates the permit as the Tioga MDP, indicates the phase being mined as "1087-5A," and does not tie the noted violations otherwise to a particular MP. The September 12, 1983, and October 14, 1983, inspection reports refer to the Department's April 21, 1983, order, which is the subject of this appeal, but that order only refers to the Tioga MDP.

Taking all of this evidence together, we find that the Department has established violations on MPs 1087-5, 1087-5(A), 1087-2(a), and 1087-2(A-2) and, as a result, was mandated to forfeit the bonds posted with those MPs. The Department failed to establish violations on MPs 1087-1 and 1087-2 and, thus, its forfeiture of those bonds was an abuse of discretion.[19]

We must next ascertain the amount of the bond for each MP the Department is entitled to forfeit. The bonds posted with MPs 1087-2(A), and 1087-5 provide that liability accrues at the rate of $500 per acre, with a minimum liability of $5,000. The bonds posted with MPs 1087-2(A-2) and 1087-5(A) provide that liability accrues at the rate of $1000 per acre, with a minimum liability of $5000. The Department presented no evidence relating to

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[18] This is based on our reading of Ex. C-6 and Ex. C-15.

[19] Erosion and sediment control violations were noted for all the Tioga MPs in the July 2, 1982, inspection report. The report of the September 12, 1982, follow-up inspection states "The E&S controls have been partially implemented but still do not meet requirements." The remaining inspection reports make no reference to erosion and sediment control violations, so we must assume the violations were corrected.

the acreage affected on any of these MPs, so we can only sustain forfeiture of the minimum liability under each bond - $5000 for MPs 1087-2(A-2), 1087-5, and 1087-5(A) and $3200 for MP 1087-2(A).[20]

As a result of our jurisdictional rulings regarding the Sullivan site bond forfeitures, we are limited to examining the propriety of the Department's 1983 forfeiture of the $40,000 collateral bond posted for MP 1087-6A. The evidence in the record points to violations of the relevant regulatory requirements which would trigger mandatory bond forfeiture. Percival exceeded the 1500 pit length requirement in 25 Pa.Code §87.141(c)(2) and changed the direction of mining, ostensibly for the purpose of facilitating the completion of a pond on MP 1087-3(A) (N.T. 314-315). A September 28, 1982, inspection of MP 1087-6A revealed numerous violations in addition to the pit length violation: water impounded in the pits in violation of §4.2 of the Surface Mining Act; non-concurrent backfilling in violation of 25 Pa.Code §87.141; inadequate treatment of mine drainage in violation of 25 Pa.Code §87.102; exposed coal measures in violation of 25 Pa.Code §87.110; absence of backfilling equipment in violation of 25 Pa.Code §87.92; and insufficient erosion and sedimentation controls in violation of 25 Pa.Code §87.106 (N.T. 3839). These violations were still present when the Department conducted inspections on October 20, November 15, and December 6, 1982 (N.T. 40-41). Violations of reclamation requirements were found in the March 9, May 7, June 2-3, and July 5, 1983, inspections (N.T. 42, 44, 56) and mine drainage treatment violations were noted in a July 5, 1983, inspection (N.T. 58). None of the violations were corrected when Inspector Confer visited the Sullivan site before the hearings (N.T. 59). Any one of these

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[20] Although the minimum liability under the bond was $5000, the bond was only in the amount of $3200.

violations alone would have been sufficient to sustain bond forfeiture; together, they make an overwhelming justification.

Since liability under the collateral bond posted for MP 1087-6A was for the entire amount (Stipulation Exhibits), the Department had only to establish violations of the Surface Mining Act, the Clean Streams Law, the rules and regulations adopted thereunder, and the terms and conditions of the Sullivan MDP and MP 1087-6A to be entitled to forfeiture of the entire amount of the bond. Having done so, we will sustain the forfeiture of the collateral bond posted with MP 1087-6A.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to this appeal.

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

3. The Board may, *sua sponte*, raise the issue of jurisdiction at any point in a proceeding.

4. The Board may not exercise jurisdiction as a result of a stipulation of the parties if the Board does not possess jurisdiction in the first instance.

5. Percival did not challenge the Department's decision to deny his application for a 1983 surface mine operator's license in his notice of appeal at Docket No. 83-094-M and, therefore, the Board is without jurisdiction to review the license denial.

6. The Department's July 27, 1983, letter to Percival regarding possible forfeiture of the bonds posted for the Sullivan and Tioga sites was not a final action and was, therefore, not reviewable by the Board.

7. Percival filed a timely appeal (in the form of Paragraph 11 of the written stipulation entered on the record by the parties during the

October 17, 1983, hearing on the merits) of the Department's September 15, 1983, forfeiture of the bonds for the Sullivan and Tioga sites.

8. The Board has no jurisdiction over any controversy associated with bond forfeiture once the bonds have been referred to the Attorney General for collection.

9. The 1983 forfeiture of the Sullivan surety bonds and the $5750 collateral bond was a nullity since the bonds were forfeited in 1979 and referred to the Attorney General for collection.

10. The Department bears the burden of proof in an appeal from a Department order requiring Percival to take affirmative action to abate pollution. 25 Pa.Code §21.101(a)(3).

11. The operator of a coal mine is liable for any discharges on his permitted area, even if the discharges pre-dated his activities and regardless of whether the operator affected the discharges or increased the pollution load. Ingram Coal Company et al. v. DER, EHB Docket No. 88-291-F (Opinion issued April 17, 1990).

12. Mine drainage which did not meet the requirements of 25 Pa.Code §87.102 and the terms and conditions of the Tioga MDP and MPs was discharged on the Tioga site.

13. Percival degraded the discharges at Monitoring Points P-2, P-3, P-4, S, L, F, A, D, P-6, 1300, 1301, C, and P-12.

14. Percival affected the pre-existing discharges on the Tioga site by, *inter alia*, drilling through the Bloss Vein, removing the clay barriers beneath the Bloss Vein, covering pre-existing discharges, and mixing toxic materials into the backfill material.

15. Percival allowed water to accumulate in the Tioga pit and failed to backfill the pit in violation of the Surface Mining Act, the Clean Streams Law, and the rules and regulations adopted thereunder.

16. The Department's issuance of the April 21, 1983, compliance order to Percival was not an abuse of discretion.

17. The burden of showing that the forfeiture of Percival's bonds was not an abuse of discretion or an arbitrary exercise of its duties or responsibilities falls on the Department.

18. When the Department finds violations of the Surface Mining Act on a permit area, it has a mandatory duty to forfeit the bonds associated with the permits.

19. When the Department forfeits a proportionate bond - i.e., one on which liability accrues at a specified rate per acre - it must also establish how much acreage on the permit area was affected by the violations.

20. The Department established violations of the Surface Mining Act on MPs 1087-2(A), 1087-2(A-2), 1087-5, AND 1087-5(A), and, therefore, its forfeiture of the bonds associated with those MPs was not an abuse of discretion.

21. The Department did not establish violations on MPs 1087-1 and 1087-2, and, therefore, its forfeiture of the bonds posted for those permits was an abuse of discretion.

22. The bonds posted with MPs 1087-2(A), 1087-2(A-2), 1087-5, and 1087-5(A) were proportionate bonds.

23. The Department did not establish the acreage affected by the violations on MPs 1087-2(A), 1087-2(A-2), 1087-5, and 1087-5(A) and was, therefore, entitled to forfeit only the minimum liability under each bond.

24. The Department is required by §4(h) of the Surface Mining Act to refer bonds to the Attorney General for collection once the forfeiture of those bonds is final.

25. Violations on the site of MP 1087-6A mandated the Department to forfeit the $40,000 collateral bond associated with that MP.

26. The Department was entitled to forfeit the entire amount of the $40,000 collateral bond posted with MP No. 1087-6A because liability was for the entire amount.

O R D E R

AND NOW, this 13th day of September, 1990, it is ordered that:

1) The Department's April 21, 1983, order is sustained and John Percival's appeal of that order is dismissed;

2) Percival's appeal of the forfeiture of the bonds posted with MPs 1087-1 and 1087-2 is sustained;

3) Percival's appeal of the forfeiture of the bonds posted with MPs 1087-2(A), 1087-2(A-2), 1087-5, and 1087-5(A) is dismissed regarding the propriety of the forfeiture, but sustained in part regarding the amount. The Department is entitled to collect $5000 for each of the bonds associated with MPs 1087-2(A-2), 1087-5, and 1087-5(A) and $3200 of the bond associated with MP 1087-2(A).

3) Percival's appeal of the forfeitures of the surety bonds posted with MPs 1087-3, 1087-3(A), and 1087-4 on the Sullivan site and the $5750 collateral bond posted with MP 1087-6 is dismissed for lack of jurisdiction;

4) Percival's appeal of the forfeiture of the $40,000 collateral bond posted with MP 1087-6A on the Sullivan site is dismissed and the Department's forfeiture is sustained; and

5) Percival's appeal of the Department's denial of his 1983 surface mining operator's license is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann did not participate in the Board's decision.

DATED: September 13, 1990

cc: **DER, Bureau of Litigation**
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For Appellant:
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TIVE, HETRICK & PIERCE
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M. DIANE SMITH
SECRETARY TO THE BO

WILLIAM RAMAGOSA, SR. et al.	:	
	:	
V.	:	**EHB Docket No. 89-097-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 14, 1990**

OPINION AND ORDER
SUR
PETITION TO DISMISS
treated as a
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Where DER has the statutory authority to order the abatement of a nuisance and orders Appellants to do so, it is no defense to the order to allege that other property interests will be affected. Accordingly, Appellants' Petition to Dismiss, treated as a Motion for Summary Judgment, will be denied.

OPINION

This Notice of Appeal was filed on April 10, 1989, contesting a Compliance Order issued by the Department of Environmental Resources (DER) on March 10, 1989. The Compliance Order, inter alia, directed Appellants to cease all activities at a site in Dingman Township, Pike County, and to restore the site to its former condition.

On March 14, 1990 Appellants filed a Petition to Dismiss the Compliance Order because of DER's failure to include other persons or entities

allegedly having interests in the site. DER filed its Response on April 11, 1990. While the Board has authority to dismiss an appeal, it cannot "dismiss" the underlying DER action without reaching some final decision on its factual or legal merits. Accordingly, the Board informed the parties in an Order dated April 13, 1990 that it would treat the Petition as a Motion for Summary Judgment. Neither party expressed any objection to this approach. On April 23, 1990 Appellants filed a Motion to Strike DER's Response for untimely filing. DER filed no Answer to this Motion, whereupon Appellants requested on May 21, 1990 that the Motion be granted. These matters were taken under advisement.

DER's failure to answer Appellants' Motion to Strike does not result in the automatic granting of the Motion, as Appellants seem to believe. The Motion, whether answered or not, must have merit; and Appellants' has none. In a written communication to legal counsel on March 22, 1990, the Board set April 11, 1990 as the response date to Appellants' Petition to Dismiss. DER's Response met that deadline. Moreover, since Appellants' Petition to Dismiss amounted to a Motion for Summary Judgment, DER's filing of a Response was voluntary. Pa. R.C.P. 1035 does not require a formal response to such a Motion and imposes no sanction for the failure to file one. Summary judgment in favor of the moving party can be granted only if appropriate: see discussion at Goodrich Amram 2d §1035(a):4, §1035(b):1 and §1035(B):2.

Turning to the substance of the claim for summary judgment, Appellants argue that the other persons and entities having interests in the site are indispensable parties - that is, that DER has no power to order Appellants to enter the site and perform restoration work when obeying the order will affect the property rights of these other persons and entities. We disagree. The identical argument was raised and rejected in Ryan v.

Commonwealth, Department of Environmental Resources, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1977), where the Court held that a landfill operator no longer having an interest in the landfill site could be ordered to enter the site and abate the conditions created by the operation. Where DER has the statutory authority to order the abatement of a nuisance, the Court ruled, the order will not be stayed simply because the nuisance is on the land of a stranger.[1]

The statutory authority involved in the Ryan case was section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, which grants to DER the power to order the abatement of nuisances, including conditions declared to be nuisances by any law administered by DER. In the Compliance Order issued in the present case, DER referred to three separate statutes as the basis for its action. Included were section 1917-A of the Administrative Code of 1929, supra; sections 5, 601, 605 and 610 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.5, 691.601, 691.605 and 691.610; and sections 18, 19 and 20 of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§693.18, 693.19 and 693.20. Section 601 of the Clean Streams Law, 35 P.S. §691.601, and section 19 of the Dam Safety and Encroachments Act, 32 P.S. §693.19, authorize DER to treat violations of those statutes as public nuisances, thereby triggering the power contained in section 1917-A of the Administrative Code of 1929, supra.

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[1] Appellants point out that, in the Ryan case, DER had secured the consent of the landowner. That was not critical to the decision, however. The Court deliberately quoted language from the Supreme Court's decision in Delaware Division Canal Co. v. Commonwealth, 60 Pa. 367 (1869), stating that the "owner of the soil where the nuisance is must not be allowed to control the public right to have it abated...." Following this, the Court stated that this principle applies "a fortiori" where the owner of the land consents.

Since DER has the clear statutory authority to order the abatement of the nuisances alleged in the Compliance Order, Appellants cannot resist on the grounds that other property interests may be affected.

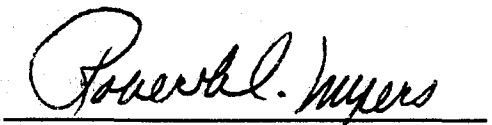
ORDER

AND NOW, this 14th day of September, 1990, it is ordered as follows:

1. The Petition to Dismiss, filed by Appellants on March 14, 1990, and treated as a Motion for Summary Judgment, is denied.

2. The Motion to Strike, filed by Appellants on April 23, 1990, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 14, 1990

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

HOWARD G. BROOKS	:	
	:	
v.	:	**EHB Docket No. 90-143-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 14, 1990**

OPINION AND ORDER

Synopsis

Sanctions are imposed against a permittee in a third party appeal for failure to file a pre-hearing memorandum. At the hearing on the merits, the permittee shall be barred from presenting its case in chief.

OPINION

This matter was initiated on April 6, 1990 with the filing of an appeal by Howard G. Brooks ("Brooks") against Valier Mining and the Department of Environmental Resources ("DER"). The appeal was taken from DER's March 8, 1990 letter written to Brooks' attorney in response to Brooks' concerns regarding reclamation work conducted by Valier Mining on Brooks' property.

Pre-hearing memoranda were filed by Brooks and DER on July 19, 1990 and August 6, 1990, respectively. Having received no pre-hearing memorandum from Valier Mining, the Board issued a rule upon Valier Mining to show cause why sanctions should not be imposed for failing to comply with our Pre-Hearing

Order No. 1. The rule was returnable on or before August 27, 1990. To date, Valier Mining has filed neither a response to the rule nor its pre-hearing memorandum.

Sanctions may be imposed against a party pursuant to 25 Pa.Code §21.124 for failure to comply with Pre-Hearing Order No. 1. Mid-Continent Insurance Co. v. DER, 1989 EHB 1299. Therefore, sanctions are hereby imposed upon Valier Mining for failure to file a pre-hearing memorandum and failure to respond to our rule to show cause. If and when this matter comes to a hearing on the merits, Valier Mining shall be precluded from presenting its case in chief, and shall be limited to the presentation of only such evidence as would normally be offered in rebuttal, cross-examination of witnesses, and the filing of a post-hearing brief. M. F. Fetterolf Coal Co. v. DER, 1987 EHB 85; Conneaut Condominium Group v. DER, 1987 EHB 107.

O R D E R

AND NOW, this 14th day of September, 1990, it is ordered that Valier Mining is precluded from presenting its case in chief at the hearing on the merits.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 14, 1990

cc: **Bureau of Litigation**
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Jeffrey Lundy, Esq.
Permittee:
Valier Mining

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M. DIANE SMI
SECRETARY TO THE

CONCERNED RESIDENTS OF THE YOUGH, INC. (CRY)	:	
and	:	
COUNTY OF WESTMORELAND	:	
v.	:	EHB Docket No. 86-513-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
MILL SERVICE, INC., Permittee	:	Issued: September 17, 1990

OPINION AND ORDER
SUR PERMITTEE'S MOTION IN LIMINE

Synopsis

In an appeal from the Department of Environmental Resources' ("DER") issuance of permits for the operation of a residual waste facility, a motion in limine is granted to preclude evidence of violations which allegedly occurred subsequent to the permit issuances, where the sole issue on appeal is whether DER abused its discretion in granting the permits. Also precluded is evidence of violations allegedly committed prior to issuance of the permits, where the alleged violations were settled by Consent Orders entered as orders of the Commonwealth Court. Finally, evidence of improper siting is precluded where appellants are relying on provisions of the regulations applicable only to hazardous waste facilities, where the Board has previously determined that said regulations are not applicable to the facility in question, Concerned Residents of the Yough v. DER and Mill Service, Inc., 1987 EHB 737.

OPINION

This action originates with DER's August 6, 1986 issuance of four permits to Mill Service, Inc. ("Mill Service") as follows:

Solid Waste Disposal Permit No. 301071

Water Obstructions and Encroachments Permit No. E 65-164

Dam Safety Permit No. D-65-153

Earth Disturbance Permit No. (65) 65-84-8-2

These permits were issued to Mill Service for the purpose of construction and operation of a residual waste site, known as "Impoundment No. 6", near Yukon, Pa. The issuance of these permits was appealed by Concerned Residents of the Yough, Inc. ("CRY") on September 4, 1986 at Docket No. 86-513, and by the County of Westmoreland ("Westmoreland County" or "the County") on September 5, 1986 at Docket No. 86-515.

Prior to the issuance of the subject permits, Mill Service and DER entered into a Consent Order on May 24, 1985 which was the result of an equity action brought by DER in the Commonwealth Court. This Consent Order dealt comprehensively with the compliance history of Mill Service's Yukon operation and alleged violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., ("CSL"); the Solid Waste Management Act, Act of July 7, 1980, P.L.380, as amended, 35 P.S. §6018.101 et seq., ("SWMA"); the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq., ("APCA"); and the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq., ("DSEA"); and the rules and regulations promulgated thereunder. The same day therewith, DER and Mill Service also entered into a Consent Order regarding Mill Service's operation of a waste facility in

Bulger, Pa. The Orders committed Mill Service to a remedial plan for alleged violations at the sites, settled the issue of civil penalties, and established a groundwater monitoring plan. Paragraph 25 of the Yukon Consent Order provided as follows:

> 25. Mill Service's execution of this Order and an Order of even date herewith relating to the Bulger Facility and compliance with both orders shall place Mill Service in sufficient compliance under Section 503 of the Solid Waste Management Act that the Department may not deny issuance of permits, licenses or permit amendments (i.e., module 1 approvals) to which Mill Service is otherwise entitled, based upon the violations identified in this Order and the Order covering the Bulger facility.

The Consent Orders were entered as Orders of the Commonwealth Court at Commonwealth of Pennsylvania, Department of Environmental Resources v. Mill Service Inc., No. 1406 C.D. 1985 and No. 1407 C.D. 1985.

On April 13, 1987, Mill Service filed Motions for Partial Summary Judgment in both dockets. In its motions, Mill Service asserted that portions of CRY's and Westmoreland County's appeals related to siting requirements applicable only to hazardous waste treatment and disposal facilities,[1] and that since Impoundment No. 6 was, in fact, a non-hazardous residual waste facility, the siting criteria regulations relied upon by CRY and the County were not applicable. The Board ruled on both motions on September 3, 1987 at 1987 EHB 737, and granted Mill Service's Motions for Partial Summary Judgment as to paragraphs 6, 7 and 8 of CRY's appeal and paragraphs 7, 8 and 9 of the

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[1]The regulations cited by CRY and Westmoreland County (hereinafter sometimes collectively referred to as "the appellants") in attempting to show improper siting of Impoundment No. 6 are as follows: 25 Pa. Code §§75.421(a)(3), 75. 442(g), 75.444(b). These provisions were renumbered effective February 10, 1990, 20 Pa. Bulletin 909 and can now be located at 25 Pa. Code §§269.21, 269.42, and 269.44 respectively.

County's appeal, effectively disposing of the argument as to the allegedly improper siting of Impoundment No. 6. In so ruling, the Board held that the sections of the regulations relied upon by CRY and Westmoreland County dealing with siting did not apply to non-hazardous waste facilities, and therefore, DER did not abuse its discretion by not applying these siting criteria to Impoundment No. 6. Id. at 742.

By Order of August 31, 1990, the Board, on its own motion, consolidated both appeals at Docket No. 86-513-MJ. The matter now before the Board is a Motion in Limine filed by Mill Service on August 6, 1990. CRY and Westmoreland County filed replies in opposition thereto on August 27, 1990 and August 28, 1990, respectively, and Mill Service responded on or about September 6, 1990.

In its motion, Mill Service asks the Board to limit the appellants' case in the following fashion:

1) Prohibit the appellants from offering evidence relating to any events which have occurred after the August 6, 1986 date of issue of the appealed permits, including but not limited to the following: (a) any subsequent alleged violations of the CSL, SWMA, APCA, and DSEA, (b) Mill Service's operation of Impoundment No. 6 after the issue of the permits, (c) the closure of Impoundment No. 5, and (d) any environmental impact or health problems occurring after August 6, 1986 allegedly caused by Mill Service's operation of the Yukon facility.

2) Preclude the offering of any evidence relating to alleged violations of the CSL, APCA, SWMA, DSEA which were covered by or included in the Yukon and Bulger Consent Orders referred to above.

3) Preclude the offer of any evidence as to the alleged improper siting of Impoundment No. 6 on the basis that the Board has already disposed of this portion of the appeals at Concerned Residents of the Yough v. DER and Mill Service, Inc., 1987 EHB 737, discussed supra.

We will first consider Mill Service's request that we preclude any evidence relating to the alleged improper siting of Impoundment No. 6. In its response, Westmoreland County admits that the question of the alleged improper siting of Impoundment No. 6 has been passed upon by the Board in its September 3, 1987 Opinion and Order at 1987 EHB 737, and that it will not offer any evidence on this issue. On the other hand, CRY appears to allege in its response that Mill Service is disposing of hazardous waste at Impoundment No. 6, and therefore, it was subject to the siting requirements for hazardous waste facilities at the time of permit issuance.

As Mill Service correctly points out in its motion and supporting brief, the issue of whether the hazardous waste facility siting criteria were applicable to Impoundment No. 6 at the time the permit was issued, and therefore whether these criteria should have been considered by DER in its review, has already been answered in the negative by this Board. As stated above, in our Opinion at 1987 EHB 742, we clearly held that DER had not abused its discretion in not applying hazardous waste siting regulations to Impoundment No. 6. Therefore, we will grant Mill Service's Motion in Limine insofar as this issue is concerned.

Turning to the balance of Mill Service's motion, we must keep in mind that the sole issue in this appeal is whether or not DER abused its discretion or acted arbitrarily in issuing the permits in question. Warren Sand and Gravel v. Commonwealth, DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). Section

104(7) of the SWMA, 35 P.S. §6018.104(7), empowers DER to "issue permits...and specify the terms and conditions thereof..." An application for a permit pursuant to the SWMA must set forth the manner in which the operator plans to comply with the requirements of the CSL, SMCRA, APCA, and the DSEA. 35 P.S. §6018.502(d). The regulations promulgated under the SWMA provide at 25 Pa.Code §75.22(d) that DER shall issue a permit when it determines that the application is complete and meets all the requirements of the pertinent acts and regulations. In examining a permit application, DER is required by Section 503(c) and (d) of the SWMA, 52 P.S. §6018.503(c) and (d), to consider the compliance history of the applicant.

In making a determination as to whether DER abused its discretion in issuing the permits for Impoundment No. 6, we must place ourselves in the position of DER at the time the permits were granted. At that point in time, the aforesaid Consent Orders had been entered into by DER and Mill Service in settlement of the equity action brought by DER against Mill Service for alleged violations of the CSL, SWMA, DSEA, and APCA. These Consent Orders were then entered as Orders of the Commonwealth Court. Mill Service argues that, by their express terms, the Consent Orders constituted a "full and complete settlement" through May 24, 1985 of Mill Service's liability for alleged outstanding violations at the Yukon and Bulger facilities.

According to Mill Service, since the Consent Orders were not appealed by the appellants, they are final and binding, and evidence of violations which allegedly occurred prior to execution of the Consent Orders, and which were covered in the Consent Orders, should be excluded. To this CRY responds that it could not have appealed the Consent Orders, because CRY was not in existence at the time they were entered into. CRY further argues that

entry of the Consent Orders does not bar CRY from raising Mill Service's alleged violation history in this proceeding. In its response, Westmoreland County states that it will not collaterally attack the Consent Orders, but, rather, plans to introduce evidence that Mill Service was violating the Consent Orders and environmental protection laws at the time the permits were issued. We concur with the County that evidence of violations existing at the time DER issued the permits is certainly relevant in determining whether there was an abuse of discretion on the part of DER. In addition, since Sections 503(c) and (d) of SWMA require DER to consider an applicant's compliance history, any violations which occurred between entry of the Consent Orders and issuance of the permits would also be relevant, as would any prior violations not covered by the Consent Orders. Therefore, the question is whether to admit evidence of past violations covered by the Consent Orders. We hold that such evidence is not admissible. Paragraph 25 of the Order specifically states that "Mill Service's execution of...and compliance with both orders shall place Mill Service in sufficient compliance under Section 503 of the Solid Waste Management Act that the Department may not deny issuance of permits...to which Mill Service is otherwise entitled, based upon the violations identified in this Order..." (emphasis added). Entry of this Order by the Commonwealth Court constitutes res judicata and cannot be collaterally attacked by the appellants. (See Pennsylvania Human Relations Commn. v. Ammon K. Graybill, Jr., Inc. Real Estate, 482 Pa. 143, 393 A.2d 420, 422 (1978), wherein the Pennsylvania Supreme Court held that "a consent decree has a res judicata effect...a court has neither the power nor the authority to modify or vary the terms of a consent decree. Nor is such a decree subject to a collateral attack.) Since DER, in reviewing the permit applications, could

not base a denial on violations which were resolved by the Consent Orders, such evidence is not admissible in determining whether DER abused its discretion in granting the permits.

The one remaining issue is whether evidence of occurrences or events subsequent to issuance of the permits is admissible. CRY takes the position that such evidence is admissible. Specifically, it seeks to introduce evidence concerning alleged violations of Mill Service which have occurred following issuance of the permits, as well as alleged environmental and health problems which have subsequently occurred. In ruling on this matter, we must keep in mind that the limited issue in this appeal is whether DER, based on the information available to it at the time, abused its discretion in granting the permits in question. Evidence of alleged subsequent violations is clearly not admissible since DER could not have considered this information at the time of its review. Although evidence of violations allegedly committed by Mill Service following grant of its permits might be relevant in an action to revoke or suspend said permits, such evidence is beyond the scope of an appeal challenging issuance of the permits. This matter was discussed briefly in our Opinion and Order issued on January 17, 1990 at the same docket number.

In summary, our scope of review in this appeal is limited to determining whether DER's issuance of the subject permits constituted an abuse of discretion, was arbitrary and capricious, or was in violation of law. In reviewing the permit applications, information regarding events which occurred subsequent to August 6, 1986 was not available to DER and therefore is not relevant in determining whether DER abused its discretion in granting the permits on August 6, 1986. Furthermore, the express language of the Consent Orders adopted by the Commonwealth Court barred DER from basing its permit

review on any violations covered by the Consent Orders. Therefore, this evidence also is not relevant. Based on this, the Board will grant the Permittee's Motion in Limine and enter the following order:

O R D E R

AND NOW, this 17th day of September, the Board grants Mill Service's Motion in Limine and enters the following order precluding certain evidence sought to be offered by one or both of the appellants:

(A) Appellants are precluded from offering any evidence regarding events or occurrences subsequent to August 6, 1986, the date DER issued to Mill Service the four permits in question, including but not limited to the following: (i) any alleged violations of the CSL, SWMA, DSEA, or APCA. (ii) Mill Service's operations, including the operation of Impoundment No. 6 and the closure of Impoundment No. 5; (iii) any alleged environmental impact from Mill Service's operations; and (iv) any health problems allegedly caused by Mill Service's operation of the Yukon Facility;

(B) Appellants are precluded from offering any evidence of alleged violations which were covered by the Yukon Consent Order entered into on May 24, 1985 between Mill Service and DER and which was subsequently approved by the Commonwealth Court. Commonwealth of Pennsylvania, Department of Environmental Resources v. Mill Service, Inc., No. 1406 C.D. 1985;

(C) Appellants are precluded from offering any evidence of alleged violations which were covered by the Bulger Consent Order entered into on May 24, 1985, between Mill Service and DER and which was subsequently approved by the Commonwealth Court. Commonwealth of Pennsylvania, Department of Environmental Resources v. Mill Service, Inc., No. 1407 C.D. 1985; and

(D) Appellants are precluded from offering any evidence of the alleged improper siting of Impoundment No. 6 because the Environmental Hearing Board has already held that the siting regulations cited by the appellants in their Notices of Appeal are not applicable to this appeal. Concerned Residents of the Yough v. DER and Mill Service, Inc., 1987 EHB 737.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 17, 1990

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

CONCERNED RESIDENTS OF THE YOUGH, INC. (CRY) and COUNTY OF WESTMORELAND	:	
v.	:	**EHB Docket No. 86-513-MJ (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	**Issued: September 18, 1990**

OPINION AND ORDER
SUR CRY'S MOTION FOR SANCTIONS

Synopsis

A Motion for Sanctions filed by Concerned Residents of the Yough, Inc. ("CRY") against Mill Service, Inc. ("Mill Service") for failure to answer Interrogatories is denied where there has been no Motion to Compel nor Order compelling further response to the Interrogatories. Furthermore, said Motion for Sanctions is untimely where it is made more than four years after the filing of Mill Service's Answers and Objections to Interrogatories and less than three weeks before the scheduled hearing on the merits.

OPINION

This matter was initiated with the filing of Notices of Appeal by CRY and the County of Westmoreland ("the County") on September 4, 1986 and September 5, 1986, respectively, from the Department of Environmental Resources' ("DER") August 6, 1986 issuance of four permits to Mill Service in

connection with the construction and operation of a residual waste facility. A more detailed history of the background of this case may be found at the Board's Opinion and Order issued on September 17, 1990 at the same docket number.

The matter now before the Board is a Motion for Sanctions filed by CRY against Mill Service on August 31, 1990. The Motion for Sanctions relates to Answers and Objections to CRY's Interrogatories filed by Mill Service on November 12, 1986. Mill Service objected to answering a majority of the Interrogatories on the basis of relevancy and because the information was a matter of public record. No Motion to Compel was ever filed by CRY asking that Mill Service provide further response.

Mill Service responded to the Motion for Sanctions on or about September 10, 1990, arguing that CRY's Motion was untimely, not having been made until four years after Mill Service's Answers and Objections had been filed. In support of this argument, Mill Service cites the Board's decision in Kirila Contractors, Inc. v. DER, 1989 EHB 94, 95, wherein the Board deferred the imposition of sanctions against the appellant for failure to respond to interrogatories and a request for production of documents. In so holding, the Board noted that one year had elapsed between the time when the appellant's responses were due and the request for sanctions.

Mill Service also makes the argument that the Motion for Sanctions lacks the requisite foundation since no Motion to Compel had ever been filed with or granted by the Board. Finally, Mill Service makes the argument that CRY's Motion has been rendered moot since the information sought is outside

the scope of the appeal. Mill Service asserts that, even if found to be relevant, much of the information sought is a matter of public record and equally accessible to both parties.

We find CRY's Motion for Sanctions to be untimely, having been made nearly four years after the filing of Mill Service's Answers and Objections, and less than three weeks before the scheduled start of the hearing on this matter. Furthermore, as is correctly pointed out by Mill Service in its supporting brief, CRY has never filed a Motion to Compel Mill Service to respond to the Interrogatories, nor has there been a Board order requiring any further response by Mill Service. Therefore, sanctions are inappropriate at this time.[1]

As to Mill Service's arguments that certain information requested is irrelevant or is equally accessible to both parties, we have not been asked to rule on this matter, and therefore need not address this issue.

O R D E R

AND NOW, this 18th day of September, 1990, CRY's Motion for Sanctions is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 18, 1990

cc: See next page

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[1] See Pa.R.C.P. 4019(g)(1), Explanatory Note ("An order of compliance entered in the first step of the proceedings, which is not obeyed, will ordinarily supply substantial justification for the second step procedure requesting sanctions...")

EHB Docket No. 86-513-MJ
September 18, 1990

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

ELMER R. BAUMGARDNER, et al.	:	
	:	
v.	:	**EHB Docket No. 88-343-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 18, 1990**

OPINION AND ORDER SUR
MOTIONS FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

Motions for summary judgment filed by both parties are denied due to the existence of material questions of fact. With regard to DER's motion, even if DER is correct that used oil may be regulated as a solid waste, this does not necessarily mean that immediate closure of a used oil recycling facility was warranted. With respect to the Appellant's motion, resolution of the Appellant's federal preemption argument requires an examination of all the facts and circumstances regarding DER's action in the present case.

OPINION

This is an appeal by Elmer R. Baumgardner, Baumgardner Oil Co., EconoFuel, Inc., and Waste-Oil Pickup and Processing (collectively, "Baumgardner") from an order of the Department of Environmental Resources (DER) dated August 29, 1988. The background of this proceeding has been stated at length in prior opinions involving supersedeas issues and will not be repeated in detail here. See Baumgardner v. DER, 1988 EHB 786, 1989 EHB

61, 1989 EHB 172, 1989 EHB 400. Suffice it to say that DER's order required Baumgardner to cease operations at his oil recycling facility in Fayetteville, Franklin County, and to file an application for a solid waste permit.

This Opinion and Order addresses motions for summary judgment filed by DER and by Baumgardner. DER asserts in its motion that the used oil which Baumgardner recycles at its Fayetteville facility is both a residual waste and a municipal waste, in that it comes from both industrial and municipal sources. Therefore, DER contends that its order closing the Fayetteville plant was justified because Baumgardner never obtained a permit to process or dispose of these wastes, as required by Sections 201 and 301 of the Solid Waste Management Act, Act of July 7, 1989, P.L. 380, No. 97, 35 P.S. §§6018.201, 6018.301.

Baumgardner filed both an answer to DER's motion and a cross-motion for summary judgment. Baumgardner argues that used oil is not a residual waste because it is not a "waste" under Zinc Corp. of America v. DER, 1989 EHB 117 ("waste" is material which is "discarded as worthless, defective, of no use"). Baumgardner further argues that used oil is not a municipal waste because it constitutes a "source-separated recyclable material" under the regulations at 25 Pa. Code §§271.1, 271.232. Therefore, Baumgardner contends that DER's action of closing the Fayetteville plant was not justified under the Solid Waste Management Act.

Baumgardner also argues in his cross-motion for summary judgment that DER's action is preempted by federal law because it interferes with the federal objectives for regulation of used oil set out in the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 et seq. In a nutshell, Baumgardner argues that under 42 U.S.C. 6935(d), if used oil is treated as a hazardous waste, a recycler shall be deemed to have a hazardous waste permit

so long as he complies with standards adopted by the Administrator under 42 U.S.C. §6924, except that the Administrator may require a permit if such is necessary to protect human health and the environment. Furthermore, Baumgardner contends that to the extent used oil is not treated as a hazardous waste,[1] DER can obtain authorization from EPA to administer and enforce a state program for regulating used oil. 42 U.S.C. §6926(h). However, Baumgardner claims that DER has not obtained such authorization, and that DER has no program for regulating used oil. Thus, the argument goes, DER's order which closed the Baumgardner facility and directed Baumgardner to apply for a solid waste permit upset the "careful balancing" called for by RCRA and was preempted by federal law.

The Board may grant summary judgment only when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summerdale Borough v. DER, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320, 1322 (1978), Ingram Coal Co. v. DER, EHB Docket No. 88-291-F (April 17, 1990). The Board must read a motion for summary judgment in the light most favorable to the non-moving party. P.R.I.D.E. v. DER, 1988 EHB 8, 10-11.

Applying these standards in the instant case, we will deny the motions for summary judgment filed by DER and Baumgardner because we believe both motions raise material questions of fact.

With regard to DER's motion, even if the Board were to agree that used oil is subject to regulation under SWMA, this does not automatically mean

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[1] DER has not taken the position here that used oil is a hazardous waste, although it does contend that the sludge which is generated during the recycling process is a hazardous waste.

that DER's closure of the Fayetteville plant was a legitimate exercise of DER's discretion. Closure may not be warranted on the sole basis that DER made a policy decision to regulate used oil as a solid waste; however, closure may be warranted by evidence of improper disposal of sludge at the facility.[2] Therefore, it is necessary to hold a hearing on the merits to gather evidence regarding, among other things, the disposal of sludge on the premises.

We also believe that Baumgardner's motion for summary judgment cannot be granted due to the existence of material questions of fact. We are, at this point, unconvinced that EPA interprets 42 U.S.C. §6926(h) as requiring a separate authorization before a state can subject used oil to regulation under the state's general programs for managing solid waste. In addition, whether or not DER's actions here upset what Baumgardner refers to as the "careful balancing" called for by RCRA depends upon all the facts and circumstances surrounding Baumgardner's activities-including any improper disposal which may have occurred. Finally, we believe there are factual questions regarding how DER intends to regulate used oil which must be addressed before we can rule on the preemption argument raised by Baumgardner.[3]

In summary, we will deny the motions for summary judgment filed by

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[2] This statement reflects the rulings by the undersigned in disposing of Baumgardner's petitions for supersedeas. See, 1988 EHB 786, 1989 EHB 61.

[3] We are not persuaded by Baumgardner's argument that used oil is not subject to regulation as a solid waste under the SWMA. We have previously addressed, and disagreed with, Baumgardner's argument that used oil is not a municipal waste. See 1988 EHB 786, 790-792. With regard to whether used oil is a residual waste, we are aware that the Environmental Quality Board has issued a proposed rulemaking on "residual waste management." 20 Pennsylvania Bulletin 1107 (February 24, 1990). We prefer to hear testimony, or at least argument, regarding how these proposed regulations affect this case, and to see whether the proposed regulations are made final, before we address this issue.

both parties. The Board will examine all of the legal questions raised in the parties' motions after a hearing on the merits.

ORDER

AND NOW, this 18th day of September, 1990, it is ordered that the motions for summary judgment filed by DER and by Baumgardner are denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 18, 1990

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SECRETARY TO THE BO

WILLIAM V. MURO	:	
	:	
v.	:	**EHB Docket No. 87-512-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 20, 1990**

ADJUDICATION

By Robert D. Myers, Member

Syllabus

Owner of lot bordering man-made lake placed 2 feet - 3 feet of fill on the lot and constructed footers in the fill in preparation for the erection of a dwelling. He then applied for a permit under the Dam Safety and Encroachments Act. DER denied the permit and ordered the removal of the fill after determining that the filled area constituted a wetland, that the placement of the fill created a significant adverse impact upon the environment and that there were no public benefits to offset the adverse impacts. On appeal, the Board held that Appellant, who bore the burden of proof on the permit denial issue, had failed to sustain his burden. With respect to the order to remove the fill, an issue on which DER bore the burden of proof, the Board held that DER had presented sufficient evidence to sustain its burden in connection with the emergent area but not in connection with the forested area.

Procedural History

William V. Muro (Appellant) filed a Notice of Appeal on December 16, 1987 from an Order and Permit Denial issued by the Department of Environmental Resources (DER) under date of November 17, 1987. The Order and Permit Denial, inter alia, denied Appellant's application for a water obstruction permit and directed Appellant to restore the land to its prior condition by removing the fill placed there.

After Appellant's Motion for Summary Judgment was denied in an Opinion and Order dated August 15, 1989 (1989 EHB 953), a hearing was held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on December 14, 1989. Both parties were represented by legal counsel. Appellant presented no witnesses but introduced two documents as exhibits. DER moved to dismiss the appeal, at the close of Appellant's case in chief, for failure to make out a prima facie case. The motion was taken under advisement and the hearing continued. DER presented one witness and a series of 30 slides.

Appellant filed his post-hearing brief on February 9, 1990. DER's post-hearing brief, due on March 1, 1990, was not filed until August 13, 1990[1] despite the failure to request and obtain an extension of time. On August 20, 1990 Appellant filed a Motion to strike DER's brief and written motion. Action on Appellant's Motion was deferred until issuance of this Adjudication with leave granted to DER to file a response by August 31, 1990. DER filed a response on September 4, 1990. It did not present a satisfactory excuse, however, and DER's post-hearing brief will not be considered in rendering this Adjudication. The record consists of the pleadings, a

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[1] It was accompanied by a written Motion to Dismiss identical to the oral motion made during the hearing, action on which was deferred.

transcript of 55 pages and 3[2] exhibits. After a full and complete review of the record, we make the following.

Findings of Fact

1. Appellant is an individual with a mailing address at Box 49, The Hideout, Lake Ariel, Pa. 18436 (Ex. A-1).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (Act) and the rules and regulations adopted pursuant to the Act.

3. Appellant is the owner of Lot 221, Section 2, Wallenpaupack Lake Estates, Paupack Township, Wayne County, Pennsylvania (Notice of Appeal, Ex. A-1).

4. Appellant's lot borders Beaver Lake, a man-made lake (N.T. 37).

5. Appellant filed with DER an Application for Dam or Water Obstruction Permit, bearing a date of February 2, 1987, seeking a permit under the Act to construct on his lot a single family dwelling 65 feet from the shoreline of Beaver Lake (Ex. A-1).

6. On April 2, 1987, when Richard C. Shannon, a water pollution biologist for DER, visited Appellant's lot, the following conditions existed:

(a) earth fill had been placed on the entire lot to a depth of 2 feet - 3 feet and to a point 1 foot from the shoreline, covering the natural soil and vegetation;

(b) concrete footers for the foundation of the single family dwelling had been constructed in the fill;

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[2] The 30 slides introduced by DER are all identified as one exhibit.

(c) an unnamed tributary to Beaver Lake that runs through the lot had been channelized;

(d) lots bordering Appellant's lot were characterized by an area of emergent vegetation, extending 68 feet - 75 feet inland from the shore of the lake, and a forested area encompassing the remainder of the lot area;

(e) the emergent areas were saturated, containing standing water and spongy soil;

(f) the forested areas were rocky with pools of standing water;

(g) the emergent areas contained dead standing timber and were dominated by cattails, steeplebush, spirea, sensitive fern, woolgrass and goldenrod, some of which also protruded through the fill on Appellant's lot;

(h) the forested areas contained fallen timber and were dominated by eastern hemlock, American beech, yellow birch and hornbeam (N.T. 12-21, 29, 30, 31, 42-43; Exhibit C-1).

7. The natural soil on Appellant's lot, according to the Wayne County Soil Survey Report, is holly silt loam, described as being very wet in nature. The typical profile has mottles within the top 3 inches to 7 inches of soil, placing it in the hydric soil category. DER performed no soil tests of its own on Appellant's lot (N.T. 32-33,44).

8. According to the National List of Wetland Plant Species, the dominant species in the emergent areas are obligate (cattails), meaning they are found in wetlands more than 99% of the time, or facultative wetland (steeplebush, spirea, sensitive fern and woolgrass), meaning they are found in wetlands between 66% and 99% of the time. The species of goldenrod was not identified adequately to enable it to be characterized (N.T. 28-30).

9. According to the National List of Wetland Plant Species, the dominant species in the forested areas are facultative upland (eastern hemlock, American beech), meaning they are found in wetland between 1% and 33% of the time, or facultative (yellow birch), meaning they are found in wetlands between 33% and 66% of the time[3] (N.T. 30-31)

10. As a result of the conditions found on Appellant's lot, DER's Khervin D. Smith, Chief of the Environmental Review Section, sent a letter to Appellant, dated May 14, 1987, requesting Appellant to submit studies relating to the environmental impact of the fill placed on his lot (N.T. 51-52).

11. In response, Appellant submitted a letter, dated July 9, 1987, from David D. Klepadlo, President of Penn-East Engineering Co., Inc. of Scranton, Pa., in which Mr. Klepadlo sought to allay DER's concerns (N.T. 52-53; Exhibit C-2).

12. Richard C. Shannon recommended denial of Appellant's application for a permit because he concluded that:

(a) Appellant's lot had been wetlands before the placement of the fill;

(b) placement of the fill had caused a loss of fish and wildlife habitat, loss of storage capabilities, loss of groundwater recharge or discharge capabilities and loss of water quality purification aspects;

(c) there were no offsetting public benefits, meeting the standards of 25 Pa. Code §105.16(b), as required by 25 Pa. Code §105.411 (N.T. 11, 35, 45-50).

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[3] The classification of hornbeam is uncertain from the record. The witness called it a facultative wetland species but went on to state that it is found in wetlands between 1% and 33% of the time, the probability range applicable to facultative upland. Because of the uncertainty, we make no finding with respect to this species.

13. Mr. Shannon's recommendation was accepted by his superiors, resulting in the issuance of the Order and Permit Denial forming the basis of the appeal (N.T. 35-36).

Discussion

The burden of proof is divided in this appeal. Appellant bears it with respect to the permit denial (25 Pa. Code §21.101 (c)(1)) and DER bears it with respect to the order to restore the lot to its prior condition (25 Pa. Code §21.101(b)(3)). This division of the burden prevents us from granting DER's Motion to Dismiss which is based upon the supposition that Appellant bears the entire burden. To carry the burden of proof, each bearer must show by a preponderance of the evidence that the action taken was (in DER's case) or was not (in Appellant's case) in accordance with law and the sound exercise of discretion: 25 Pa. Code §21.101(a).

Appellant's only evidence consisted of his two exhibits: 2 pages of the application for the permit and the letter from Mr. Klepadlo. This evidence establishes only that Appellant filed an application and furnished DER with Klepadlo's conclusions. It falls far short of establishing that Appellant satisfied all of the statutory and regulatory requirements for a permit. Appellant's legal counsel apparently assumes that the introduction of Klepadlo's letter as an exhibit is the same as having Klepadlo testify. In permit application appeals, we customarily admit as exhibits all of the forms, letters, reports and other documents filed by the applicant with DER; but such admission does not establish the truth of what is contained in those documents. Without the testimony of the witness who prepared them, they are hearsay (Moorman v. Tingle, 320 Pa. Super. Ct. 348, 467 A.2d 359 (1983)) and cannot form the basis of an Adjudication without other corroborating evidence (Fairfield Township Volunteer Fire Company No. 1 v. Commonwealth, Human

Relations Commission, ___ Pa. Cmwlth. ____, 575 A.2d 152 (1990). Since Appellant offered no corroborating evidence, Klepadlo's conclusions cannot be considered. Consequently, Appellant has failed to carry his burden of proof in the permit denial issue.

DER's evidence is competent to show that fill was placed and concrete footers were constructed on Appellant's lot in preparation for the erection of a single family dwelling. The inspection of Appellant's lot and bordering lots on April 2, 1987 convinced Richard C. Shannon that the fill was placed in a wetland area. This determination triggered the balancing exercise prescribed by 25 Pa. Code §105.411. Mr. Shannon assessed the adverse impact of the fill upon the environment and found it to be significant. He then considered the public benefits of the project, as suggested by 25 Pa. Code §105.16(b), and found none. Without the presence of a public benefit to outweigh the environmental harm, Mr. Shannon recommended that the permit be denied and the removal of the fill be mandated. His superiors accepted this recommendation and took action.

Whether or not DER was justified in ordering the removal of the fill depends on whether or not the fill was there lawfully. The definitions of "body of water" and "encroachment" in section 3 of the Act, 32 P.S. §693.3, clearly include the placement of fill so as to change the course, current or cross-sectional area of, inter alia, any natural or artificial lake, pond, reservoir, swamp, marsh or wetland. Section 6 of the Act, 32 P.S. §693.6, requires a permit from DER to place the fill or to maintain fill placed without a permit prior to the effective date of the Act. These statutory provisions are reflected in DER's regulations at 25 Pa. Code Chapter 105. The general requirements for permits, applications and operations are set forth in subchapter A, while specific requirements pertaining to various types of

regulated structures and activities are included in the subchapters that follow. Subchapter J, applicable to the placement of fill, includes §105.411 which imposes the balancing requirement when fill is to be placed in wetlands.

It is clear from the evidence that the fill placed on Appellant's lot changed the cross-sectional area. If the affected area constituted wetlands, the fill could not be placed or maintained legally without a DER permit. "Wetlands" is not defined in the Act but is defined in the regulations at 25 Pa. Code §105.1, as follows:

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas. The term includes but is not limited to wetland areas listed in the State Water Plan, the United States Forest Service Wetlands Inventory of Pennsylvania, the Pennsylvania Coastal Zone Management Plan and a wetland area designated by a river basin commission.

DER's statement of policy regarding the methodology to be used in identifying wetlands is contained in the regulations at subchapter M of Chapter 25. Section 105.451(c) of that subchapter mentions three essential characteristics of wetlands - (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology. All of these characteristics are present in the emergent areas of the lots bordering Appellant's and it is reasonable to conclude that they all were present on Appellant's lot before placement of the fill. The dominant plant species (cattail) falls into the obligate category followed by four other species in the facultative wetland category. The soil type is hydric in nature; and the area is saturated, spongy and laced with pools of standing water.

Unfortunately, we have no expert testimony to guide us in assessing the evidence on this point. When DER proffered such testimony during the hearing, Appellant objected on the ground that, in its pre-hearing memorandum, DER had stated that no expert testimony would be presented. The objection was sustained. Despite the absence of expert testimony, we are satisified that the evidence is strong enough for us to conclude that DER was fully justified in determining that the emergent area was a wetland. The evidence with respect to the forested area is equivocal, however. The presence of standing water and holly silt loam certainly suggest that it may be a wetland, but the species of vegetation tend to point in the opposite direction. We are unable to evaluate these conflicting characteristics without expert guidance. Since DER has the burden of proof on this issue, the failure to present expert testimony redounds to its own detriment.

DER's determination that filling in the wetlands had a significant adverse impact upon the environment and that there was no public benefit to offset such impact is supported by substantial evidence. Appellant presented no countering evidence. To the extent that Appellant's lot constituted a wetland, therefore, DER's order to remove the fill was an appropriate exercise of discretion.

Conclusions of Law

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

2. Appellant has the burden of proof on the issue concerning DER's denial of the permit application, and DER has the burden of proof on the issue concerning its order to remove the fill.

3. Because DER bears the burden of proof on one of the issues, the Board cannot grant DER's Motion to Dismiss based on the supposition that Appellant bears the entire burden.

4. The contents of Mr. Klepadlo's letter, admitted into evidence as an exhibit of Appellant, amounts to hearsay without Klepadlo's testimony and cannot form the basis of the Board's decision without corroborating evidence, none of which was presented.

5. Appellant failed to prove by a preponderance of the evidence that DER violated the law or abused its discretion in denying Appellant a permit.

6. The placement or maintenance of fill in a wetland area so as to change the cross-sectional area requires a permit from DER whether placed prior to or subsequent to the effective date of the Act.

7. The evidence is sufficient to establish that DER was justified in concluding that the emergent area of Appellant's lot had been a wetland prior to the placement of the fill.

8. The evidence is insufficient to establish that DER was justified in concluding that the forested area of Appellant's lot had been a wetland prior to the placement of the fill.

9. The placement and maintenance of fill in the wetland portion of Appellant's lot created a significant adverse impact upon the environment without any offsetting public benefit.

10. DER's order to remove the fill from the wetland portion of Appellant's lot was an appropriate exercise of discretion.

ORDER

AND NOW, this 20th day of September, 1990, it is ordered as follows:

1. Appellant's Motion to Strike DER's post-hearing brief and Motion to Dismiss is granted.

2. Appellant's appeal is sustained in part and dismissed in part.

3. DER's order to remove the fill is limited to the wetland portion of Appellant's lot as determined in the foregoing Adjudication.

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
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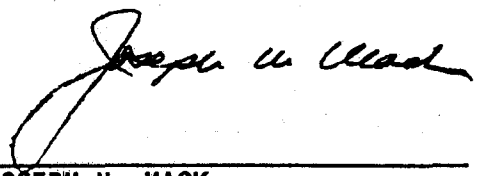
Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

EHB Docket No. 87-512-M



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 20, 1990

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M. DIANE SMITH
SECRETARY TO THE BOAR

RAYMARK INDUSTRIES, INC. et al.	:	
	:	
v.	:	**EHB Docket No. 89-294-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 20, 1990**

OPINION AND ORDER
SUR MOTION OF RAYMARK CORPORATION
FOR SUMMARY JUDGMENT AND MOTION OF
RAYMARK INDUSTRIES, RAYMARK FRICTION, AND,
IN THE ALTERNATIVE, RAYMARK CORPORATION,
FOR PARTIAL SUMMARY JUDGMENT

Synopsis

A motion for summary judgment and a motion for partial summary judgment are treated as motions for judgment on the pleadings in this appeal. Raymark Corporation's Motion is denied because the issues raised in that motion are not contained in the notice of appeal. The motion of Raymark Industries, Raymark Friction, and Raymark Corporation is denied in part. The law is not clear and the facts undisputed as to whether Paragraph 4(2) of the 1990 Order, which requires these appellants to provide a plan for removal of baghouse dust that will be generated in the future at the Manheim facility, constitutes an arbitrary and capricious or unlawful exercise of DER's functions and duties. The motion as to Paragraph 9 of the 1990 Order is granted. The laws relied upon by DER in issuing the 1990 Order do not authorize DER to predetermine

that any "substantial failure of Raymark or Raytech" to comply with the 1990 Order constitutes failure to comply with an enforcement action for purposes of Section 1301 of the Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 et seq., and DER has not shown us that it was authorized to issue Paragraph 9 of its Order. Thus, the law is clear that Paragraph 9 is invalid as a matter of law and judgment on the pleadings as to that paragraph is appropriate.

OPINION

The appeal at Docket No. 89-294-E involves three matters which have been consolidated. The corporate entities involved are Raymark Corporation ("Corporation"), Raymark Industries ("Industries"), Raymark Friction ("Friction"), and Raytech Corporation ("Raytech"). The first of the three notices of appeal to be filed was Docket No. 89-294-F, which was a skeleton notice of appeal filed on September 1, 1989 by Industries from a DER order dated July 31, 1989 ("1989 Order"). Later, on September 14, 1989, both Industries and Corporation filed an amended notice of appeal which purported to have them both as appellants. Although Corporation was not directed by the 1989 Order to take any action, it has attempted to join in the appeal of that order by filing the amended notice of appeal with Industries.[1] On May

[1]It appears that Corporation's joinder in this amended notice of appeal could constitute an untimely appeal by Corporation. We have no jurisdiction over such appeals, but DER has inexplicably failed to raise this matter as yet. It will have to be addressed before we adjudicate the merits of this amended appeal.

22, 1990, the matter was transferred to Board Member Richard S. Ehmann and was assigned Docket No. 89-294-E to reflect that transfer.

In the meantime, Industries, Corporation, and Friction (hereafter collectively "the Raymarks") had filed a notice of appeal on May 7, 1990 from an order of DER dated April 26, 1990 ("1990 Order"). A Motion to Consolidate the appeal with Docket No. 89-294-F was filed along with this notice of appeal, which was assigned Docket No. 90-180-F. On May 15, 1990, the Raymarks filed a petition for supersedeas and an alternative motion for partial summary judgment. That same day, the matter was also reassigned to Member Ehmann, and the docket number was changed to "E" to reflect that transfer. On May 24, 1990, Member Ehmann ordered the Raymarks' petition and their motion for partial summary judgment be deemed withdrawn without prejudice. On May 25, 1990, Member Ehmann ordered Docket No. 90-180-E to be consolidated with Docket No. 89-294-E.

On May 23, 1990, Raytech had filed a separate notice of appeal from the 1990 Order which was assigned Docket No. 90-209-E. On June 4, 1990, a Rule to Show Cause why Docket No. 90-209-E should not be consolidated with Docket No. 89-294-E was issued. Raytech's and DER's responses were received by us on June 25, 1990 and June 28, 1990, respectively. Upon consideration of those responses, we issued an order on July 11, 1990 making the Rule absolute and consolidating all three appeals at Docket No. 89-294-E. On July 12, 1990, Corporation filed a Motion seeking summary judgment and, in the alternative, the Raymarks filed a motion for partial summary judgment. DER filed its response to the motions on July 30, 1990. On August 10, 1990, Corporation

filed its reply to DER's Brief in Opposition to its Motion. Raytech has taken no position on the issues in these Motions.

From the extensive factual backgrounds set forth in their Motions and the Response, it is clear that DER and the Raymarks agree to the following facts. Industries owns a manufacturing facility ("facility") located in Manheim, Pennsylvania, and a landfill ("landfill") which is also located in Manheim. While Industries operated the facility, it disposed of its manufacturing wastes at the landfill. After March of 1987, baghouse dust from the facility was collected and stored in bags on the surface of a portion of the landfill. On April 24, 1987, Industries submitted to DER a closure plan for the landfill. DER issued a comment letter to the closure plan on September 23, 1987. Subsequently, Friction leased the facility from Industries and began manufacturing operations. It continued the placement of manufacturing wastes in baghouse bags and storage of the bags on the surface of the landfill. An involuntary bankruptcy proceeding was brought against Industries in early 1989. By July of 1989, there was an accumulation of bags of baghouse dust at the landfill. On July 31, 1989, DER issued an order to Industries and Corporation which, inter alia, directed Industries to submit a closure plan for the landfill within thirty days and a removal plan for the accumulated baghouse dust bags within fifteen days.

On April 26, 1990, DER issued the 1990 Order which was appealed at Docket No. 90-180-F and 90-209-F. DER explains at Paragraph QQ that after it issued the 1989 Order, it became aware of facts establishing that companies other than Industries, including but not necessarily limited to Raytech, are legally

responsible for obligations arising out of Industries' operation of the facility. The 1990 Order, inter alia, directs "Raymark" (defined as Industries, Raytech, and Corporation), to submit to DER within thirty days of the order a closure/post-closure plan for the landfill.

While Corporation has filed a motion for summary judgment, we will treat it as a motion for judgment on the pleadings since "such a motion made at the close of the pleadings and supported only by the pleadings is more correctly labeled a motion for judgment on the pleadings rather than one for summary judgment." Beardell v. Western Wayne School District, 91 Pa. Cmwlth. 348, __, 496 A.2d 1373, 1375 (1985); Winton Consolidated Companies v. DER, EHB Docket No. 89-356-E, (issued July 31, 1990).[2] A motion for judgment on the pleadings, like a motion for summary judgment, may be granted when no material facts are in dispute and a hearing is pointless because the law is clear on the issue. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303; Deitz v. DER, EHB Docket No. 88-525-MJ (issued March 14, 1990). In ruling upon the motion for judgment on the pleadings, the Board will treat all facts pleaded by the non-moving party as true. Upper Allegheny, supra, at 305.

In its Motion, Corporation states as its grounds for summary judgment that DER's issuance of the 1990 Order to Corporation constituted an arbitrary and capricious exercise of its functions and duties and was contrary to law. It

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[2]The parties are advised that in this situation, where a motion for summary judgment has been filed without any factual support of the type outlined in Pa. R.C.P. 1035, (deposition testimony, answers to interrogatories, admissions, or supporting affidavits), we would have been forced to deny the motion. Since we have treated the motion as one for judgment on the pleadings, factual verification is not an issue for us.

argues, "DER has alleged no violations of law by Corporation. DER has merely identified Corporation as the corporate parent of Industries and Friction and, as a matter of law, this relationship alone does not render Corporation liable for the environmental obligations of Industries or Friction, or the proper subject of this order."

In addressing Corporation's Motion, it is evident that the Notice of Appeal from the 1990 Order does not specifically raise the issues of whether DER improperly included Corporation in the Order based upon its parent-subsidiary relationship to Industries or whether that relationship alone does not render Corporation liable for the environmental obligations of Industries.[3] In its Motion, Corporation attempts to cover this deficiency by couching its argument in terms of DER's issuance of the 1990 Order to Corporation being an arbitrary and capricious exercise of its functions and duties and contrary to law. While the Notice of Appeal does assert that the issuance of the 1990 Order was an arbitrary and capricious exercise of DER's functions and duties and was contrary to law, the reasons stated in the Notice of Appeal cannot fairly be read to include the issues raised in Corporation's Motion. The Board cannot consider issues which were not raised in the Notice of Appeal because they are untimely when they are later raised. See Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 812 (1989), aff'd, 521 Pa. 121, 555 A.2d 812 (1989) (waiver provision of 25

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[3]Corporation did reserve the right to amend its Notice of Appeal based upon additional grounds for appeal revealed through discovery, but it has never petitioned for leave to amend its Notice of Appeal to add this issue.

Pa. Code §21.51(e) has been specifically upheld by Commonwealth Court). See also Western Hickory Coal Company, Inc. v. DER, EHB Docket No. 90-057-E (issued July 20, 1990); Skolnick v. DER, EHB Docket No. 89-290-F (issued June 11, 1990); ROBBI v. DER and York County Solid Waste and Refuse Authority, 1988 EHB 500; 25 Pa. Code §21.51(e). Consequently, Corporation's Motion, which is based on these arguments, must be denied.[4]

Next, we address the Raymarks' Motion for Partial Summary Judgment. They first allege that Paragraph 4(2) of the 1990 Order constitutes an arbitrary and capricious exercise of DER's functions and duties and is contrary to law because that paragraph requires the submission of a plan for disposal of baghouse dust generated in the future, and they allege there is no support for such a requirement under Pennsylvania law.

We also treat this motion as one for judgment on the pleadings pursuant to our discussion, supra. This issue has not clearly been raised in the Notice of Appeal. However, since it arguably has been raised in Paragraph 3 of the Notice of Appeal, we will address it.

Paragraph 4(2) of the 1990 Order provides: "Within thirty (30) days of the date of this order, Raymark [defined as Industries, Raytech, and Corporation] and Raymark Friction shall submit to the Department a plan for 2) removal of baghouse dust that will be generated at the Manheim facility in the future."

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[4]Having said this we nevertheless recognize that summary judgment could be granted to an Appellant on an issue not raised in its notice of appeal, if the issue were raised by DER or another party. This is not the case here however.

In their Brief in Support of their Motion, the Raymarks argue that sound public policy reasons exist such that generators of waste should not be required to commit to future methods of disposal because they must be afforded flexibility in their disposal arrangements as waste management technologies change. They further argue that should Industries or Friction violate any environmental law with respect to the baghouse dust, DER has the capacity to protect public health and the environment by penalizing the violation and by ordering the violator to correct the violation. Additionally, they contend the interests of public health and the environment are adequately protected by the requirement that the disposal facility prepare a Module One permit each time a new residual or hazardous wastestream is received.

DER, in its Objections to the Motion, cites several statutory provisions under which it argues its authority for issuing Paragraph 4(2) may be found. Further, DER asserts that it was reasonable for it to require the movants to advise DER of how they would avoid problems with the baghouse dust in the future, in view of Industries' and Friction's failure in the past to handle the baghouse dust at the landfill in a responsible manner and of the threat to human health and the environment which results from the improper handling of baghouse dust. DER states that the wastes accumulated in the baghouse dust contain asbestos and lead, (DER's Brief at p.p. 3-4 and 1990 Order), whereas the Raymarks state in their brief that the baghouse dust is free of asbestos and lead.

The moving parties have not shown us that the law is clear that DER is not empowered to issue Paragraph 4(2). Also, there are disputed material facts

regarding the danger to the public health and the environment. Thus, judgment on the pleadings is inappropriate and the motion must be denied.

The Raymarks also seek summary judgment as to Paragraph 9 of the 1990 Order. Again, we treat this Motion as one for judgment on the pleadings for the reasons outlined above.

Paragraph 9 provides: "Any substantial failure of Raymark or Raytech to comply with this order constitutes failure to comply with an 'enforcement action' for purposes of §1301 of the HSCA, 35 P.S. §6020.1301."

The Raymarks contend that Paragraph 9 is invalid as a matter of law because it is outside DER's enforcement authority. DER, on the other hand, contends the paragraph is a legitimate exercise of its authority, but it cites no law in support of this idea. Further, DER argues that Paragraph 9 "merely provides notice to Raymark and Raytech of the possible consequence, under Pennsylvania law, of a failure to comply with the Department's Order."

As is acknowledged by both the Raymarks and DER, DER did not issue the 1990 Order under the authority of the HSCA. Rather, DER cited as its authority various provisions of the Solid Waste Management Act, (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.; the Clean Streams Law, (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17. By including Paragraph 9 in the Order section of the 1990 Order, however, DER has issued a command and has not "merely provided notice" of the "possible" consequence of failure to comply with the 1990 Order. In light of motions practice before the Board, we could

easily envision a scenario in which DER would issue a subsequent order under HSCA to the Raymarks and, when the Raymarks appeal, DER would argue certain of their grounds for appeal are foreclosed by a failure to challenge this "notice" in this Order. When DER inserts a provision like this in its Order, it must recognize that it is not sending someone a mere notice of a possible future consequence.

Further, no authority for DER's predetermination that a particular order is an enforcement action for purposes of §1301 of HSCA[5] can be found in any of the acts cited in the 1990 Order nor does DER's brief go beyond the suggestion that there is authority and cite any such authority for us. We conclude that the law is clear that DER was without authority to include Paragraph 9 in its Order and the paragraph is invalid as a matter of law.

Thus, judgment on the pleadings is warranted as to this issue. We accordingly grant the Raymarks judgment on the pleadings as to Paragraph 9.

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[5]Section 1301 of HSCA provides in pertinent part:

> Notwithstanding the provisions of subsection 505(c) and section 507, an identified and responsible owner or operator of a site with a release or threatened release of a hazardous substance or a contaminant shall not be subject to enforcement orders or the cost recovery provisions of this act, until the department has instituted adminstrative or judicial enforcement action against the owner or operator under other applicable environmental laws and the owner or operator has failed to comply with or is financially unable to comply with such administrative or judicial enforcement action. In the event of noncompliance with such administrative or judicial enforcement action, the provisions of this act may be applied by the department....(Footnote omitted.)

O R D E R

AND NOW, this 20th day of September, 1990, it is ordered that Corporation's Motion for Summary Judgment, treated as a motion for judgment on the pleadings, and as such, is denied. The Motion for Partial Summary Judgment of the Raymarks, also treated as a motion for judgment on the pleadings, is denied as to Paragraph 4(2) and is granted as to Paragraph 9.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board member Terrance J. Fitzpatrick has recused himself in this case.

DATED: September 20, 1990

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M. DIANE SMITH
SECRETARY TO THE BC

NEW HANOVER CORPORATION	:	
	:	
V.	:	**EHB Docket No. 90-225-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 21, 1990**

OPINION AND ORDER
SUR
PETITION TO INTERVENE

Maxine Woelfling, Chairman

Synopsis

A petition to intervene by a citizens' group in an appeal of a denial of an application for a solid waste permit modification is denied where the petitioner fails to establish a direct, immediate and substantial interest, fails to distinguish its interest as separate and distinct from the other parties, and fails to establish it will produce any evidence that would assist the Board in resolving the matter.

OPINION

This matter was initiated by the June 5, 1990, filing of a notice of appeal by New Hanover Corporation (Corporation) seeking review of the Department of Environmental Resources' (Department) May 7, 1990, denial of the Corporation's re-permitting application for a waste disposal facility in New Hanover Township, Montgomery County. The Corporation's re-permitting application, which was submitted in accordance with the 1988 municipal waste regulations, was denied for numerous reasons, including violations of Article I, Section 27 of the Pennsylvania Constitution. The Corporation challenges

the Department's denial on many grounds, many of which are not germane to the matter presently before the Board.

A petition to intervene in this matter was filed on June 25, 1990, by Paradise Watch Dogs (PWD), a citizens' association incorporated in Pennsylvania. PWD contends its members are concerned about the protection of the environment in their community and the economic and environmental harm that may result from a landfill. Specifically, PWD asserts that many of its members live adjacent to the site of the proposed landfill, that they are dependent on private wells as a sole source of water, and that they would be severely affected by any noise or ground water contamination which could result from the landfill. PWD also raises concerns about the need for the landfill and the effect the landfill may have on property values. PWD notes that it has been involved with the Corporation's solid waste disposal site since its appeal of the original permit issuance at EHB Docket No. 88-126-W, and states, generally, that its interests are separate and distinct from the interest of the Department.

On July 9, 1990, the Corporation filed its answer in opposition to the petition to intervene, denying that the landfill will result in contamination or create adverse impact from noise or other hazards and noting that the application process was subject to public comment. In the accompanying brief, the Corporation argues that PWD has failed to satisfy the standards for intervention in 25 Pa. Code §21.62 and contends PWD's arguments are irrelevant, repetitious and have no relevance in this appeal, as they primarily bear on issues addressed in PWD's pending appeal of the original permit issuance at EHB Docket No. 88-126-W. Finally, the Corporation argues PWD has not demonstrated that it would present evidence that would assist the Board in resolving the issues in this case.

The Department did not respond to PWD's petition to intervene.

Intervention before the Board is governed by 25 Pa. Code §21.62. The Board has consistently held that intervention is discretionary and that petitioners must show a direct, immediate and substantial interest in the outcome of the litigation. Keystone Sanitation, Inc. v. DER, 1989 EHB 1287, 1289-90. The factors considered by the Board in ruling on a petition to intervene include 1) the prospective intervenor's relevant interest; 2) the adequacy of representation provided by the existing parties; and 3) the ability of the prospective intervenor to present relevant evidence. Bethenergy Mines, Inc. v. DER, 1987 EHB 873. Intervention is not allowed where it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or confusion of issues. City of Harrisburg v. DER, 1988 EHB 946. A prospective intervenor has the burden of showing that intervention should be granted. Del-Aware Unlimited, Inc. v. DER, 1988 EHB 547.

Because PWD has failed to satisfy its burden of showing why intervention should be granted, we must deny its petition. PWD's general statements regarding its concern over the environmental and economic impact of the landfill, along with its failure to specify any evidence it intends to produce, clearly do not establish a direct, immediate and substantial interest in the outcome of this appeal sufficient to warrant intervention. PWD has not addressed the adequacy of representation provided by the Department other than to say its interest is "separate and distinct." To the extent PWD has a general interest in the protection of the environment, we believe that the Department can adequately protect that interest. PWD has not discussed a single piece of evidence it intends to produce, nor has it explained how its involvement would assist the Board in resolving this matter. And, we agree

with the Corporation that the issues raised by PWD on its Petition more appropriately relate to PWD's appeal of the Department's 1988 issuance of a permit to the Corporation. In summary, PWD has failed to carry its burden of persuading us that it meets the three-pronged standard set forth in Bethenergy Mines, supra.

ORDER

AND NOW, this 21st day of September, 1990, it is ordered that the petition to intervene of Paradise Watch Dogs is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: September 21, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

RAYMARK INDUSTRIES, INC. et al.	:	
	:	
v.	:	**EHB Docket No. 89-294-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 24, 1990**

**OPINION AND ORDER SUR
DER MOTION
TO STRIKE OR,
IN THE ALTERNATIVE
FOR PARTIAL SUMMARY
ADJUDICATION
TREATED AS A MOTION FOR
JUDGMENT ON THE PLEADINGS**

Synopsis

Where, in a portion of their Notice of Appeal, Appellants seek review of the Department of Environmental Resources' (DER) refusal to settle its dispute with these Appellants, they seek review of the exercise of DER's prosecutorial discretion. The exercise of prosecutorial discretion by an agency of the Commonwealth is not subject to judicial review. Accordingly, DER's alternative Motion for Partial Summary Judgment raising this issue, treated as a motion for partial judgment on the pleadings, has merit and must be granted.

OPINION

The appeal at Docket No. 89-294-E involves three matters which have been consolidated. The corporate entities involved are Raymark Corporation ("Corporation"), Raymark Industries ("Industries"), Raymark Friction

("Friction"), (collectively hereinafter the "Raymarks")[1] and Raytech Corporation ("Raytech"). The first of the three notices of appeal was filed on September 1, 1989 by Industries from a DER order dated July 31, 1989 ("1989 Order"). On May 22, 1990, the matter was transferred to Board Member Richard S. Ehmann and was assigned Docket No. 89-294-E to reflect that transfer.

In the meantime, the Raymarks had filed a notice of appeal on May 7, 1990 from an order of DER dated April 26, 1990 ("1990 Order"). A Motion to Consolidate this appeal with the appeal at Docket No. 89-294-F was filed along with this notice of appeal. On May 25, 1990, Member Ehmann ordered Docket No. 90-180-E to be consolidated with Docket No. 89-294-E.

On May 23, 1990, Raytech had filed a separate notice of appeal from the 1990 Order, which was assigned Docket No. 90-209-E. On June 4, 1990, a Rule to Show Cause why Raytech's appeal should not be consolidated with the Raymarks' appeal was issued. After consideration of responses to the Rule from DER and Raytech, we issued an order on July 11, 1990, making the Rule absolute and consolidating all three appeals at Docket No. 89-294-E. On July 12, 1990, Corporation filed a Motion seeking summary judgment as to Corporation only, and, in the alternative, Corporation, Industries and Friction filed a motion for partial summary judgment. These Motions are addressed in our Opinion and Order issued on September 20, 1990.

On July 20, 1990, DER filed its Motion To Strike Or, In the Alternative, For Partial Summary Adjudication. DER's Motion argues that Paragraph 4 of the

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[1]The Raymarks are not to be confused with either the Rayettes or the Ramones, even if we are tempted by the volume of paper filed in this case to be reminded of an album-sized record which could aptly be titled "Remarks" by the Raymarks.

Raymarks' Notice of Appeal should be struck because it details settlement negotiations between the parties, and evidence of same is irrelevant and inadmissible. In the alternative, DER's Motion states that assuming arguendo that the facts in Paragraph 4 are true, these alleged facts constitute no defense to the Order's issuance.

The Raymarks responded to DER's Motion with Objections which were filed with us on August 14, 1990. The Raymarks' Objections suggest that the purpose of reciting the details of the settlement negotiations was to show that DER abused its discretion in issuing the 1990 Order because it should have settled these issues as to the 1989 Order, which, in turn, would have eliminated the need for the 1990 Order. Accordingly, the Raymarks argue these negotiations are admissible to show DER's arbitrary and unreasonable action in issuing the 1990 Order. Raymarks also argue that DER opened the door to this evidence because it referenced same in the 1990 Order. Finally, the Raymarks argue DER's alternative Motion For Partial Summary Judgment must be denied because DER's election to litigate the issues presented in the 1990 Order, rather than to settle same, constitutes an arbitrary and capricious exercise of DER's functions and duties.

In response to the Objections of the Raymarks and their supporting Brief, on August 17, 1990, counsel for DER "faxed" us his Reply Brief which argues that DER did not "open the door".[2]

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[2]Counsel for Raytech has elected to remain out of this fray. By letter dated August 13, 1990, Raytech has advised us it will file no response to DER's Motion, even though it does not agree with all of DER's representations.

From the extensive factual backgrounds set forth in their Motions and responses, it is clear that DER and the Raymarks agree to the following facts. Industries owns a manufacturing facility ("facility") located in Manheim, Pennsylvania, and a landfill ("landfill") which is also located in Manheim. While Industries operated the facility, it disposed of wastes it produced at the landfill. After March of 1987, baghouse dust from the facility's air pollution control equipment was collected and stored in baghouse bags on the surface of a portion of the landfill. Subsequently, Friction leased the facility from Industries and began manufacturing operations. It continued the placement of manufacturing wastes in baghouse bags and storage of the bags on the surface of the landfill. By July of 1989, there was an accumulation of bags of baghouse bag dust at the landfill. On July 31, 1989, DER issued an order to Industries and Corporation which directed Industries to submit a closure plan for the landfill within thirty days and a removal plan for the baghouse dust bags within fifteen days. (See 1989 Order.) The superseding 1990 Order referenced above and issued to Raytech, Corporation, Industries, and Friction also dealt with the same issues as the 1989 Order. It states that it supersedes DER's 1989 Order.[3]

Because we are treating DER's Motion For Partial Summary Adjudication as a motion for partial judgment on the pleadings and we are granting same, we need

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[3]On August 29, 1990, we issued the parties a Rule to Show Cause why the appeal of the 1989 Order should not be dismissed, since the 1990 order says it supersedes the 1989 Order.

not deal with DER's Motion To Strike because granting of the Motion For Partial Summary Adjudication eliminates the issue raised by the Motion To Strike.

While DER titled its motion as a Motion For Partial Summary Adjudication, it is in fact seeking a judgment on the pleadings which consist of the Raymarks' Notice of Appeal. This is obvious from that statement in DER's motion to the effect that even if we assume all the facts in Paragraph 4 of the Raymarks' Notice of Appeal to be true, they constitute no defense to DER's Order.

As we have stated in the past, in the appropriate case, we are authorized to grant a motion for judgment on the pleadings. G.B. Mining Company v. DER, 1988 EHB 1065; Borough of Dunmore v. DER, Docket No. 87-401-F (Opinion and Order issued June 28, 1990). A judgment on the pleadings will be granted where the pleadings do not state a valid cause of action. Pa.R.C.P. 1034; Bensalem Township School District v. DER, 518 Pa. 581, 544 A.2d 1318 (1988); G. B. Mining Co., supra.

While factual disputes in this case must be resolved in favor of the Raymarks as non-moving parties under G. B. Mining, supra, the facts in this case were never in dispute for purposes of this Motion because DER says that even if we assume the allegations in the Raymarks' Paragraph 4 are true, DER is entitled to relief. DER then says all these allegations merely show normal negotiations against a litigation background. In response, the Raymarks argue that there is no incremental environmental benefit by DER not settling; that with a 1989 Order and a 1990 Order, the only sane course is to require DER's withdrawal of both orders; and that DER seeks through its Motion to have this

Board hold that DER may ignore its duty to consider the economic impact of its actions.

Paragraph 4 (with twenty-two subparagraphs) in the Raymarks' Notice of Appeal is a detailed recital from Raymark's perspective of the course and results of unsuccessful settlement negotiations between DER, on the one hand, and Industries and Corporation, on the other. These negotiations failed to produce an agreement to resolve the dispute over closure of the Manheim landfill, apparently because of DER's desire to hold Raytech responsible jointly with the Raymarks for this closure liability.[4] When negotiations broke down on this point, DER issued its now appealed 1990 Order. From DER's refusal to settle, the Raymarks launch a series of challenges dealing with DER's bad faith in failing to settle.

Looking at Paragraph No. 4, the motion and response, it is clear that neither party has verbalized the key issue here. The Raymarks seek through Paragraph 4 to have us review an area of DER activity over which we have no authority. The Raymarks seek a review of a DER decision to litigate rather than to settle. This would be a review of DER's exercise of its prosecutorial discretion. Such actions as DER took, i.e., rejecting the settlement proposal, are not subject to judicial review. Michael J. Downing v. Commonwealth, Medical Education and Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976); Ralph D. Edney v. DER, 1989 EHB 1356; Consolidation Coal Company v. DER, 1985 EHB 768. Since these decisions are not subject to our review, DER is correct that even if everything the Raymarks say is true, it

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[4]We say "apparently" because of the lack of evidence in the record before us at this preliminary stage in this appeal.

constitutes no defense to the 1990 Order. Accordingly, there is no reason not to grant DER's motion as to Paragraph 4 and we enter the following Order.

O R D E R

DER's alternative Motion For Partial Summary Judgment as to Paragraph 4 of the Raymarks' Notice of Appeal, treated as a Motion For Partial Judgment on the Pleadings, is granted for the reason set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board member Terrance J. Fitzpatrick has recused himself in this case.

DATED: September 24, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

GEORGE HAPCHUK	:	
	:	
v.	:	**EHB Docket No. 90-191-E**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 24, 1990**

OPINION AND ORDER

By Richard S. Ehmann, Member

Synopsis

When an Appellant has failed to file his Pre-Hearing Memorandum in accordance with an order of the Board and has failed to respond to a Rule To Show Cause, his appeal may be dismissed as a sanction pursuant to 25 Pa. Code §21.124.

OPINION

On May 11, 1990, George Hapchuk ("Hapchuk") filed an appeal from a Compliance Order dated April 16, 1990 and issued by the Commonwealth's Department of Environmental Resources ("DER"). The Order directs Hapchuk to immediately cease dumping or depositing solid waste (apparently, sewage sludge or septic tank wastes) at his property in Hempfield Township in Westmoreland County and to construct a barrier to prevent the sludge from entering the waters of the Commonwealth.

In response to this Notice of Appeal, we issued our standard Pre-Hearing Order No. 1, paragraph 3 of which required Hapchuk to file his Pre-Hearing Memorandum with us on or before July 30, 1990.

On August 17, 1990, having heard nothing further from Hapchuk and not having received his Pre-Hearing Memorandum, we issued him a Rule To Show Cause why his appeal should not be dismissed as a sanction, pursuant to 25 Pa. Code §21.124, for failing to file his Pre-Hearing Memorandum. This Rule was returnable on or before September 6, 1990 and specified that the Board's receipt of Hapchuk's Pre-Hearing Memorandum within this time period would constitute a discharge of this Rule. Our certified mail receipt shows that his counsel received this Rule by certified mail on August 18, 1990.

Hapchuk has made no response to our Rule To Show Cause. Under these circumstances, dismissal as a sanction, pursuant to 25 Pa. Code §21.124, is warranted for failure to comply with our Orders. Delta Coal Sales, Inc. et al. v. DER, Docket No. 90-044-MJ (Opinion issued August 21, 1990).

O R D E R

AND NOW, this 24th day of September, 1990, it is ordered that the appeal of George Hapchuk is dismissed as a santion under 25 Pa. Code §21.124 for failure to comply with the Board's Order and Rule.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
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TERRANCE J. FITZPATRICK
Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 24, 1990

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

med

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M. DIANE SMITH
SECRETARY TO THE BO

SAMUEL B. KING	:	
	:	
V.	:	**EHB Docket No. 87-111-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 25, 1990**

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

By Robert D. Myers, Member

Syllabus:

A landowner piled tires on the surface of the ground and engaged in the open burning of tires without permits from DER. DER ordered the landowner to cease these activities and to remove the tires from the site to an approved solid waste disposal facility for disposal or recycling. The Board holds that, in view of the environmental and health problems created by the piling of the tires on the surface and the ineffectiveness of burying the tires on site as a means of disposal, DER was justified in requiring the tires to be removed to an approved disposal facility.

Procedural History

On March 23, 1987 Samuel B. King (Appellant) filed a Notice of Appeal from an Order of the Department of Environmental Resources (DER) issued March 12, 1987. The Order accused Appellant of the surface disposal and open

burning of tires on his property in Providence Township, Lancaster County, without permits from DER; and directed Appellant to cease such activities and to remove the tires to an approved disposal facility.

A Motion to Dismiss the appeal, filed by DER on April 23, 1987, was denied in a Board Opinion and Order dated July 2, 1987 (1987 EHB 543). A Motion for Summary Judgment, filed by DER on March 14, 1989, was partially granted[1] (1989 EHB 1093). A hearing was scheduled to begin in Harrisburg on February 13, 1990, before Administrative Law Judge Robert D. Myers, a Member of the Board. Written notice of the hearing was given on December 14, 1989. When the hearing was convened, DER appeared by legal counsel but Appellant did not appear either in person or by legal counsel. Sidney Moyer, a person who identified himself as a friend of Appellant but who acknowledged that he was not a lawyer, was in attendance. He stated that his purpose was not to represent Appellant in the hearing but to secure a continuance to enable settlement discussions to take place.[2]

Since the appeal had been pending for nearly three years, Judge Myers refused to postpone the hearing. Instead, he called upon DER to present its case in chief (since DER has the burden of proof) and then recessed the hearing for 30 days to enable settlement discussions to take place. He ruled

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[1] Appellant had admitted the violations and was contesting only the reasonableness of the corrective action ordered by DER.

[2] According to the Notice of Appeal and the statements of Sidney Moyer, Appellant is a member of the Old Order Amish sect. While he was represented by legal counsel from August 3, 1987 to March 22, 1989, he represented himself at all other times. The Board, aware that the Old Order Amish are reluctant participants in legal proceedings, treated Appellant with a leniency not ordinarily tolerated in Board proceedings. Since the appeal had been initiated by Appellant, however, and not by DER, it had to proceed to final action regardless of Appellant's reluctance to participate. The deference accorded to pro se litigants cannot be permitted to interfere with the performance of the Board's statutory duties.

that, if no settlement is reached within that period, Appellant could request an opportunity to appear in person or by legal counsel to present evidence. This arrangement was fully explained in a letter, dated February 13, 1990, from Judge Myers to Appellant.

Another day of hearing, subsequently requested by Appellant, was scheduled for April 24, 1990 in Harrisburg. Written notice was given on March 29, 1990. On the morning of the hearing, the Board was informed by telephone that Appellant would not appear in person or by legal counsel. When Appellant was not present at the convening of the hearing later that day, the hearing was adjourned and the record was closed.

The record consists of the pleadings, a transcript of 28 pages and 2 exhibits. After a full and complete review of the record, we make the following:

Findings of Fact

1. Appellant is an individual residing at 1361 Byerland Church Road, Willow Street (Providence Township, Lancaster County), Pennsylvania 17584 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and has the responsibility and authority to enforce and administer, inter alia, the provisions of the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq.; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17; and the rules and regulations adopted pursuant to said statutes.

3. In January 1987 when DER personnel inspected Appellant's property:

(a) approximately 50,000 tires were piled on the surface of the ground;

(b) Appellant was burning tires in the open, the smoke and odor from which was detectable beyond the limits of Appellant's property;

(c) evidence existed of prior open burning of tires within the confines of a tributary of Big Beaver Creek on Appellant's property; and

(d) Appellant had no permits from DER authorizing such activity (Order attached to Notice of Appeal; N.T. 13,15).

4. By an Order issued March 12, 1987 (Order) DER directed Appellant to cease the activities detailed in finding of fact number 3 and to take immediate corrective action, including the removal of the tires to a properly permitted solid waste disposal facility for disposal or recycling (Order attached to Notice of Appeal).

5. Since his receipt of the Order, Appellant has not accepted any more tires for disposal and has not engaged in any open burning of tires. (N.T. 19).

6. Appellant has not removed any tires from his property, preferring instead to bury them on site (Notice of Appeal; N.T. 19).

7. Buried tires tend to work their way up to the surface instead of remaining below ground (N.T. 21).

8. Tires stored on the surface are unsightly, are subject to fire, become a breeding ground for insects and may cause water pollution (N.T. 15, 21-22).

Discussion

DER, having the burden of proof: 25 Pa. Code §21.101(b)(3), must show by a preponderance of the evidence that the Order was authorized by statute and was an appropriate exercise of discretion. Since Appellant has admitted the activities of which he is accused and has acknowledged that they constituted violations of the APCA, the SWMA, the CSL and the underlying regulations, the only remaining issue is the appropriateness of DER's mandate to remove the tires from the site (see Opinion and Order issued October 11, 1989, 1989 EHB 1093).

By its evidence, DER has shown that tires stored on the surface create unacceptable environmental and health problems and that buried tires have a tendency to work their way up to the surface. Appellant has presented no evidence to the contrary. In view of this evidence, we agree with DER that the only appropriate corrective action is the removal of the tires from the site to an approved solid waste disposal facility where they can be disposed of properly or recycled.

Conclusions of Law

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

2. DER has the burden of showing by a preponderance of the evidence that the Order was authorized by statute and was an appropriate exercise of discretion.

3. Appellant's activities constituted violations of the APCA, the SWMA, the CSL and the underlying regulations.

4. DER's insistence that the tires be removed from the site to an approved solid waste disposal facility for disposal or recycling was an appropriate exercise of discretion.

ORDER

AND NOW, this 25th day of September, 1990, it is ordered that Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 25, 1990

cc: **Bureau of Litigation**
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M. DIANE SMIT
SECRETARY TO THE E

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	**EHB Docket No. 90-034-CP-W**
U.S. WRECKING, INC.	:	**Issued:** September 27, 1990

OPINION AND ORDER SUR MOTION FOR DEFAULT JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

A motion for default judgment based upon the defendant's alleged failure to file a timely answer to a complaint for civil penalties will be denied where there is no proof establishing that the defendant was served with both a complaint for civil penalties and a notice to defend by a date certain. The twenty day period for answering such a complaint does not begin to toll until the defendant is in receipt of both the complaint and the notice to defend.

OPINION

This matter was initiated by the January 16, 1990, filing of a complaint for civil penalties pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119 (1959), as amended, 35 P.S. §4001 *et seq.*, by the Department of Environmental Resources (Department). The complaint alleges that U.S. Wrecking Inc. (U.S. Wrecking) failed to observe certain regulations concerning asbestos notification, removal, demolition and disposal in violation of the Air Pollution Control Act. A Notice to Defend

was not attached to the complaint, and, subsequently, on February 7, 1990, a notice to defend was filed with the Board.

On July 3, 1990, the Department filed a motion for default judgment or, in the alternative, for sanctions, based upon U.S. Wrecking's failure to answer the complaint within twenty days of service in accordance with the Board's Rules of Practice and Procedure, 25 Pa. Code §21.66. The Department alleges that the first mailing of the complaint to U.S. Wrecking on January 18, 1990, was returned to the Department unopened. The complaint was then mailed again to a different address and was not returned. Consequently, the Department contends that U.S. Wrecking's failure to respond to the second complaint subjects it to entry of a default judgment.

On July 30, 1990, U.S. Wrecking filed an answer to both the motion for default and the complaint. In its answer to the motion, U.S. Wrecking states that it received the notice to defend on or about February 6, 1990, but that it was not served with a copy of the complaint until July 27,1990.

Because the Department never established when proper service was effected upon U.S. Wrecking and, thus, when U.S. Wrecking had to file an answer, its motion must be denied.

The rule applicable to complaints for civil penalties at 25 Pa. Code §21.66 provides in pertinent part that: "Answers to complaints for civil penalties shall be filed with the Board within 20 days after the date of service of the complaint..." The Board rule relating to service on a party at 25 Pa. Code §21.32(b) provides that:

> Complaints for civil penalties when served, shall be enclosed with:
>
> 1) a statement certifying that it is a true and complete copy of the complaint filed with the Board; and
>
> 2) a notice to plead. (emphasis added)

As a result, a party's obligation to answer the complaint does not begin to toll until service in accordance with 25 Pa. Code §21.32(b) has been effected.

The Board must view the Department's motion in the light most favorable to U.S. Wrecking. Manor Mining & Contracting Corporation v. DER, EHB Docket No. 86-544-F (Opinion issued March 9, 1990). While U.S. Wrecking admits to having received the notice to defend, it denies receiving the complaint until July 27, 1990.

The Department asserts in a letter dated July 27, 1990, that it mailed the complaint sometime in January of 1990, and yet, it has provided no evidence of that mailing. Furthermore, as the Department admits in its letter dated April 2, 1990, it mistakenly omitted its notice to plead, which it then mailed under separate cover on or about February 5, 1990.[1]

Because there was never proper service of the complaint, U.S. Wrecking's obligation to respond to it under 25 Pa Code §21.66 was not tolled. Consequently, we must deny the Department's motion.

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[1] Paragraph 4 of the Department's motion alleges that "On or about February 5, 1990, the Board informed Department counsel that it had contacted U.S. Wrecking because no answer to the complaint had been filed. The Board informed the Department that U.S. Wrecking admitted to receiving the complaint, but did not know what to do because no Notice to Plead was attached." As with the rest of the Department's motion, this factual allegation was not properly supported by affidavits, and, in any event, is contested by U.S. Wrecking.

ORDER

AND NOW, this 27th day of September, 1990, it is ordered that the Department of Environmental Resources' motion for default judgment, or, in the alterative sanctions, is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: September 27, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Central Region
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Thomas E. Harting, Esq.
Lancaster, PA

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M. DIANE SMITH
SECRETARY TO THE BOAR

RAM DISPOSAL SERVICE	:	
	:	
v.	:	**EHB Docket No. 90-282-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 27, 1990**

OPINION AND ORDER SUR MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

The Board dismisses an appeal for lack of jurisdiction. Failure to prepay a civil penalty assessed under Act 101 deprives the Board of jurisdiction over the matter and is grounds for dismissal.

OPINION

This case involves an appeal by Ram Disposal Service ("Ram") from a four hundred dollar ($400) civil penalty assessed on June 11, 1990 by the Department of Environmental Resources ("DER") pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 et seq. (Act 101). The assessment was based upon an alleged violation of Section 1101(e) of Act 101, 53 P.S. §4000.1101(e): failure to have proper signage on equipment transporting solid

waste in connection with Ram's equipment unloading at the Lasky Landfill located in Cambria County. Ram filed its notice of appeal on July 13, 1990, but did not submit prepayment of the civil penalty with the notice of appeal. On August 27, 1990, DER filed a Motion To Dismiss. In this motion, DER asserts that Ram failed to perfect its appeal in that it did not prepay the assessment; therefore, this Board has no jurisdiction over the matter. Ram was notified of DER's Motion by our letter of August 30, 1990 and was given until September 17, 1990 to file a response. No response has been received by the Board.

According to our records, Ram has yet to make its civil penalty prepayment. Thus, the appeal was not perfected, and we will dismiss this matter for lack of jurisdiction. Act 101, under which DER assessed the penalty, states in relevant part:

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

53 P.S. §4000.1704(b). The plain language of Act 101 indicates that this failure resulted in Ram's waiver of its rights to contest the civil penalty.

Grand Central Sanitation, Inc. v. DER, EHB Docket No. 89-615-F (Opinion and Order issued June 28, 1990). Accordingly we enter the following Order, dismissing this appeal.

O R D E R

AND NOW, this 27th day of September, 1990, it is ordered that the appeal of Ram Disposal Service is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 27, 1990

cc: **Bureau of Litigation**
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Gail A. Myers, Esq.
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Boswell, PA

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