

ENVIRONMENTAL HEARING BOARD

SELECTED DECISIONS AND ISSUES DURING 1999

Attorney-Client Privilege

Conrail, Inc. (97-166-C, May 3, 1999) Report of environmental consultants concerning investigation requested by company counsel into a contaminated facility as the result of an administrative order issued by the Department held privileged from discovery by reason of the attorney-client privilege.

Attorneys Fees and Expenses

Raymond Proffitt Foundation (98-020-R, March 26, 1999) Application denied in appeal from issuance of a coal mining permit where the permittee surrendered its permit in the early stages of the appeal, apparently for business reasons

Discovery

Dauphin Meadows, Inc. (99-190-L, October 8, 1999) A landfill challenging the Department's denial of its application for an expansion subpoenaed experts from a traffic consulting firm for depositions. The experts had advised the Department during the review of the application and were expected to testify for the Department at trial. The Board granted a Department motion to quash the landfill's subpoena to depose the experts, noting that the expert witness had been retained at least in part from the beginning in anticipation of litigation, and that the landfill served the notice of deposition before the deadline for filing expert reports.

Wurth (98-179-MG, October 21, 1999) The Board granted a Department motion to compel the production of documents from an appellant challenging the denial of his application for permit for a solid waste transfer facility. Since the Department may consider applicants' compliance histories under 25 Pa. Code § 271.125(a)(6), the Appellants were entitled to documents from the permittee concerning the compliance history of solid waste processing and disposal facilities owned or operated by the permittee or its related parties within the previous 10 years.

Enforcement

Westinghouse Electric Corporation (88-319-CP-MG, March 26, 1999) The Board reassessed a penalty in the amount of \$3,200,000 for failure to remediate spills of hazardous substances and failure to notify the Department of the resulting contamination over a ten year period. A penalty of \$61,500 for actual proved discharges to ground water and of \$35,015 for the Department's investigation costs was also assessed. The Commonwealth Court had remanded the matter to the Board to reconsider its award of a

\$5,451,283 based on the Court's belief that the penalty had been assessed by the Board on the unproved assumption that all of the contamination of the ground water had been caused by Westinghouse. *Westinghouse Electric Corporation v. Department of Environmental Protection*, 705 A.2d 1349 (Pa. Cmwlth.1998). An appeal from the reassessed penalty is pending in the Commonwealth Court.

FR&S, Inc. (97-247-MG, May 19, 1999) The Board affirmed the assessment of a civil penalty against a solid waste landfill in the amount of \$334,500 under the Solid Waste Management Act for failure to meet a deadline for the installation of a cap and gas management system in a portion of the landfill. This was a reduction from the Department's original assessment of a \$352,000 penalty because the Department failed to prove that a penalty assessed for turning off the power to a leachate collection system and the penalty for elevated gas levels at the boundary of the site were reasonable and appropriate. An appeal is pending in the Commonwealth Court.

Marlingo's Disposal Service (96-271-MR, March 31, 1999) Declaration of bond forfeiture upheld on motion for summary judgment based on appellant's violations of the Solid Waste Management Act and regulations thereunder, a consent order and adjudication and landfill closure obligations.

Charles E. Brake Co., Inc (98-026-C, December 21, 1999). The Board sustained an appeal of an \$800 civil penalty assessed against the operator under the Noncoal Surface Mining Act and the Clean Streams Law. The Board eliminated the civil penalty, holding that, where the operator made a timely request for an assessment conference, the Department had to hold the conference before assessing the penalty. The Board also dismissed an appeal filed by a surface mine operator challenging a compliance order issued under the Noncoal Surface Mining Act, holding that the Department has the authority to order operators to cease operations on land that they neither own nor have bonded—even if the Department failed to issue them a notice of violation beforehand.

Hazardous Sites Cleanup

Clever (98-086-MG, October 26, 1999) The Board granted a Department motion for summary judgment in an appeal of an administrative order, issued under the Hazardous Sites Cleanup Act, that directed appellant to provide the Department with access to property the Department believed to be contaminated. The Board held that the Department was entitled to the access because the Department had a reasonable basis to believe that there was a release of a hazardous substance on the property, and the administrative order was reasonably related to determining the need for a response. Although appellant insisted that he did not "own" the property, but was merely an agent for those who did, the Board determined that the evidence in the record was sufficient to make him an "owner" under the Act.

Inability to Pay Penalty as Condition of Appeal

Goetz, Jr. (97-226-C, February 12, 1999) Appeal of civil penalty assessment for a noncoal mining operation dismissed where appellant failed to pay the civil penalty or post a bond as required by Board order following the failure of appellant to bear his burden of proof that he was unable to meet this requirement as a condition of pursuing the appeal. *See also Swartley Transportation Company, Inc.* (99-017-L, March 15, 1999)

Hrivnak Motor Company (99-052-L, June 21, 1999) Appellants were excused from posting a bond or prepaying a civil penalty where they proved that it would cause an undue financial hardship for them to do so. The opinion emphasizes the difficulty in liquidating assets in time to meet 30-day deadline for action either at the time the appeal is filed or in response to a Board order in the event the Board determined that appellants were financially able.

Intervention

Joseph Conners (99-138-L, August 20, 1999) Citizens group permitted to intervene in hog farmer's appeal from the disapproval of his nutrient management plan. The group's members have a substantial, immediate, and direct interest in whether the plan is approved by virtue of their close proximity to the site and other factors. The intervention is aimed at supporting the Department action. The intervenor will not be limited in what arguments it can present simply by virtue of its intervenor status. The propriety considering these issues to be determined as the litigation progresses.

Jefferson Township Supervisors (98-071-MG, August 27, 1999) A petition to intervene by a township sewer authority is denied where the petition is filed over a year after the Department issued the order to both the petitioner and the Township. Granting such a petition by a recipient of a Department order would permit the petitioner to circumvent the requirement that an appeal must be filed within 30 days of the Department action.

Mining

Wheeling & Lake Erie Railway (97-252-R, May 26, 1999) The Mine Subsidence Act does not authorize the Department of Environmental Protection to order a coal mining company to reimburse a railroad for mine subsidence damages to its railroad tracks. The Department's regulations also provide no such authority.

People United to Save Homes (96-232-R, July 2, 1999) Because it is not technologically and economically feasible to longwall mine and provide support in the mines to homes, nothing in the Mine Subsidence Act prohibits the resulting subsidence in a predictable and controlled manner. Fifty-percent support is required for certain structures and streams. The Department can prohibit such mining if it would result in irreparable damage to occupied dwellings. Owners of homes must be reimbursed for damage caused by subsidence.

The Department abused its discretion in requiring only a ten-thousand dollar bond to secure, among other things, the mining company's obligation to repair damage done by subsidence. Permit remanded to the Department for calculation of a proper bond amount and future mining conditioned on posting of bond in proper amount within 120 days.

Williams (98-153-R, August 31, 1999) The Board granted the coal company's motion to limit issues in this appeal of a revision to a deep coal mining permit. Appellants sought to raise, for the first time, in their pre-hearing memorandum, issues concerning water loss, water replacement and the adequacy of the mine subsidence bond. The Board held that these issues were not raised in the notice of appeal. The Board further rejected Appellants' argument that the mining company should have anticipated that these issues were part of the appeal because Appellants conducted discovery on at least one of the issues.

Kilmer (98-102-L, October 19, 1999) The Board granted a motion to dismiss an appeal of a compliance order issued under the Noncoal Surface Mining Act. The Board held that the appeal became moot when the Department vacated the order, and explained that appellant could not appeal a second, related order where he failed to file a separate appeal of that order.

Sewage Facilities

Scott Township Preservation Alliance (98-209-MG, June 17, 1999) The Board has no jurisdiction over an appeal from a letter from the Department which neither changes the status quo ante of its previous approval of the Township's Sewage Facilities Plan or imposes new obligations through its issuance. The failure of the Appellant, a citizen's group, to appeal the Department's prior approval of the sewage facilities plan under the Sewage Facilities Act bars the Board from granting relief. A change in the plan, if at all, must come from an application by the Township to the Department to approve an amendment to the approved plan.

Jefferson Township Supervisors (98-071-MG, October 13, 1999) The Board granted a motion to dismiss a municipality's appeal of a Department order requiring the municipality to implement its official sewage facilities plan. The municipality contended that its official plan was unsuitable. However, the Board explained that, because the municipality failed to file a timely appeal of the official plan, the municipality could not challenge the Department's order enforcing the plan. It was limited to proposing a revision to the official plan.

Successor Parties

Seder (98-058-MG, September 21, 1999) The Board granted the motion of a purchaser of real estate to be substituted as the party appellant where the basis for the original appellants' claim turned on their ownership of particular real estate. The Board also denied motions to dismiss the purchaser's appeal holding that the substitution was not

barred either by an absence of authority in the Board to substitute a party appellant or by the failure of the purchaser to file his own appeal within 30 days of the Department's issuance of a permit for the operation of a dam and minor project on a stream adjoining real estate owned by the appellants and the permittee.

Supersedeas

Highridge Water Authority (98-191-R, January 29, 1999) Petition for supersedeas of Department decision to permit customer of appellant to purchase drinking water supplies from another supplier of drinking water at a lower cost denied for failure to demonstrate a likelihood of success because the Water Rights Act applies only to surface waters and the new supplier proposed to supply drinking water only from ground water sources.

202 Island Car Wash, L.P. (99-008-MG, February 4, 1999) The Board declined to supersede a Department order revoking permits required for operation of underground storage tanks and directing the cessation of operations where the owners and operators failed to comply over many months with the Department's requirements for a site characterization study of a release of petroleum product and with sampling and replacement drinking water supplies.

Thomas F. Wagner (98-184-MG, February 11, 1999) Board superseded Department order suspending appellant's permits for operation of underground tanks and requiring him to cease operations. Appellant had met all of the Department's requirements for reopening operations following the release and had cooperated with the Department in the remediation of the discharge in all respects. However, he was unable to complete the remediation by reason of financial inability after the \$1,000,000 available from the USTIF had been spent and the Department decided to take over the completion of the remediation.

Global Eco-Logical Services, Inc. (99-055-L, August 4, 1999) Supersedeas of revocation of solid waste permit and forfeiture of bond granted on fulfillment of special conditions designed to minimize any potential threat to the environment following resumption of operations pursuant to the supersedeas. The supersedeas of the permit revocation will terminate in the event appellant violates any term or condition of its permit or of any environmental statute or regulation governing its operations. Forfeiture of bond supersedeas until after final hearing.