

SELECTED ENVIRONMENTAL HEARING BOARD and APPELLATE COURT DECISIONS from the YEAR 2000

Air Pollution Control

United Refining Company v. DEP, EHB Docket No. 99-187-L (Opinion issued February 15, 2000). The Board held that an appeal from a Department letter, which informed the permit applicant that its application was incomplete because the project in question was subject to New Source Review, must be dismissed because the letter does not constitute final action.

Attorney Fees

Department of Environmental Protection v. Bethenergy Mines, Inc., 758 A.2d 1168 (Pa. 2000). The Department commenced an enforcement proceeding against the coal mine operator after a landowner alleged that subsidence caused by the mining activities destroyed the watershed for a creek. Ultimately the proceeding terminated in the permittee's favor, and the Board awarded a large sum as costs and attorney's fees pursuant to 52 Pa.C.S. § 1406.5(g), a statute relating to mine subsidence. In affirming the Board's decision, the majority of the Commonwealth Court essentially adopted the rationale of the Board.¹ The Department sought review of the Commonwealth Court's affirmance of the award of costs and attorney's fees to the coal mine operator, arguing that such an award was not authorized under 52 Pa.C.S. § 1406.5(g). The state Supreme Court reversed the order affirming the award, holding that the statute in question only authorized awards in proceedings relating to bond and permit requirements under the mining subsidence statute, not to general enforcement proceedings.

Lucchino v. Department of Environmental Protection, 744 A.2d 352 (Pa. Cmwlth. 2000). The Commonwealth Court affirmed the Board's decision which held that a permittee seeking to recover costs and attorney fees in the amount of \$6,987.50 under the Surface Mining Conservation and Reclamation Act and the Clean Streams Law from a third-party appellant may do so if the four-part test as set forth in *Big B Mining Co. v. Department of Environmental Resources*² is met and it can be demonstrated that the appeal was brought in bad faith. See 1998 EHB 556.

Dam Safety and Encroachments Act

Seder v. DEP, EHB Docket No. 98-058-MG (Adjudication issued April 27, 2000). The Board dismissed a third-party appeal from a permit issued by the Department for the operation and maintenance of a small dam and hydroelectric generating plant. The Board held that the

¹ See *Department of Environmental Protection v. Bethenergy Mines, Inc.*, No. 1601 C.D. 1997 (Pa. Cmwlth. filed September 17, 1998).

² 624 A.2d 713 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 633 A.2d 153 (Pa. 1993).

appellant had failed to demonstrate that as a downstream landowner of the lower portion of the dam his signature was a necessary prerequisite for the issuance of the permit. The Board also held that the Department properly did not require the permittees to secure a flowage easement for the downstream property and that a permit condition requiring the permittees to maintain the millrace on the downstream property did not infringe upon the property rights of the appellant. An appeal is pending in Commonwealth Court.

Enforcement

Wagner v. DEP, EHB Docket No. 98-184-MG (Adjudication issued August 29, 2000). The Board concluded that the Department properly suspended underground storage tank permits for a retail gasoline station after a release of over 10,000 gallons of gasoline resulted in significant groundwater contamination and required two residents to evacuate their homes due, in part, to the operator's failure to properly monitor gasoline inventory and take prompt corrective action after directed to do so by Department personnel. The Board determined that the Department may hold the appellant legally responsible for the cleanup of the release while at the same time performing those activities itself. An appeal is pending in Commonwealth Court.

Goetz v. DEP, EHB Docket No. 97-226-C (Adjudication issued June 26, 2000). The Board held that a compliance order directing the appellant to allow Department personnel to enter and inspect a noncoal surface mining site that he was operating on his property was reasonable where the appellant was excavating the rock, he lacked a permit and license for noncoal mining, he had not reclaimed the site and he had previously interfered with, and even struck, Department personnel investigating the site.

DEP v. Tessa Ltd., EHB Docket No. 98-239-CP-K (Adjudication issued June 14, 2000). The Board approved the Department's recommended penalty of \$100 per day for failing to submit a Part II permit application for the construction of a leachate treatment system, failing to commence or complete construction of a leachate treatment system, and failing to achieve compliance with effluent limit set forth in the permittee's National Pollutant Discharge Elimination System (NPDES) permit. In addition, notwithstanding the Department's failure to amend its complaint and the defendant's failure to attend the hearing, the Board granted the Department's request made at the hearing that the \$100 per day penalty carry forward from the date after the complaint was filed through the date of the hearing. The total penalty assessed was \$121,000.

Leeward Construction, Inc. v. DEP, EHB Docket No. 98-048-L (Adjudication issued June 13, 2000). The Board dismissed consolidated appeals from three Department orders issued to an earthmoving contractor because the project was causing actual and potential excess sedimentation of the receiving streams in violation of the contractor's storm water NPDES permit. The Board determined that the Department had the authority to issue the orders and they were necessary to aid in the enforcement of the Clean Streams Law.

202 Island Car Wash, L.P. v. DEP, EHB Docket No. 98-023-MG (Adjudication issued May 19, 2000). The Board affirmed the Department's assessment of a civil penalty in the amount of \$54,900 against a retail gasoline station operator for, among other violations, failing

to register its underground storage tanks and failing to properly perform leak detection at its facility in accordance with the Storage Tank Act and its corresponding regulations. The Board reduced the original \$152,100 penalty because: (1) the Department assessed two separate penalties where the conduct giving rise to one violation was included in conduct which gave rise to another violation, therefore only one penalty was appropriate; and, (2) the evidence as to whether the violations caused the environmental damage was ambiguous.

Gromicko v. DEP, EHB Docket No. 98-199-MG (Adjudication issued April 27, 2000). The Board affirmed the Department's denial of an application for a radon testing certification based on the appellant's violations in performing previous mitigation services which indicated a lack of ability and intention to comply with the Radon Certification Act. The Board also affirmed a civil penalty assessment in the amount of \$14,576 for 30 violations in the installation of mitigation systems at 12 residences.

Livingston v. DEP, EHB Docket No. 97-130-R (Adjudication issued April 19, 2000). The Board upheld the Department's revocation of permits authorizing the construction of a boat dock and marina as a sanction for the appellant's proceeding without obtaining necessary permits to construct a road to the site over land containing wetlands.

Whitemarsh Disposal Corporation, Inc. v. DEP, EHB Docket No. 97-099-L (Adjudication issued March 20, 2000). The Board upheld a Department order directing a private sewerage facility to cease discharging, as well as the Department's refusal to renew the facility's NPDES permit. The facility's permit provided that it was an interim facility that was to be shut down when alternate municipal facilities became available. The Board found that the Department correctly concluded that such alternate facilities were available. The Board modified the order to give the plant's operator 180 rather than 90 days to cease discharging. The Department's actions were further justified because of the rundown condition of the plant, the operator's poor compliance history, the operator's demonstrated unwillingness and inability to comply with the law, and its destitute financial condition and lack of institutional controls. The Board assessed a \$250,000 penalty against the corporate operator for failing to maintain the facility, exceeding its discharge limits, failing to notify the Department of the problems, and operating without a permit. The Board assessed a \$17,000 penalty against an individual for his participation in the violations.

Westinghouse Electric Corporation v. Department of Environmental Protection (*Westinghouse II*), 745 A.2d 1277 (Pa. Cmwlth. 2000). The history of this protracted litigation is detailed in (*Westinghouse I*), 705 A.2d 1349 (Pa. Cmwlth. 1998), *appeal denied*, 729 A.2d 1133 (Pa. 1998). A panel of the Commonwealth Court affirmed the Board's adjudication which determined that Westinghouse had violated various sections of the Clean Streams Law and corresponding regulations as a result of its failure to remediate spills of hazardous substances and its failure to notify the Department of the resulting contamination over a ten-year period. *See* 1996 EHB 1144. The court concluded, however, that part of the Board's penalty analysis was based upon the assumption that all illegal discharges proven resulted in contamination, although the Board had expressly declined to find that all discharges actually contaminated waters. As a result, the court vacated the Board's \$5,451,238 civil penalty and remanded for calculation of a new penalty based only upon matters that the Board had found to be proven. On remand, the

Board reassessed the penalty in the amount of \$3,296,515. *See* 1999 EHB 98. On appeal, a panel of the Commonwealth Court affirmed the Board's reassessment of the civil penalty. The court agreed that the Board's penalty calculation on remand was not improperly based upon implementing a policy of deterrence without a factual foundation. In rejecting Westinghouse's argument that the amount of the penalty was unprecedented in previous Board adjudications, the court held that the penalty reasonably fit the violations.

F.R. & S., Inc. v. Department of Environmental Protection, 761 A.2d 634 (Pa. Cmwlth. 2000). The Commonwealth Court affirmed the Board's assessment of a \$315,000 civil penalty against an owner of a municipal waste landfill for violations of the Solid Waste Management Act. *See* 1999 EHB 241. The Court held that the penalty was reasonable and that what other landfills received as penalties was not relevant to whether the Department's civil penalty against an owner constituted discriminatory enforcement of the Act.

General Permits

Stevens v. DEP, EHB Docket No. 2000-030-L (Opinion issued April 11, 2000). An appeal by neighboring landowners from a general permit coverage approval that is filed within 30 days of when the neighbors were first notified that sludge would be applied on adjacent property will not be dismissed because the appeal was not filed within 30 days after the issuance of the general permit.

Mining

People United to Save Homes v. DEP, 97-262-R (Adjudication issued December 28, 2000). The Board held that the Department did not err in granting a renewal permit for the operator of an underground coal mine even though the permit application was filed less than 180 days before the expiration date of the permit. The Board found that the mining regulation in question creates a presumption of successive renewals and contains no penalty for a late filing. Additionally, the Board determined that the renewal permit was issued after the date of expiration in order to allow for an informal public conference. The Board did not agree with the appellant's argument that the original subsidence bond in the amount of \$10,000 was inadequate since subsequent to the reissuance of the renewal permit, the Department recalculated the subsidence bond, which resulted in the mining company posting a bond in the amount of \$2,150,498.50.

Harriman Coal Corporation v. DEP, EHB Docket No. 99-068-C (Opinion issued September 28, 2000). The Board denied the Department's motion to dismiss challenges to surface coal mining license renewals. Although the renewals had expired, the Board determined that the mootness doctrine did not apply because the appellant raised issues that were capable of repetition but would evade review.

Harriman Coal Corporation v. DEP, EHB Docket No. 98-235-C (Opinion issued July 21, 2000). The Board denied the Department's motion to dismiss for mootness despite the lifting of the compliance order based on alleged violations under the Surface Mining Conservation and

Reclamation Act. The appellant continues to have a stake in the appeal of the order as a result of the penalty escalation provisions in the Department's regulations.

Sedat, Inc. v. DEP, EHB Docket No. 99-171-L (Opinion issued July 18, 2000). The Board granted the Department's motion for summary judgment, following a transfer order from a court of common pleas, because the stipulated record demonstrated that there was not an extraordinary delay in reviewing the permittee's surface coal mine permit application; therefore, there was not a temporary taking of the party's property for which the party was entitled to compensation.

Goetz v. DEP, EHB Docket No. 97-226-C (Adjudication issued June 26, 2000). A person who extracted minerals from the earth or its surface did not fall within the "building construction" exception to the definition of "surface mining" in the Noncoal Surface Mining Conservation and Reclamation Act where: (1) he did not conduct the excavation activity concurrently with the construction of the building; and, (2) he failed to limit the area mined to the amount necessary for the construction of the building. A person who extracted minerals from the earth or its surface did not fall within the "noncommercial use" exception to the definition of "surface mining" in the Noncoal Act where he did not use all of the materials that he extracted from the site for his own use. The appellant failed to prove that the Department authorized his noncoal mining on a site by virtue of a letter it sent to him where: (1) the letter was sent before the Act was even enacted; (2) only one page of the letter was introduced at hearing, and the signature was absent; and, (3) appellant exceeded the scope of the authority the letter allegedly conferred upon him to conduct excavation activity.

Wayne v. DEP, EHB Docket No. 98-175-R (Adjudication issued July 11, 2000). The Board held that the Department erred in granting Stage III bond release for the site on which a haul road is located since the Department failed to follow its own regulations when it approved the retention of the haul road without a maintenance plan. Although the appellant did not specifically argue that the Department erred by approving a bond release without requiring a maintenance plan for the haul road, her objections in the notice of appeal concerning runoff and erosion relating to the haul road and the Department's failure to order remedial measures for the road were sufficient to preserve her objections. The Board concluded that the appellant did not meet her burden of proof regarding her allegations that the permittee's mining caused the appellant's water quality problems or that the haul road contained toxic materials.

Rettig v. DEP, EHB Docket No. 2000-064-R (Opinion issued May 23, 2000). In granting the appellant's motion for summary judgment, the Board held that the coal company must send letters of notification to adjoining property owners prior to filing its application for Stage I bond release. Since this was not done, the Board rescinded the Department's approval of the permittee's application for bond release.

Lucchino v. DEP, EHB Docket No. 98-166-R (Adjudication issued May 9, 2000). The Board dismissed a third-party appeal on the ground that the appellant failed to prove that the Department acted contrary to law or otherwise erred when it approved Stage II and Stage III bond release for two surface coal mines.

Blose v. DEP, EHB Docket No. 98-034-R (Adjudication issued March 7, 2000). The Board sustained a third-party appeal on the ground that the Department did not follow the regulatory language in granting a surface coal mining permit which required that waivers be submitted with the permit application of the requirement that mining not be conducted within 300 feet of occupied dwellings. Since the owners of dwellings within 300 feet of the mine plan boundaries would not waive this requirement, the Board found that the mining could not be feasibly accomplished and remanded the permit to the Department for consideration of any alternate mining plan that might be submitted. An appeal is pending in Commonwealth Court.

Jurisdiction

Borough of Edinboro v. DEP, EHB Docket No. 2000-070-L (Opinion issued June 26, 2000). In denying the Department's motion to dismiss, the Board held that a Department letter which does not withdraw the duties imposed by a previous Department letter is merely an attempt to characterize the earlier letter as a nonappealable action and as such, is irrelevant. (The Board granted the Department's second motion to dismiss the appeal as moot since the Department sent a third letter specifically withdrawing the original letter and stating that the appellants did not have to take any action. *Borough of Edinboro v. DEP*, EHB Docket No. 2000-070-L (Opinion issued September 11, 2000).)

Goetz v. DEP, EHB Docket No. 97-226-C (Adjudication issued June 26, 2000). An inspection report that simply states whether an operator is in violation of Department regulations is not ordinarily an appealable action, while an inspection report that contains a mandate is an appealable action; consequently, the Department bears the burden of proof regarding whether an inspection report is an appealable action, just as it would for an order.

Felix Dam Preservation Association v. DEP, EHB Docket No. 2000-009-K (Opinion issued April 10, 2000). The Department's issuance of a Notice of Award on bids to remove a dam is not an appealable order where the regulatory scheme requires that the Department issue a permit for removal of the dam before removal can be effectuated.

Protect Environment and Children Everywhere v. DEP, EHB Docket No. 99-170-L (Opinion issued January 4, 2000). The Board held that the Department's advertising of a request for proposals in the *Pennsylvania Bulletin* for a reclamation project does not constitute a final appealable action.

Oil and Gas Act

Grazis v. DEP, EHB Docket No. 2000-017-K (Opinion issued September 19, 2000). On cross-motions for summary judgment in an appeal of the Department's bond forfeiture action, the Board granted in part and denied in part the appellant's motion while denying the Department's motion. The Board determined that the Department acted contrary to law when it forfeited the appellant's blanket bond without first having reviewed the proffered replacement bonds.

Procedural Matters

Discovery

Defense Logistics Agency, Department of the Army v. DEP, EHB Docket No. 2000-004-MG (Opinion issued October 23, 2000). The Board granted a motion to limit discovery which sought to bar the deposition of an attorney representing the Department of Environmental Protection concerning communication with Department staff who provided technical advice or reviewed an enforcement order issued by the Department. The information sought was too vague to provide a basis to conclude that any information disclosed by the Department's attorney would not violate attorney-client privilege or the work-product doctrine.

Evidence

Goetz v. DEP, EHB Docket No. 97-226-C (Opinion issued June 26, 2000). The search and seizure guarantees in the U.S. Constitution do not require that the Board exclude evidence that is the fruit of an unlawful search or seizure since the Supreme Court has held that the exclusionary rule does not apply to civil, administrative proceedings, like those before the Board. The outcome would not necessarily be the same under Article 1, Section 8, of the Pennsylvania Constitution because the Pennsylvania Constitution affords greater protection against unreasonable searches and seizures than the U.S. Constitution.

Smedley v. DEP, EHB Docket No. 97-253-K (Opinion February 14, 2000). Rule 611(c) of the Pennsylvania Rules of Evidence permits the use of leading questions in examining Department witnesses by an appellant because Department employees are identified with an adverse party within the meaning of this rule.

Intervention

P.H. Glatfelter Company v. DEP, EHB Docket No. 2000-194-L (Opinion issued October 13, 2000). In a pulp and paper mill's appeal from the color limitations in the mill's NPDES permit, the Board permitted local citizens and environmental groups to intervene because the use and enjoyment of the receiving stream by the citizens and the environmental groups' members is credibly alleged to have been adversely affected on a continual basis by the mill's discharge. The intervenors are limited to offering evidence and argument on the issues identified in their petition.

Giordano v. DEP, EHB Docket No. 99-204-L (Opinion issued September 26, 2000). Although a neighboring Township would have had standing to appeal in its own right, it was nevertheless granted intervention in this appeal of a major modification of a landfill permit. However, significant limitations were placed on its participation in discovery and presentation of evidence at the hearing due to the fact that its Petition was filed late in the proceedings.

Pennsylvania Game Commission v. DEP, EHB Docket No. 2000-067-R (Opinion issued June 19, 2000). In granting a petition to intervene, the Board held that the petitioner may raise the issues of whether a permit revision failed to address North Fork Dunkard Fork as a perennial

stream and whether it failed to address how the operator will minimize adverse impacts on fish where the original appellant raised the issues of whether the Department failed to require the delineation of all riparian habitats and failed to address how the operator would minimize adverse impacts on wildlife.

Parties

Ainjar Trust v. DEP, EHB Docket No. 99-248-K (Opinion issued April 27, 2000). The Board denied the permittee's motion to dismiss where the permittee was not served on the same day the notice of appeal was filed. As in the *Thomas* decision, the Board held that this failure was not jurisdictional.

Thomas v. DEP, EHB Docket No. 98-150-C (Opinion issued April 18, 2000). Where the Department issued its approval of a municipality's sewage facilities plan to a joint municipal sewage authority rather than to the municipalities who submitted the plan, the Board added the municipal sewage authority to the appeal as the "permittee." The Board held that the joint municipal sewage authority was entitled to a dismissal because it was not the "permittee" and the addition had been made by the Board without prompting by the appellant.

Thomas v. DEP, EHB Docket No. 98-150-C (Opinion issued April 27, 2000). The Board denied the motion to dismiss the appeal for failure to serve a copy of the notice of appeal on the municipal recipients of the Department's action. The Board held that failure to timely serve the notice of appeal on the recipients is not required for the Board to have jurisdiction where: (a) the failure to effect timely service resulted from a breakdown of the Department's and Board's procedures; and, (2) the appellant subsequently served copies of the notice of appeal on the municipal recipients of the Department's action.

Res Judicata/ Collateral Estoppel

Kresge & Sons, Inc. v. DEP, EHB Docket No. 99-149-K (Opinion issued January 27, 2000). Summary judgment granted in part in a bond forfeiture action was based on the appellant's failure to appeal an order suspending its permit as part of a previous compliance order because this failure bars the appellant from contesting the violations set forth in the compliance order which also provided the basis for the bond forfeiture.

Sanctions

DEP v. Tessa Ltd., EHB Docket No. 98-239-CP-K (Opinion issued March 15, 2000). The defendant in the Department's complaint for civil penalties failed to file a pre-hearing memorandum as required by the Board's order scheduling a hearing and stated that it would not contest the Department's action. The Board entered an order precluding it from presenting evidence from the scheduled hearing on liability and the amount of the penalty. The Board denied the Department's motion for a default adjudication because the defendant had filed an answer to the complaint denying the material allegations of the Department's complaint and the Board had to hear the evidence in order to assess an appropriate penalty.

Standing

Giordano v. DEP, EHB Docket No. 99-204-L (Opinion issued October 4, 2000). Because the Board determined that there are disputed issues of fact about whether the appellants have been harmed by the issuance of the landfill's major permit modification, the permittee's motion to dismiss for lack of standing was denied.

Beaver Falls Municipal Authority v. DEP, EHB Docket No. 2000-098-R (Opinion issued August 25, 2000). In denying the permittee's motion to dismiss, the Board held that where the permittee makes general conclusory statements in a dispositive motion, the Board cannot find as a matter of law at such an early stage of the proceedings that the appellant has no standing. The Board held that an appellant need not make allegations of standing in its notice of appeal.

Ziviello v. Commonwealth of Pennsylvania State Conservation Commission, EHB Docket No. 99-185-R (Opinion issued July 31, 2000). The Board held that third-party appellants have standing where they credibly aver that the permittee's conduct will potentially cause illness from misapplication of manure or incorrect nitrogen concentration estimates, create malodor and cause groundwater contamination and runoff onto property frequented by the appellants.

O'Reilly v. DEP, EHB Docket No. 99-166-L (Opinion issued May 24, 2000). The Board held that a third-party appellant has standing where he credibly avers that the permittee's storm water discharges resulting from the development of a shopping center will potentially pollute a stream that the appellant enjoys and uses for fishing.

Wurth v. DEP, EHB Docket No. 98-197-MG (Opinion issued February 29, 2000). The Board held that individual and organizational appellants did not have standing to appeal the transfer and reissuance of a solid waste permit from a municipal operator to a private operator because they failed to present in response to a motion for summary judgment evidence that they would be harmed by the change of operators.

Sewage Facilities Act

Dallas Area Joint Sewer Authority v. DEP, EHB Docket No. 2000-091-C (Opinion issued September 12, 2000). In granting the Department's motion to dismiss, the Board held that it lacks subject matter jurisdiction under the Sewage Facilities Act over an appeal seeking to challenge the Department's failure to act on a letter sent to the Department by a municipal authority. An appeal is pending before Commonwealth Court.

Scott Township Environmental Preservation Alliance v. DEP, EHB Docket No. 99-048-MG (Opinion issued February 15, 2000). A letter to the Department purporting to be a private request under the Sewage Facilities Act was both procedurally and substantively deficient in that the request was not first made to the municipality and it contained no description of the requested revision. The letter therefore could not be a valid private request under the Act to which the Department had a duty to respond. The Department's motion for summary judgment was granted.

Solid Waste

Dauphin Meadows v. DEP, EHB Docket No. 99-190-L (Opinion issued April 27, 2000). In an appeal from the denial of a landfill permit, the Board held that a guidance document that requires a landfill permittee to prove that the benefits of a landfill expansion clearly outweigh the harm of expansion constitutes a procedurally defective regulation, not a valid statement of policy. The Board held that the Department's reliance on the balancing test set forth in the guidance document was improper. The Board remanded the permit application to the Department for further review that does not rely on the balancing test contained in this guidance.

A similar decision was made in *Appalachian Power Company v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000). Electric power companies and trade associations representing the nation's chemical and petroleum industry challenged the validity of portions of an EPA document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs." The Court of Appeals set aside the Guidance Document in its entirety, finding that certain Guidance provisions expanded the scope of the statute and its regulations and should have been subject to the rulemaking procedures required under federal law.

Wurth v. DEP, EHB Docket No. 98-179-MG (Opinion issued February 29, 2000). The Board denied a motion for summary judgment filed by third party appellants in an appeal of the reissuance of a landfill permit from the City of Bethlehem to a private landfill operator. The Board held that the appellants failed to sustain their burden of demonstrating that they were entitled to judgment concerning their allegations that the Department failed to appropriately consider the compliance history of the permit applicant, county and sub-county waste plans, recycling provisions, leachate storage, needs analysis, environmental assessment and public notice and comment. The Board granted the permittee's motion for summary judgment on the ground that the appellant had failed to show in response to the motion that the permit transfer and reissuance caused them a direct injury necessary to demonstrate that they had standing to appeal.

Supersedeas

Fifer v. DEP, EHB Docket No. 2000-149-MG (Opinion issued November 3, 2000). In an appeal from the issuance of a Department order directing the appellants to cease receiving, processing or disposing of land clearing wastes without a permit and to remove all solid wastes from the sites, the Board denied a petition for supersedeas. Since woody materials derived from land clearing and held for processing are considered waste rather than forest products under the Department's solid waste regulations, the Board determined that the Department's order was reasonable and appropriate. However, a conditional supersedeas was granted with respect to the disposal of some of the mulch at the appellants' facilities since the appellants' evidence was sufficient to prove that this mulch is a marketable product rather than waste.

Jefferson County Commissioners v. DEP, EHB Docket No. 95-097-C (Opinion issued March 24, 2000). A petition for supersedeas of a Department order suspending a permit for construction and operation of a landfill near an airport was denied. A principal issue involved the possibility that the permittee might not be able to construct or operate the landfill under a

recently adopted amendment to the Federal Aviation Act. The Board held that the permittee had failed to demonstrate irreparable harm and lack of injury to the public.

Wetlands

Eagle Environmental, L.P. v. Department of Environmental Protection, No. 2704 C.D. 1998 (Pa. Cmwlth. filed January 19, 2000)(Opinion not reported). This case arises out of an appeal of the Board's adjudication affirming the Department's revocation and suspension of the permits necessary for Eagle to construct and operate a proposed municipal landfill on the basis that certain streams were subsequently classified as "wild trout streams" and certain wetlands became classified as "exceptional value wetlands." See 1998 EHB 896. The court held that it was proper for the Board, in its *de novo* capacity, to substitute its discretion for that of the Department in rendering a decision as to whether the streams were wild trout streams. The court also determined that Eagle's failure to challenge Intervenor Pennsylvania Fish and Boat Commission's classification and inclusion of certain trout streams on the List and the Criterion for identifying streams to place on the List constitutes a waiver. The Commonwealth Court granted reconsideration and the parties reargued the case during the summer of 2000. As of the date that this summary was prepared, the court had not issued a decision.

*Cases summarized and compiled as of January 23, 2001 with the help of Jennifer L. Poller, Assistant Counsel.