

**SELECTED ENVIRONMENTAL HEARING BOARD  
AND RELATED COURT  
DECISIONS DURING THE YEAR 2001**

**Air Quality**

*Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001). The Board sustained the grant by DEP of a minor modification to an operating permit that authorized the permittee to add a component of tire derived fuel for two of its boilers. The Appellant failed to demonstrate that the minor modification would result in the increase in the emissions of any contaminant.

*North American Refractories Company v. DEP*, EHB Docket No. 99-199-MG (Adjudication issued May 8, 2001). A majority of the Board held that the Department erred when it denied a brick manufacturer's application for emission reduction credits (ERC) as untimely filed. The manufacturer ceased operating an air pollution source in order to perform repairs, but did not file its application for credits until it determined several months later that the shutdown would be permanent instead of temporary. The part of 25 Pa. Code § 127.207 that requires that an ERC application must be filed within one year of "the initiation of the emissions reduction used to generate ERCs" means one year from when the facility commits to initiate an acceptable emission reduction technique as defined in the same regulation. In the case of a curtailment in operations such as that which is the subject of this appeal, 25 Pa. Code § 127.207(5)(ii) provides that the curtailment must be permanent. Judges Miller and Krancer dissented on the grounds that this is an improper interpretation of the regulation, and that the Department's interpretation that the application had to be filed within one year of the initiation of the emission reduction should have been accepted by the Board.

This decision is currently under review by the Commonwealth Court.

**Water Quality**

*O'Reilly v. DEP*, EHB Docket No. 99-166-L (Adjudication issued January 3, 2001). The Board dismissed in most respects a citizen's appeal from the Department's issuance of an NPDES permit for a storm water discharge associated with construction activities at a retail complex being developed in Lehigh County. The citizen failed to prove that the site's discharge would harm or threaten the receiving stream as a result of on-site or off-site conditions. The citizen failed to prove that either the site developer or the prospective tenant of the site had a compliance history that would have justified withholding the developer's permit. The Board remanded the permit to the Department to obtain the signature on the application of a responsible corporate official because the evidence showed that no such signature had been obtained.

## **Mining**

*People United to Save Homes v. Department of Environmental Protection (PUSH)*, Nos. 1855 and 1938 C.D. 2000 (Pa. Cmwlth. 2001). The Commonwealth Court upheld the Board's decision that the Department's approval to the coal mining activity permit which added additional underground acreage to its existing mining permits and subsidence control plan areas for long wall mining was proper, but required the Department to recalculate the amount of the required bond to reflect the likely cost to the Department of a default by the permittee in meeting its obligations under the criteria set forth in the Bituminous Mine Subsidence and Conservation Act.

Long wall mining results in a high recovery rate at a relatively low cost, but causes subsidence of the surface overlying and in the vicinity of the mining panel and often results in loss or damage to natural water sources. The Bituminous Mine Subsidence and Conservation Act, as amended, requires mining companies, regardless of the absence of rights to surface support, to adopt measures that would prevent material damage to surface structures to the extent technologically and economically feasible, and if mining were to result in irreparable damage, to authorize the Department to prohibit such mining.

The Court rejected PUSH's contention that the permit authorized an unconstitutional taking because of the absence of a right to support and the Subsidence Act being justified by the Commonwealth's police power. The Court also rejected the contention that the Board had improperly interpreted the Act to prohibit mining only if homes would be irreparably harmed. The Court also held that mining could be permitted even if water supplies would be affected because the Act prohibits mining that would result in pollution of waters only if the mining adversely affected the use of the waters. The Court also upheld the Board's determination that the permit application adequately described how affected water supplies would be replaced. Finally, the Court found that the Department's policy of requiring a \$10,000 bond was improper and upheld the Board's requirement that the Department recalculate the amount of the required bond based on the factors set forth in the Subsidence Act.

*People United to Save Homes v. Department of Environmental Protection (PUSH)*, No. 236 C.D. 2001 (Pa. Cmwlth. 2001). The Commonwealth Court, in an "opinion not reported," upheld the Board's determination that the mining company was not precluded from obtaining a permit because it did not meet a requirement in the Department's regulations requiring that a permit renewal application be filed 180 days before permit expiration and operated its mine before the Department issued the renewal permit. The Court held that this requirement was directive rather than mandatory and that a presumption of successive renewal contained in the Department's regulations meant that the permit never expired.

*Birdsboro v. DEP*, EHB Docket No. 99-071-K (Adjudication issued April 30, 2001). The Board upheld the grant of a non-coal mining permit, authorization to mine and related NPDES permit because Appellants did not satisfy their burden of proof that the mining activities would have an adverse effect on a nearby watershed and exceptional

value stream. The Department had imposed extensive conditions on the permit in view of the stream's exceptional value designation to protect the watershed and made the second phase of the mining plan conditional on the absence of any adverse effect on the stream and watershed during the mining under the first phase. An appeal is pending before the Commonwealth Court.

*Riddle v. DEP*, EHB Docket No. 99-226 and 227-MG, (Adjudication issued February 26, 2001). Appeals from decisions of the Department not to order a mining operator to provide a landowner with an alternate water supply are dismissed even though the Surface Mining Act's rebuttable presumption that the diminishment of the water supply was caused by mining. The dismissal was based on the evidence at the hearing on the merits that the diminishment of the Appellant's water supply more likely than not was caused instead by a failure to periodically clean the well and by drought conditions that prevailed throughout Pennsylvania.

*Riddle v. DEP*, EHB Docket No. 98-142-MG (consolidated with 2000-201-MG) (Opinions issued April 16, 2001 and April 30, 2001) These appeals involve the Department's approval of applications for Stage I Bond release relating to two separate mining properties. The Board denied the Department's motion for summary judgment relating to one area based on affidavits of Department inspectors that this permit area had been reclaimed to approximate original contour because of the conclusory nature of these affidavits. In addition the Board denied the Department's motion based on a claim that the Appellant lacked standing to complain of a lack of notice to other landowners of the application.

With respect to the second mining area, the Board granted in part and denied in part the Permittee's motion for summary judgment. The Board granted the motion on grounds of administrative finality with respect to objections that should have been raised in an appeal from the issuance of the mining permit. The Board denied the motion with respect to objections that were based on the claim that violations of the mining laws, regulations, and the permit barred the issuance of a Stage I Bond release.

A hearing was recently held in this case, and a final decision by the Board is pending.

*Maddock v. DEP*, EHB Docket No. 99-224-L (Adjudication issued April 13, 2001). The Board remanded a revision to a mining company's coal refuse disposal area permit to authorize the use of a borehole that had already been drilled as a conduit to collect surface seeps and direct them to treatment. The Board held improper the approval of this revision without first having required the mining company to obtain updated hydro-geological and water supply information. The permit revision was remanded for further consideration in light of updated information.

*United Mine Workers of America v. DEP*, EHB Docket No. 2001-081-K (Adjudication issued December 5, 2001). The Board rescinded the Department's approval of a variance of provisions of the Pennsylvania Bituminous Coal Mining Act requiring that a pre-shift examination of mine safety conditions be performed within the three hours immediately preceding the start of a coal or non-coal producing shift. The

mining company's request for the variance was based on a provision of this Act which authorized an operator to adopt new methods and processes, if such new methods and processes accord protection to personnel and property substantially equal to or in excess of the requirements set forth in the Act. The mining company's proposal was to conduct this examination every eight hours to accommodate a new work schedule under the mine's 24 hour operation so that, among other things, no employee would be in the mine for more than eight hours without a safety inspection being performed. A majority of the Board concluded that such a variance was authorized by the Act, but this proposal would not accord equal or greater protection to personnel and property. Judges Miller and Labuskes dissented based in their belief that the proposed variance would provided equal protection.

### **Sewage Facilities Act**

*Scott Township Environmental Preservation Alliance v. DEP*, EHB Docket No. 99-239-MG (Opinion issued January 31, 2001) The Board granted the Department's motion for summary judgment because a letter purporting to be a private request under the Sewage Facilities Act was substantively deficient because it requested a wholesale revision to the municipality's previously approved and adopted official sewage facilities plan on grounds of overall cost and well-being of the environment. No appeal had been filed from that approval.

*Eisenhardt v. DEP*, EHB Docket No. 2000-109-MG (Adjudication issued June 4, 2001). A sewage facilities planning module for the interim use of holding tanks for a commercial real estate development was remanded to the Department because it did not contain a proper commitment to provide sewage disposal upon completion of a sewage treatment plant expansion. The Board held that the planning documents from the water authority's engineer did not provide an adequate assurance to provide sewage service as required by the Department's regulations.

*Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (Adjudication issued October 10, 2001). The Board denied an appeal by a neighboring landowner/developer which objected to the approval of a sewage planning module for a residential housing development. Specifically the Board held that the appellant had failed to prove that there would be environmental harm resulting from the plan approval, and that it complied with Chapter 94 wasteload management regulations and other requirements of the sewage facilities regulations. The Board did modify the Department's approval to delete reference to 30 EDUs for a clubhouse that had been eliminated from the development plan before its review of the planning module. An appeal is pending with the Commonwealth Court.

### **Solid Waste**

*Eagle Environmental, L.P. v. DEP*, No. 2704 C.D. 1998, (Pa. Cmwlth. 2001). The Commonwealth Court, in an "opinion not reported," affirmed the Board's approval of the Department's revocation of a solid waste permit because it would have permitted the fill of wetlands which discharged water to what was determined subsequently to be a "wild trout stream". The result of this determination was that the wetlands were classified as

“exceptional value wetlands” under the Department’s wetland regulations that could not be filled. The Fish and Boat Commission had determined that the stream was a “wild trout stream” based on its criteria after the permit had been issued. That criteria had not been promulgated as a regulation under the Commonwealth Documents Law. The Department revoked the permit based on the Fish and Boat Commission’s determination.

The Board held that the Department had an independent duty to determine whether in fact the stream was a wild trout stream and, exercising the Board’s powers of *de novo* review, determined that the stream was a “wild trout stream” and affirmed the Department’s action on that basis. The Court held that the Department’s regulation was not an impermissible delegation of authority to the Fish and Boat Commission, but held that the Fish and Boat Commission’s criterion of a “wild trout stream” was invalid because it was a regulation that was not promulgated in compliance with the Commonwealth Documents Law. While the Court held that the Board erred in considering this criterion to be merely an internal document, the court said this was of no moment because the Board’s determination that the stream was a “wild trout stream” was properly made in the exercise of its powers of *de novo* review independent of the Fish and Boat Commission’s criterion.

The Board’s adjudication is reported at 1998 EHB 896. An application for review is pending in the Supreme Court of Pennsylvania.

*Horsehead Resource Development Company, Inc. v. DEP*, 780 A.2d 856 (Pa. Cmwlth. 2001). The Commonwealth Court upheld the dismissal of appeals of the manufacturer of a waste- derived product designed for paving purposes from orders directed to the manufacturer’s customers requiring them to remove the material from their property. After the appeals were filed, the customers reached settlement agreements with the Department. The Board dismissed the appeals on the motion of the Department on the grounds that the manufacturer’s appeals were moot as a result of these settlements. The Court said that the Department’s determination was not one that is capable of repetition and yet evade review in part because the manufacturer’s application for a beneficial use determination was to be pursued with the Department and that determination would be subject to review by the Board.

*Giordano v. DEP*, EHB Docket No. 99-204-L (Adjudication issued August 22, 2001). Nearby citizens and a neighboring township challenged a permit modification which increased a landfill’s average daily tonnage. The Board held that it was appropriate to apply a regulation which required the benefit of such a modification to outweigh the harm which was promulgated after the permit modification was approved. Applying the regulation to the evidence adduced at hearing, the Board concluded that the benefit of the increased tonnage did not clearly outweigh the harm because it accelerated the utilization of landfill capacity and accordingly the Board rescinded the permit modification. An appeal is pending with the Commonwealth Court.

### **Storage Tank Act**

*Wagner v. Department of Environmental Protection*, No. 2187 C.D. 2000 (Cmwlth. 2001). The Commonwealth Court, in an “opinion not reported,” upheld the

Board's adjudication upholding the Department's order suspending permits for storage tanks and requiring a service station operator to cease operations as a result of a release of more than 10,000 gallons of product from the station's storage tanks as being necessary to the enforcement of the Storage Tank Act. The Board's adjudication, reported at 2000 EHB 1032, found that the operator's failure to properly monitor his tank inventory and to take prompt remedial action once the release was discovered justified the Department's order as being necessary to the enforcement of the Storage Tank Act.

*Hrivnak Motor Co. v. DEP*, EHB Docket No. 99-052-L (Adjudication issued June 5, 2001). Since the Appellants failed to timely report a significant release of gasoline from their underground storage tanks and failed to address the resulting contamination in a meaningful way, the Board upheld the Department's decision to suspend their storage tank permits. Finding that the Board's adjudication in *Thomas F. Wagner, Inc. v. DEP*, 2000 EHB 1032, *aff'd*, 2187 C.D. 2000 (Pa. Cmwlth. filed April 3, 2001), directly on point the Board concluded that the Department's action was reasonable, appropriate and necessary. The Board also held that the Appellants failed to articulate any reasoned basis for reducing the Department's assessment of a \$163,000 civil penalty.

*Farmer v. DEP*, EHB Docket No. 98-226-L (Adjudication issued March 26, 2001). The Board dismissed an appeal brought by a certified tank inspector and his employer from a \$14,000 civil penalty assessment imposed for seven faulty inspections. Among other things, this inspector reported that inspected facilities were employing proper leak detection and corrosion protection when, in fact, they were not. All of the underlying violations were either stipulated or established in a previous Board decision. An appeal is pending before the Commonwealth Court.

*Defense Logistics Agency v. DEP*, EHB Docket No. 2000-004-MG (Opinion issued April 16, 2001). This appeal involves responsibility for remediation of a plume of petroleum products underlying an area in South Philadelphia. For a number of years the Department, the Appellant (a unit of the United States Army) and the owner of petroleum refineries in the area had worked cooperatively under a consent order and agreement to remediate this contamination. The Department's order under appeal assigned many of the remaining remediation tasks only to Appellant. On cross-motions for summary judgment, the Board granted the Department's motion with respect to (1) the Appellant's liability under the Storage Tank Act and Clean Streams Law, (2) the Appellant's waiver of the defense of sovereign immunity, (3) the claim that the Department's order was not in violation of the consent order and agreement, and (4) the Department's failure to also issue the order to the owner of the nearby refineries. However, the Board denied both the Department's and the Appellant's motions with respect to the Appellant's claim that the Department's failure also assign the remaining remediation tasks to the owner of the refineries was an abuse of discretion..

Following a hearing on the merits, the Board dismissed the appeal. (Adjudication issued December 21, 2001). The Appellant failed to produce a shred of evidence that the failure to assign remediation tasks to another party was the result of bias, prejudice or partiality, even though that claim was nearly the exclusive reason for the Board's denial of the Department's motion for summary judgment. The Board held that the failure to consider the Appellant's compliance history was not a reason for reviewing the

Department's exercise of its broad discretion in pursuing enforcement actions. It also held that the Department's consideration of a report of a neutral technical expert used by the parties in attempting to reach an agreement with respect to the remediation was proper. The Board had barred the admission in evidence of this report because the federal Alternative Dispute Resolution Act prevented disclosure to persons other than those who were parties to the dispute resolution agreement. Finally, the Board held that the Department's order did not violate the dispute resolution procedures agreed upon in a memorandum and agreement between the Department and the Department of Defense relating to the allocation of costs incurred by the Department for services rendered to the Department of Defense related to the closing of the Appellant's defense facility.

## **Enforcement**

*Global Eco-Logical Services, Inc. v. Department of Environmental Protection*, No. 125 M.D.2001 (Pa. Cmwlth. 2001). The Commonwealth Court affirmed the Board's grant of a motion for summary judgment finding that a provision for automatic revocation of a solid waste permit contained in a consent order and agreement (CO&A) executed by the appellant was valid and enforceable. The Court said that by agreeing to the CO&A's conditions for termination the Appellant bargained away arguments that otherwise might be presented to the Board that the Appellant's failure to submit annual operations reports and failure to pay penalties on the schedule set forth in the CO&A did not justify revocation of the permit.

*DEP v. Leeward Construction, Inc.*, EHB Docket No. 99-257-L-CP (Opinion issued October 1, 2001). The Board assessed a total civil penalty of \$258,500 for an earthmoving contractor's violations of the Clean Streams Law. The Board assessed \$109,000 for the contractor's failure to install effective erosion and sedimentation controls and for operating without an approved erosion and sedimentation plan. The Board assessed \$49,500 for the contractor's pollution of the waters of the Commonwealth, and \$100,000 for the contractor's deliberate violations of the Department's stop work orders. Judge Krancer's concurring opinion said that he would like to see evidence of profit gained in this type of case so that the Board could consider whether to add an additional amount of penalty over and above the amount of profit gained for punishment and deterrence. An appeal is pending in the Commonwealth Court.

## **Supersedeas**

*Quinn Lickman v. DEP*, EHB Docket 2001-012 and -013-C (Opinion issued February 13, 2001). The Board denied the Department's motion to dismiss a supersedeas petition because it had not adequately demonstrated that the Appellant's right to mine had been terminated before the petition for supersedeas had been filed. The Board held that the Department had not adequately demonstrated that the Appellant, an operator under contract with a licensed mining company, did not have a right to mine prior to the filing of the petition for supersedeas. It also rejected the Department's contention that the right to mine had been previously terminated by compliance orders.

*Harriman Coal Corporation v. DEP*, EHB Docket No. 2000-148-C (Opinion issued March 7, 2001). A petition for supersedeas was denied because the Appellant failed to make the requisite “strong showing” that it was entitled to a supersedeas where (1) the Appellant is unlikely to prevail on the merits of its appeal of the denial of the renewal of its permit to mine, (2) it was not clear that the Appellant had the authority to mine prior to the denial of the renewal, and (3) the Appellant remains in violation of an outstanding consent order and agreement.

*Tire Jockey Services, Inc. v. DEP*, EHB Docket No. 2001-155-K (Opinion Issued December 17, 2001). The Board issued a limited and conditional supersedeas from one aspect of the Department’s order directed to an unpermitted tire facility to cease accepting waste tires, cease processing waste tires and to dispose of all tires within 30 days. The supersedeas was limited to those tires that had been successfully inflation tested, and have been segregated and held for reuse as tires. This limited supersedeas was conditioned on the posting of a bond in the amount of \$74,891 because of the many other tires at the facility not held for resale.

## **Takings**

*Davailus v. DEP*, EHB Docket No. 96-253-MG (Opinion issued June 6, 2001). A motion for summary judgment was denied in an action alleging a taking of the claimant’s property by the Department when it denied the claimant’s application for a permit to harvest peat from wetlands on his property. The Board held that there were significant factual matters in dispute concerning the reasonable investment-backed expectations of the claimant. There were also factual issues concerning whether the regulated wetland portion of the property should be considered separately from the entire tract for the purpose of the takings analysis in light of the Commonwealth Court’s recent decision in *Machipongo Land and Coal Co. v. Department of Environmental Resources*.<sup>1</sup>

## **Dam Safety and Encroachment Act**

*Seder v. Department of Environmental Protection*, No. 1224 C.D. 2000 (Pa. Cmwlth. 2001). In an “opinion not reported” the Commonwealth Court upheld the Board’s finding that the Department properly issued a permit under the Dam Safety and Encroachment Act and the Limited Power Act authorizing the impoundment of water near an existing dam for the purpose of generating electricity. The court rejected the contention of a down-stream property owner that his signature was required on the permit application. The court held that this signature was unnecessary because only the signature of the owner of the dam or the person exercising primary responsibility for the dam. In this case the permittee had primary responsibility for the operation of the dam. The Board’s adjudication is reported at 2000 EHB 575

## **Nutrient Management**

*Ziviello v. DEP*, EHB Docket No. 99-185-R (Opinion Issued December 20, 2001). The Board dismissed an appeal from the approval of the State Conservation

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<sup>1</sup> 719 A.2d 19 (Pa. Cmwlth. 1998).

Commission's approval of a nutrient management plan for a proposed hog farm. The Board held that the referral of plan approval from the Conservation District to the Commission was proper, that Appellants were not prejudiced by the failure of the Commission to give them a copy of the plan for approximately two months even though the application was a public record under the Right to Know Act, and the rights of Appellant's were given full effect by a *de novo* hearing before the Board. The Board found on the basis of the evidence presented at the hearing that the plan provided adequate protection against excessive nitrogen discharges to ground water and included realistic and achievable crop yields.

## **Procedural Matters**

### *Administrative Finality*

*Department of Environmental Protection v. Peters Township Sanitary Authority*, 767 A.2d 601 (Pa. Cmwlth. 2001). The Commonwealth Court reversed the Board's order that permitted a township sanitary authority to claim additional interest expense as a reimbursable cost under the Contribution by Commonwealth to Cost of Abating Pollution Act. The Court held that the township's claim for additional interest was barred by the failure of the township authority to appeal from the Department's allowance of a 1.5% rate of interest allowable by the Department in times prior to this Board's and the Court's decisions<sup>2</sup> allowing a claim for an interest rate reflecting a higher cost of money during construction.

### *Discovery*

*Lower Paxton Township v. DEP*, EHB Docket No. 2000-169-K (Opinion issued March 7, 2001). The Board denied the Department's motion for a protective order of a Department employee who had signed the letter embodying the action complained of and was involved in the decision making process. The motion was based on the "deliberative process privilege" that the Board held inapplicable under the facts of this case.

### *Intervention*

*Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, EHB Docket No. 2000-237-R (Opinion issued January 11, 2001). The Board allowed four organizations, whose members live, hike, fish and observe nature and wildlife in the vicinity of a proposed commercial development, to intervene on the side of the Department in an appeal by the proposed developer of the denial of the developer's application for a water obstruction and encroachment permit.

### *Jurisdiction*

*Dauphin Meadows, Inc. v. DEP*, EHB Docket No. 99-190-L (Opinion issued February 8, 2001). The Board held that it has the authority to retain jurisdiction incident to a remand of a case to the Department for further consideration.

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<sup>2</sup> 629 A.2d 508 (Pa. Cmwlth. 1997).

### *Reconsideration*

*Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235-C (Opinion issued January 2, 2001). The Board will not grant reconsideration of its decision either on the basis of the claim that it made a mistake in its decision or on the basis of new arguments relating to the exclusion of evidence based on privilege with respect to settlement negotiations not advanced prior to the Board's decision.

### *Standard of Review*

*Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001). The Board continued to approve as a standard of *de novo* review the standard of whether the Department's action is in conformance with the law and is otherwise reasonable and appropriate. This opinion fully articulates why the Board believes that this standard is more appropriate to the Board's powers of *de novo* review than is the "abuse of discretion" standard applicable to *judicial* review of administrative action.

*Candela v. DEP*, EHB Docket No. 2000-073-L (Opinion issued March 9, 2001). The Board granted an Appellant's motion for summary judgment because the Department has no authority under the Bluff Recession and Setback Act for "exempting" areas that have been designated by regulation as bluff recession hazard areas.

### *Standing.*

*Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001). The Board held that a person who is exposed to and comes into contact with air emissions emanating from a paper manufacturing plant has standing to appeal the Department's grant of a minor modification to its operating permit that would allow the operator to add a component of tire derived fuel for its two boilers.

*Triggs v. DEP*, EHB Docket No. 2000-240-MG (Opinion issued May 3, 2001). A motion for summary judgment based on lack of standing was denied under a special provision of the Air Pollution Control Act which gives a right to appeal to the Board to any person who participated in the public comment process for a plan approval or permit. The Appellant had commented in the public comment process for the plan approval involved, and the evidence indicated that he had a reasonable, real world concern that he would be adversely affected by the Department's action.

*Riddle v. DEP*, EHB Docket No. 98-142-MG (Opinion issued April 16, 2001). The Board denied the Department's motion for summary judgment as to the Appellant's standing to object to the Stage I Bond release on the ground that other affected landowners had not been properly notified of the mining company's application for bond release. The opinion states that a number of Board Members believe that once an Appellant has standing to pursue an appeal on one issue he need not prove that he is an aggrieved person with respect to other issues.

*Maddock v. DEP*, EHB Docket No. 2000-164-L (Opinion issued April 10, 2001). Owners of a well that allegedly had been affected by activities at a nearby mining complex have standing to challenge the Department's decision to waive collection of a reclamation bond at that complex. The well owners' claim that it is improper to waive collection of the bond covering a deep mine at the complex with ongoing treatment obligations is properly the subject of the appeal.

December 31, 2001