

SELECTED ENVIRONMENTAL HEARING BOARD AND RELATED COURT DECISIONS DURING THE YEAR 2002

Air Quality

North American Refractories Company v. Department of Environmental Protection, No. 1298 C.D. 2001, (Pa. Cmwlth. 2002). The Department reasonably interpreted its air quality regulations to require that an application for an emission reduction credit be filed within one year of the initiation of the emission reduction for which credit was sought and not from the time the Appellant intended that the reduction become permanent. The Court held that the Board was bound by this interpretation once it determined that the Department's interpretation was reasonable.

North American Refractories Company v. DEP, EHB Docket No. 99-199-L (Adjudication issued April 19, 2002). On remand, the Board rejected the challenge to the regulation that imposed the one-year deadline for an application for emission reduction credits because the Appellant failed to meet its statutory burden of proving that the deadline, although more stringent than federal law, is not reasonably necessary in order for the Commonwealth to achieve or maintain ambient air quality standards or satisfy related statutory requirements.

Wheelabrator Falls v. DEP, EHB Docket No. 2001-100-K (Opinion issued May 16, 2002). The Appellant's motion for summary judgment in an appeal from a Title V operating permit was denied because of disputed issues of fact relating to a conflict between the application of a provision of the EPA's New Source Performance Standards, incorporated by the Department's air quality regulations, and the Department's Best Available Technology Policy with respect to recourse recovery facilities issued under the provisions of Act 101. The permit limited relief for only some of these standards during periods of start-up and shutdown, but not for malfunction. Application of the New Source Performance Standards may have entitled the Appellant relief from all applicable standards during a period of malfunction as well as start-up and shutdown.

Enforcement

Farmer v. Department of Environmental Protection, No. 966 C.D. 2001 (Pa.Cmwlth. filed ____ 2002). The Court affirmed the Board's approval of a \$14,000 penalty in an Opinion Not Reported for a tank inspector's incomplete and inaccurate reports relating to seven different facilities under the Storage Tank Act. The Court said that the conduct of this experienced tank inspector was higher than basic liability requirements under the Department's penalty matrix, that the penalty was within the appropriate range for low risk violations, and that the failure to consider the liability of the facility owners in assessing the penalty against the inspector was reasonable. The Court said that this was not a case of shared responsibility for the same conduct.

HSCA/Brownfields

Chirico v. DEP, EHB Docket No. 2001-048-MG (Opinion issued January 28, 2002). The Board upheld the Department's entry into a prospective purchaser agreement for the development of commercial facilities at a contaminated site while EPA and the Department were conducting a remedial investigation and the development of a feasibility study leading to the final decision for remediation of the entire site. The Department has authority under HSCA to enter into such an agreement, and the administrative record gave no indication that the Department's action was arbitrary or capricious.

Mining

Birdsboro v. Department of Environmental Protection, 795 A.2d 444 (Pa. Cmwlth. 2002). The Commonwealth Court affirmed the Board's approval of the issuance of a noncoal mining permit in an area which the Department had designated as an exceptional value watershed provided the mine plan was redesigned to raise the floor of a section of the mine and to split the mine into two geographic and temporal areas designated as Phase 1 and Phase 2. Among other conditions of the Department's approval, mining under Phase 2 could not proceed until after the Appellant produces evidence that Phase 1 mining did not damage wetlands surface water, or groundwater. The Court upheld the Board's rejection of the testimony of one of the Appellant's witnesses, held that the Department's interpretation of its regulations was reasonable, that the Department did not err in deferring full authorization for phase 2 until the completion of the Phase 1 mining and concluded that the Appellant's rights were not denied by the authoring of the adjudication by a Board Member other than the Board Member who conducted the hearing and heard the testimony of the witnesses.

Maddock v. DEP, EHB Docket No. 2000-145-L and 164-L (Adjudication issued January 22, 2002). The Board dismissed an appeal from the renewal of a coal refuse disposal permit as well as an appeal from a related bond release where the Appellants failed to prove that the continuing use of a borehole at the permitted facility presented any threat of an adverse impact on the Appellants' well.

Riddle v. DEP, EHB Docket No. 98-142-MG (Adjudication issued March 25, 2002). The Board dismissed appeals from the Department's approval of two Stage I Bond releases because the evidence as to one property owned by the Appellant demonstrated that the bond release area was properly contoured and had adequate drainage controls. In the case of the second property, the Board found that the Appellant failed to adduce any evidence that there were ongoing violations of the Surface Mining Act or the regulations thereunder. Accordingly, the criteria for bond release had been met for both properties.

Colt Resources Inc. v. DEP, EHB Docket No. 2002-090-R (Opinion issued September 12, 2002). The Board denied a motion for partial summary judgment in an appeal of a civil penalty assessment under the Surface Mining Act. Pursuant to Section 18.4 of the Surface Mining Act and the Commonwealth Court's holding in *Kent Coal Mining Co. v. Department of Environmental Resources*, the Board determined that a party who appeals a civil penalty assessment issued under Section 18.4 may challenge both the amount of the penalty as well as the fact of the underlying violation, even where that party has not appealed the compliance order giving rise to the civil penalty.

Goetz v. DEP, EHB Docket No. 99-168-C (Consolidated with 99-220-C) (Adjudication issued October 11, 2002). The Board dismissed consolidated appeals of two compliance orders issued to Appellant by the Department pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. § 3301 *et seq.* (Noncoal Mining Act), for conducting noncoal surface mining activities on his property without complying with applicable performance standards and requirements prescribed in implementing regulations. The Board concluded that the Department met its burden of proving that the compliance orders were properly issued in that: 1) the orders conformed with applicable law; 2) the orders were supported by a preponderance of the evidence; and 3) the orders were a reasonable exercise of the Department's discretion and Appellant failed to demonstrate that he was entitled to any of the affirmative defenses provided in the Noncoal Mining Act.

George M. Lucchino v. DEP, 809 A.2d 264 (Pa.2002). The Supreme Court affirmed the Board's decision directing Appellant to pay costs and counsel fees to a Permittee pursuant to section 4(b) of the Surface Mining Conservation and Reclamation Act (SMCRA) and Section 307(b) of the Clean Streams Law. Mindful of the necessity to balance the potential chilling effect of any grant of attorney's fees against an individual litigant on the willingness of citizens to bring suits and the importance of protecting against frivolous suits the Court supported the award of fees in this case. The Court stated that the Board's findings 1) that Appellant had no basis for his appeal and was essentially using the process to harass the Department of Environmental Protection and the Permittee and 2) that the Appellant lacked standing as he would in no way be affected by the permit he sought to challenge were sufficient to warrant the award.

The Court further noted that in Act 138 of 2000, the Environmental Protection – Strategic Lawsuits Against Public Participation Act, which was enacted subsequent to the Court's grant of allocatur, the legislature defined the standard for the award of attorneys fees for the EHB as follows:

Recipients of awards. – Appropriate costs and fees incurred for a proceeding concerning coal mining activities may be awarded:

* * * *

(4) To a permittee from any party where the permittee demonstrates that the party, in bad faith and for the purpose of harassing or embarrassing the permittee:

* * * *

(ii) participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

27 Pa.C.S. § 7708(c).

Consol Pennsylvania Coal, Co. v. DEP, et al., EHB Docket no. 2002-112-L (Opinion Issued December 31, 2002). The Board modified a condition in an underground mining permit revision that authorized development mining but required that an additional permit revision be issued before full-extraction mining could proceed. The Board retained the part of the condition that made the issuance of that additional permit revision contingent upon compliance with regulations related to mining and water pollution and hydrologic balance requirements. The Board struck the part of the condition that was based upon the application of the Dam Safety and Encroachments Act and certain water discharge requirements in the regulations.

The Board determined that the Dam Safety and Encroachments Act and the permitting regulations promulgated thereunder and codified at 25 Pa. Code Chapter 105 do not apply to the subsidence impacts of underground mining beneath watercourses. The Board also stated that 25 Pa. Code Chapter 93, which applies to “discharges,” also does not apply to the subsidence impacts of underground mining. The Board further determined that the Clean Streams Law and the water-protection provisions of 25 Pa. Code Chapters 86 and 89, however, do apply to the subsidence impacts of underground mining. In permitting and regulating the subsidence impacts of underground mining, the Department is not limited to the Bituminous Mine Subsidence and Land Conservation Act and Subchapter F of 25 Pa. Code Chapter 89. A motion for reconsideration limited to the application of 25 Pa. Code Chapter 93 is pending.

Nuisance

Tinicum Township v. Delaware County Concrete, Inc., ___ A.2d___ (No. 1119 C.D. 2002, Pa. Cmwlth. filed December 13, 2002). The Commonwealth Court upheld an Order of the Court of Common Pleas of Bucks County granting Tinicum Township’s (“Tinicum”) request for a preliminary injunction to enjoin Delaware Valley Concrete (“DVC”) from blasting in their quarry operation. In 2001, after almost five years of review, the Department issued DVC a mining permit under the Non-Coal Surface Mining Conservation and Reclamation Act (Non-Coal Act), Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. § § 3301-3326. Tinicum sought an injunction to prevent DVC from blasting claiming the blasting violated its Blasting Ordinance and that the blasting constituted a private and public nuisance because of the danger to the health, safety and welfare of the community. The lower court granted the injunction finding that the blasting violated the Blasting Ordinance and that it constituted a nuisance.

On appeal DVC argued that the Tinicum Ordinance was pre-empted by the Non-Coal Act and that the trial court erred in enjoining DVC from blasting as a nuisance because as a regulated activity it could not be a nuisance *per se*. The Commonwealth Court determined that the Tinicum Ordinance was pre-empted by the Non-Coal Act, but

upheld issuance of the injunction based upon the blasting activity being a nuisance. The Commonwealth Court determined that if mining causes or has a significant potential to cause a public nuisance, it could be prohibited regardless of compliance with the applicable statutes and regulations. *Id.* at 12.

Nutrient Management

Hissong Farmstead, Inc. v. State Conservation Commission, EHB Docket No. 2001-291-L (Opinion issued November 12, 2002). The Board denied a motion for summary judgment under the nutrient-management regulations. A nutrient-management regulation that includes setback requirements provides that it applies to “new” manure storage lagoons. The appeal presented the question: “new” relative to what? The Board, in denying the operator’s motion for summary judgment, declined to adopt the operator’s position that, as a matter of law, a lagoon can only be “new” if it is built after the date chosen by the operator to submit its nutrient management plan for approval.

Regulatory Takings

Machipongo Land and Coal Company v. Commonwealth, 799 A. 2d 751 (Pa. 2002). The Supreme Court reversed the Commonwealth Court’s determination that a regulatory taking occurred when the EQB determined that certain property was unsuitable for mining under the Surface Mining Control and Reclamation Act. The Commonwealth Court had held that the coal estate in the designated area could be considered separately from the rest of the land for purposes of taking analysis and held that the owners had been deprived of all reasonable use of this coal estate. The Supreme Court held that such a “vertical” separation of the interest in land was improper for takings analysis.

The Court’s remand order first required the Commonwealth Court to define the horizontal extent of the relevant property including both the surface and mineral rights. The factors to be considered in determining the relevant parcel are, without limitation, “unity and continuity of ownership, the dates of acquisition, the extent to which the proposed parcel has been considered as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owners investment backed-expectations; and, the landowner’s plans for development.”

Secondly, the Court directed the Commonwealth Court to determine whether a *Lucas* analysis requires a finding that a taking occurred. This was required because the record was unclear as to whether some owners of the coal estate also owned a surface estate. Under this test, regulations that deprive an owner of ‘all economically beneficial or productive use of land’ are takings unless the use constitutes a public nuisance or are caused by the nature of the use and the owner could have expected that the government might prohibit it.” In addition, such a taking would not occur if state property law independently prohibits the use. As to one property owner the Supreme Court held that because that owner’s surface rights had independent value as evidenced by actual sales of acreage, timber and entering into leases for gas development, the *Lucas* test was satisfied.

Thirdly, the Court required the Commonwealth Court to conduct a traditional takings or *Penn Central* analysis in the case of all property owners to determine whether the regulation is unduly oppressive in forcing some people to bear public burdens which in all fairness and justice should be borne by the public as a whole. Subject to the issue of nuisance, the Court remanded to the Commonwealth Court for a trial on the facts relevant to this traditional taking analysis.

Finally, the Court's order required the Commonwealth Court to determine whether the proposed use could constitute a nuisance or would otherwise violate state property law. The Court said that even if the proposed regulation prohibited all economically beneficial use of the land, there would be no taking if the use could be abated or prohibited by general principles of state property law. The Court observed that a use that was acceptable when the property was purchased may become unacceptable over time so that the owner's expectations of the lawfulness of that use may no longer be reasonable. Reasonableness is ordinarily a factual issue, but whether there is a public right may be an issue of law. Referring to the common law of nuisance and the provisions of the Clean Streams Law defining a nuisance, the Court said that if the owners proposed use of the stream would unreasonably interfere with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation. In conclusion the Court's opinion stated: "Indeed, despite our conviction that private property rights are to be strongly protected, we are struck by the impropriety of taking action that would require the General Assembly to pay someone not to pollute public water or destroy public fisheries.

Sewage Planning

Perkasie Borough Authority v. DEP, EHB Docket No. 2001-267-K (Opinion issued September 17, 2002). The Board granted a joint motion for partial summary judgment and determined that the Appellant was precluded by the doctrine of administrative finality from asserting, in an appeal of a facility's Part II/Water Quality Management Permit, that the facility is not needed and that, instead, sewage should be directed to the existing treatment plant where the prior unappealed Act 537 Sewage Facilities Plan provided for construction of the new plant and the prior Part I/NPDES permit had been granted and was not appealed. In addition, the Board denied Appellant's cross-motion for summary judgment asserting that the contemplated plant would not be able to meet its permitted effluent limitations as there were disputed issues of fact, including expert opinion.

Sewage Sludge

Benjamin A. Stevens and Judith E. Stevens v. DEP, 2000-030-L (Adjudication issued March 7, 2002). In an appeal brought by landowners who live adjacent to a site used for the land application of sewage sludge, the Board upheld the procedures and standards utilized by the Department in reviewing the site's suitability. The Board rejected the argument that the site could not be reviewed in accordance with procedures applicable under the general permit for the beneficial use of sludge. In addition, the Board found that the Permittee could use the site in question because it was adequately

investigated, despite the fact that it was not possible to determine with precision exactly how much sludge was previously applied to the site.

Solid Waste

Eagle Environmental II, L.P. and Chest Township v. DEP, EHB Docket No.2001-198-MG(Opinion issued April 4, 2002). The Board denied a motion for summary judgment which presented a challenge to the validity of 25 Pa. Code § 287.127(c), a Department regulation requiring the applicant for a residual waste landfill permit to identify the social and economic benefits created by the proposed landfill, and to demonstrate that those benefits clearly outweigh the known and potential environmental harms caused by the project. The Board determined that there was statutory authority for the regulation in the Solid Waste Management Act and Act 101. The Board also upheld the constitutionality of the challenged regulation. A related cross-motion was denied because it turned on disputed issues of fact reserved for the hearing on the merits. An interlocutory appeal is pending in Commonwealth Court.

Southeastern Chester County Refuse Authority v. DEP, EHB Docket No. 2001-032-K (Opinion issued February 6, 2002). In an Opinion and Order granting summary judgment to the Department and the Intervenor, London Grove Township, the Board held that the Environmental Quality Board did not act *ultra vires* when it passed 25 Pa. Code 271.202(f), relating to the Department's acceptance of applications and completeness review. Appellant argued that 271.202(f) was *ultra vires* because it allowed the Department to not accept a landfill expansion application where there was more than five years of remaining capacity. The Board arrived at its holding after concluding that the preamble to the regulations published in the *Pennsylvania Bulletin* and the stated purposes of the Solid Waste Management Act provided the necessary authority for the regulation.

Jefferson County Commissioners v. DEP, EHB Docket No. 90-097-C (Adjudication issued February 28, 2002). The Board revoked a permit to construct and operate a municipal waste disposal facility under SWMA and Act 101 because, among other things, its location in close proximity to a County airport would attract birds and present a significantly increased risk to aircraft using the airport as a result of bird strikes, a harm to the public safety posed by the landfill in its proposed location.

Environmental & Recycling Services, Inc. v. DEP, EHB Docket No. 2000-172-C (Adjudication issued May 8, 2002). The Board sustained an appeal from the Department's denial of an application for a modification of a permit to operate a construction/demolition landfill to increase the landfill's average daily volume limit. The Board amended the permit to increase the average daily volume limit as requested because the Appellant satisfied its burden of proving that it met the requirements for approval of its application.

Maryanne Goheen v. DEP, EHB Docket No. 2002-077-L (Opinion issued August 22, 2002). The Board denied a motion for partial summary judgment in an appeal from

the renewal of a landfill's permit. The Board determined that a third-party Appellant may not challenge the legality of a host municipality's incorporation because the Pennsylvania Supreme Court has already determined that the incorporation was legal. The Board further determined that the Appellant, however, was not necessarily precluded solely as a result of the Supreme Court's holding from arguing that the fees being paid to the host municipality should not be considered as adequate mitigation for harms being suffered by parties other than that municipality.

Tire Jockey Services, Inc. v. DEP, EHB Docket No. 2001-155-K (Consolidated with 2001-041-K) (Adjudication issued December 23, 2002). The Board dismissed an appeal from an order and civil penalty assessment issued to Appellant by the Department pursuant to the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, for operating a residual waste processing facility without a permit. The Department proved that the order was properly issued, and Appellant failed to sustain challenges to the Department's authority to issue the order. Appellant's position that all of the whole tires which would come to the site are not waste within the meaning of the Solid Waste Management Act was rejected. The civil penalty was upheld as lawful and reasonable. The Board also dismissed an appeal from the denial of an application for a determination of applicability of a general permit to Appellant's waste tire processing facility. The Department had correctly determined that the application was fundamentally deficient with respect to adequate bonding. It had also correctly determined that Appellant's principal demonstrated a lack of ability or intention to comply with environmental laws and regulations as set forth in the "compliance history" provision of Section 503(c) of the Solid Waste Management Act.

Water Quality

Municipal Authority of Union Township v. DEP, EHB Docket No. 2002-043-L (Opinion issued February 4, 2002). The Board granted the Appellant's motion for partial summary judgment holding that the Department may not refuse to set otherwise applicable, technology-based effluent limits in an Appellant's NPDES permit solely because the Appellant's publicly owned treatment works is designed for and is in fact meeting more stringent limits.

Jurisdiction

Donny Beaver and Hidden Hollow Enterprises, Inc. t/d/b/a Paradise Outfitters v. DEP, EHB Docket No. 2002-096-K (Opinion issued August 8, 2002). The Board granted a Department Motion to Dismiss the appeal of a Department letter (Dkt. No. 2002-096-K) which asserted the Commonwealth's legal position that it owns the riverbed of the Little Juniata River and that the public has a right to lawfully access a portion of the river adjacent to Appellants' land. The Board determined that the letter was not an appealable agency action within the Board's jurisdiction. The Board also granted a Department Motion to Dismiss a second appeal from a subsequent letter to Appellants (Dkt. No. 2002-151-K). The second letter merely reiterated the legal positions outlined in the

original letter and similarly did not constitute an appealable action. Judge Krancer dissented asserting his position that the letters were appealable actions.

Smithtown Creek Watershed Association v. DEP, Docket No. 2002-100-MG (Opinion Issued August 15, 2002). The Board granted a motion to dismiss an appeal of a decision by the Environmental Quality Board rejecting a petition to upgrade the designation of a waterway. The Board held that it has no jurisdiction to review rulemaking decisions of the Environmental Quality Board outside the context of an action by the Department applying or otherwise implementing the regulation.

Standard of Review

Eighty-Four Mining Co. v. United Mine Workers of America, et al., No. 22 C.D. 2002 (Pa. Cmwlth. 2002). In an unreported opinion, the Commonwealth Court, affirmed a Board decision that sustained the United Mine Workers of America's appeal and rescinded the Department's grant of a variance from pre-shift examination requirements. On appeal to the Commonwealth Court, Eighty-Four Mining contended that the Board erred when it failed to defer to the Department's statutory interpretation of pre-shift examination requirements and that the Board's order was not supported by substantial evidence. In upholding the Board's determination, the Court stated that the Board was required to review the evidence *de novo* and, contrary to the Department, found that the requested variance did not afford protection substantially equal to or greater than the applicable requirements. The Court distinguished this case from *Department of Environmental Protection v. North American Refractories Company*, 791 A.2d 461 (Pa. Cmwlth. 2002) stating that this was a case of statutory interpretation not regulatory interpretation and that unlike in *North American Refractories* the Board found the Department's interpretation unreasonable. The Court determined that the Board acted within its discretion and that the decision was supported by substantial evidence.

Procedure

Amendments to Notice of Appeal

Wallace Township, v. DEP, EHB Docket No. 2002-113-MG (Consolidated with 2002-114-MG, 2002-115-MG, 2002-123-MG, 2002-124-MG, and 2002-126-MG) (Opinion issued October 8, 2002). The Board granted a Joint Motion for Leave to amend notices of appeal from the Department's approval of a water withdrawal permit to a drinking water supplier to add three specific alternative sources, not specifically mentioned in the notices of appeal, to the general claim that the Department improperly failed to consider alternative sources of water supply. The Board concluded that the Permittee would not be prejudiced by this amendment under the particular circumstances of the consolidated appeals.

Expedited Hearings

Pennsylvania Trout v. DEP, EHB Docket No. 2002-251-R (Opinion issued November 13, 2002). The Board denied a motion to shorten the discovery period from 90 days to 60 days; to expedite the filing of expert reports and Dispositive Motions; and to schedule a merits hearing approximately four to five months from the filing of an Appeal where the opposing party had presented valid reasons why such an expedited schedule would infringe upon its right to due process.

Expert Reports

Township of Paradise v. DEP, EHB Docket No. 2001-024-K (Opinion issued February 5, 2002). The Board granted a motion to strike two expert reports served after the deadline for the filing of Appellant's expert reports.

Mootness

James E. Brumage v. DEP, EHB Docket No. 2001-212-R (Opinion issued May 16, 2002). The Board dismissed a third party appeal of a permit authorizing the removal of coal within 150 feet of a natural gas well as moot where the coal removal had already taken place, the Appellants did not seek a supersedeas of the permit, and the Board was unable to grant the relief requested by the Appellants.

Motions in Limine

Clearview Land Development Co. v. DEP, EHB Docket No. 2002-191-K (Opinion issued May 16, 2002). The Department's motion *in limine* was denied because it sought the disposition of the Appellant's claim that it could contest liability for violations of SWMA in a penalty assessment case.

Motions for Nonsuit

Naomi R. Decker v. DEP, EHB Docket No. 2001-107-L (Opinion issued July 9, 2002). The Board granted a motion for nonsuit where the Appellant failed to present any evidence of record that she had standing where the question of standing was at issue. Appellant failed to call either lay or expert witnesses and did not testify herself. Appellant's case consisted only of a series of documents. Following a motion for nonsuit in a matter where standing was at issue the Board concluded that the limited evidence of record did not support any of the criteria prerequisite to standing.

Petitions to Intervene

Consol Pennsylvania Coal v. DEP, EHB Docket No. 2002-112-L (Opinion issued October 10, 2002). The Board denied without prejudice a citizens group's petition to intervene where its petition was not verified. The Board granted another local citizens

group's petition to intervene in a coal company's appeal from conditions placed in a Department approved revision to its coal mining activity permit because the petitioner has a direct, immediate, and substantial interest in the revision area which is credibly alleged to be adversely affected by the permitted activity.

Standing

Perkasie Borough Authority v. DEP, EHB Docket No. 2001-267-K (Opinion issued February 6, 2002). In an Opinion and Order denying the Permittee's, Hilltown Township Water and Sewer Authority, Motion to Dismiss or in the alternative Motion for Summary Judgment the Board held that it could not conclude at the motion stage, on the basis of the pleadings and the record as it then stood, that the Appellant lacked standing. The Appellant water and sewer authority appealed the issuance of a Part II NPDES permit for the construction by the Permittee of its own treatment facility. The Appellant alleged, among other things, that the construction of the plant would force the rates that it, as a constituent municipal authority of the regional authority, pays to the regional authority for treatment at the regional authority's plant to increase due to the loss of Permittee's flow.

Summary Judgment

Milco Industries Inc. v. DEP, EHB Docket No. 2001-179-L (Consolidated with 2001-188-L and 2001-194-L)(Opinion issued August 20, 2002). In an appeal from an enforcement order issued because odors allegedly associated with a wastewater discharge to a Municipal Authority's sewer system were alleged to be escaping a sewer line and causing citizen complaints, the Board denied a motion for summary judgment. Where a motion for summary judgment sought to sustain an appeal from an enforcement order because the Department could not make out a *prima facie* case that it had the legal authority to issue the order, the motion must be denied where the Department can demonstrate a *prima facie* case that it had the requisite authority under any one provision of any one statute or regulation.

James Kleissler v. DEP, EHB Docket No. 2001-295-L (Opinion issued September 6, 2002). The Board denied motions for summary judgment in a third-party appeal from the issuance of storm water and oil and gas permits for a well field in the Allegheny National Forest due to genuine issues of disputed fact regarding every issue. Disputed factual issues and incomplete legal arguments prevented the issuance of summary judgment on such issues as to whether the oil wells should have been permitted due to their alleged impact on the forest, the habitats of sensitive wildlife, and receiving streams. The record was also disputed and incomplete on such questions as which wells should have been covered by which permits, whether the Department should have considered the cumulative impact of multiple permitted segments, and the significance of alleged deficiencies in the processing of the permit applications.

Wheelabrator Falls, Inc. v. DEP, EHB Docket No. 2002-100-K (Opinion issued October 21, 2002). The Board denied Appellant's second motion for summary judgment

because there was a threshold disputed factual issue on the extent to which Appellant's previous air plan approvals and operating permits provided start-up, shut-down and malfunction relief (SSM Relief) which factual issue, in turn, impinged upon the possible application of administrative finality in this appeal of the scope of SSM Relief in Appellant's Title V air permit. In addition, Wheelabrator had not demonstrated that it was entitled to judgment as a matter of law with respect to the question of the meaning of the term "publication" as used in Section 509 of Act 101 with respect to the Best Available Technology (BAT) Policy for resource recovery facilities.

Supersedeas

Tinicum Township v. DEP, EHB Docket No. 2002-101-L (Opinion issued September 18, 2002). A supersedeas of an NPDES permit renewal was granted where the appellant demonstrated that the permittee would not suffer any injury and the environment would not be harmed if a supersedeas was granted, that local residents and the hydrologic regime were suffering irreparable harm and that the harm may have been exacerbated in the absence of a supersedeas, and that the appellant had a substantial likelihood of proving that the Department materially erred by not considering the environmental impact of pumping in accordance with the renewed permit's terms.

Diane Lois Mazze v. DEP, EHB Docket No. 2002-193- MG (Consolidated with 2002-196-MG and 2002-197-MG) (Opinion issued October 30, 2002). The Board denied a petition for supersedeas of the Department's approval of the application of biosolids consisting of treated sewage sludge to farmland pursuant to the Department's regulations. The Appellant, who alleged high sensitivity to chemical exposures and resides near this farmland, failed to provide convincing evidence that she will be subject to irreparable harm by the Department's action or that she is likely to succeed in overturning the Department's approval after a hearing on the merits of the appeal.