

## SELECTED ENVIRONMENTAL HEARING BOARD AND RELATED COURT DECISIONS OF 2003

### Enforcement

The Commonwealth Court affirmed a civil penalty assessed by the Board in the amount of \$258,500 against an earthmoving contractor for violations of the Clean Streams Law, in *Leeward Construction, Inc. v. Department of Environmental Protection*, 821 A.2d 145 (Pa. Cmwlth. 2003). The violations arose from the contractor's failure to comply with erosion and sedimentation control plans related to the construction of a Walmart. The court rejected the contractor's argument that the plans it had submitted to the Department were not possible to comply with and that numerous violations of the CSL and failure to abide by several stop-work orders issued by the Department justified the amount of the penalty.

Although the Board ultimately dismissed the appellant's appeal of a penalty assessment, the Board agreed that the Department erred by applying a state-wide, across-the-board minimum penalty assessment, without reference to the specific circumstances of the appellant's violation. In *B&W Disposal Inc. v. DEP*, 2003 EHB 456, the Board considered the penalty for violations of the solid waste law which occurred during "Operation Clean Sweep." In spite of the Department's legal error, the Board found that the evidence adduced at the hearing supported the assessment of a \$ 6,000 civil penalty.

In *Keinath v. DEP*, 2003 EHB 43, the Board upheld a civil penalty in the amount of \$19,000. This penalty was assessed against a building contractor who harassed and threatened a Department inspector who was investigating an open burning complaint. Harassment of an inspector is a violation of the Air Pollution Control Act.

A compliance order directing an appellant to submit a restoration plan after he unlawfully diverted a watercourse and filled in a pond on his property was largely upheld in *Strubinger v. DEP*, 2003 EHB 247. Although the appellant's activity was clearly unlawful and remediation necessary, the Department failed to prove that it was necessary or reasonable to require the appellant to return the watercourse to its original location.

In *Starr v. DEP*, 2003 EHB 360, the Board granted the Department's motion for summary judgment and dismissed an appeal from an order asserting violations of the Solid Waste Management Act relating to the unpermitted disposal of waste tires by the appellants. The Board found that the appellants, who had been litigating the Department's attempts to order the clean-up of the site for over 15 years, had failed to raise any genuine issue of material fact or any legitimate defense to the Department's order. The Board further found that the terms of the order were reasonable and appropriate under the circumstances.

The Board held that many violations of the Solid Waste Management Act had been established by operation of collateral estoppel in *Clearview Land Development Co. v. DEP*, 2003 EHB 398. Other violations were established by evidence adduced at the hearing before the Board, therefore a civil penalty in the amount of \$59,500 was reasonable and appropriate.

## **Mining**

In *Maple Creek Mining, Co. v. DEP*, 2003 EHB 34, the Board held that under the Mine Subsidence Act a mine operator appealing a Department order to compensate a landowner for damages must deposit the compensation amount in an interest-bearing escrow account within sixty days of receiving the Department's order. Failure to do so will result in the dismissal of the appeal.

The Board denied a petition for attorneys fees in *United Mine Workers of America v. DEP*, 2003 EHB 256. Although the appellant had been successful on the merits on their underground mining appeal, the statutory provision under which the appellant sought fees and costs, 27 Pa. C.S. § 7708 (Act 138 of 2000), applied only to proceedings involving surface mining and not underground mining.

The Board held that Department a letter declining to order a surface mining operator to replace a farmer's water supply was an appealable action and directed the Department to require the mine operator to supply a farmer with an alternate supply of water. In *Schneiderwind v. DEP*, 2003 EHB 274,<sup>1</sup> the Board rejected the Department's argument that the letter was merely an exercise of the Department's prosecutorial discretion. Instead, the Board found that it was an action which affected a protected property right of the appealing farmer, since a purpose of the water replacement provisions of the surface mining legislation was the protection of water supplies.

## **Sewage Planning**

By granting a motion for summary judgment, the Board sustained an order of the Department which required the appellant-borough to take specific actions to abate continuing violations of the Sewage Facilities Act, in *Burnside Borough v. DEP*, 2003 EHB 305. The borough did not contest the factual findings of the Department concerning on-going discharges of raw sewage on property located within the borough from a wildcat sewage system. Accordingly, the Board concluded that there were no issues of material fact in dispute. Further the Department's order requiring the borough to take specific actions to abate the discharges after ten months of inaction on the part of the borough was a reasonable exercise of the Department's authority under the Sewage Facilities Act.

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<sup>1</sup> This adjudication has been appealed by both the Department and the mine operator to the Commonwealth Court.

## Solid Waste

In *Tri-County Industries, Inc. v. Department of Environmental Protection*, 818 A.2d 574 (Pa. Cmwlth. 2003)), the Commonwealth Court affirmed the Board's conclusion that the so-called "harms/benefits analysis" embodied in 25 Pa. Code § 127.127, is consistent with the Solid Waste Management Act and Act 101. Section 127 requires that the benefits of a project "clearly outweigh the known and potential environmental harms." The court further held that economic and social considerations are proper subjects in evaluating whether a particular permit action meets the balancing test required by the regulations.

In *Browning-Ferris Industries v. Department of Environmental Protection*, 819 A.2d 148 (Pa. Cmwlth. 2003)(*en banc*), the Commonwealth Court reversed an adjudication of the Board which rescinded a permit modification issued by the Department allowing a landfill to increase its average daily volume by 2,000 tons per day because the benefits of the modification did not outweigh the harms. The court held that the Board erred by failing to include the economic benefit to the municipalities of a faster payment of the host fees which would be paid as a result of the capacity increase in its harms and benefits analysis under 25 Pa. Code § 271.127(a). Accordingly, the court held that the benefits of the permit modification outweighed the harms and reinstated the permit modification, dismissing the appeal of the citizen-appellants.

Both *Tri-County* and *Browning-Ferris* have been appealed to the Supreme Court. That court granted *allocatur* in *Tri-County*.<sup>2</sup> However, by order dated December 11, 2003, the court has declined to either grant or deny the request for appeal pending its decision in *Tri-County* and *Eagle Environmental II v. DEP*.<sup>3</sup>

The Commonwealth Court also affirmed the Board in *Leatherwood, Inc. v. Department of Environmental Protection*, 819 A.2d 604 (Pa. Cmwlth. 2003) After 28 days of hearing the Board had concluded that the Department erred by issuing a solid waste permit to a landfill operator because the operator had failed to include an adequate plan for the mitigation of bird strikes. The proposed landfill was to be sited in close proximity to a local airport. Local government officials who appealed the permit adduced sufficient testimony concerning the risks posed to incoming aircraft from birds who would be attracted to the landfill, a hazard which the permittee failed to adequately address.

A decision by the Board that a suspended solid waste permit was void was affirmed by the Commonwealth Court in *Eagle Environmental, L.P. v. DEP*, 833 A.2d 805 (Pa. Cmwlth. 2003), because a solid waste regulation explicitly provides that where no solid waste is processed or disposed under the permit within five years of issuance,

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<sup>2</sup> 263 MAP 2003

<sup>3</sup> *Eagle II*, 261 MAP 2003; *Browning-Ferris*, 252 MAP 2003.

that permit is void. The Department's order suspending the permit and ensuing litigation did not supersede the regulatory time limit.

The Commonwealth Court reversed the Board in *Tire Jockey Inc. v. DEP*, 836 A.2d 1026 (Pa. Cmwlth. 2003), and held that a facility may not need a residual waste permit for the sizing, shaping and sorting of used tires, if the resulting materials were recycled and thereby exempted from the definition of waste. The court rejected the argument that the processor's activities did not fall within the recycling "exception" of the waste regulations simply because the tire materials were not used or reused at the processor's facility. The appeal was remanded to the Board for further findings relating to the existence of a market for the tire products and whether they will be used or reused as ingredients in an industrial process or as an effective substitute for a commercial product. The Supreme Court granted the petition for allowance of appeal filed by the Department on October 5, 2004.

The Board, in *Dauphin Meadows, Inc. v. DEP*, 2003 EHB 163, held that where a permit is remanded to the Department for further consideration and the applicant substantially revises its application, the Board on appeal, will apply the regulation that was in effect at the time of the Department's final decision and not the regulation that was in effect at the time the original permit application was filed before the initial appeal. Further, the environmental assessment of the proposed permit modification, expanding the landfill, is limited to the subject of the proposed modification itself, and not the original landfill.

In *Philadelphia Waste Services, Inc. v. DEP*, 2003 EHB 323, the Board dismissed the appeal of a waste facility operator from a denial of its permit application based on its proximity to a park. The Board held that although the location of the proposed facility had been used in the past for various waste-related activities, it was not "grandfathered" from the prohibition of waste facilities within 300 yards of a park.

## **Takings**

In *Davailus v. DEP*, 2003 EHB 101, the Board held that the Department's denial of a permit to harvest peat from wetlands was not a taking. Specifically, the Board found that the permit denial was neither unduly oppressive, nor did it deprive the landowner of all economic value of the parcel. The permit denial only interfered with some of the claimants investment expectations, the claimants were permitted to remove a significant portion of the peat from the property before the permit denial, the property has retained substantial value, and the permit denial promoted the vital public interest in the preservation of wetland habitat.

## **Board Procedure**

### *Administrative Finality*

The Board dismissed the appeal of a permit transferee in *Jai Mai, Inc. v. DEP*, 2003 EHB 349, who had challenged permit conditions of NPDES and Water Quality Management permits. The Board held that there had been no changes to either permit. Even though the permit transferee was not affected at the time of the original permit issuance, it is nevertheless bound by the terms and conditions of the permit which became final when the permit was issued in the transferor's name, and may not use the transfer as a vehicle to attack the conditions of the permit.

### *Appealable Actions*

The Board dismissed the appeal by the County of Berks of a notice of violation issued by the Department which noted violations at its wastewater treatment plant. Noting that such notices by the Department represent "one of the many provisional, interlocutory, decisions" and did not require the County to take any action, and therefore was not an appealable action. *County of Berks v. DEP*, 2003 EHB 77.

A letter issued by DEP to a township sewage enforcement officer, which commented on a pre-permit application for a proposed alternative sewage disposal system was not a final appealable action over which the Board has jurisdiction. The Board in *Boggs v. DEP*, 2003 EHB 389, observed that the letter did not mandate any action on the part of the township merely expressed the Department's "belief" that the proposal "may be" deficient. Therefore the appeal was dismissed.

### *Discovery*

The Board granted a motion for a protective order filed by the Pennsylvania Fish and Boat Commission in *Hanson Aggregates v. DEP*, 2003 EHB 1. In this appeal of dredging permits, the permittee sought discovery of information regarding the site-specific locations of threatened and endangered fish species. The Board agreed with the Fish Commission that such information was highly confidential and that the permittee failed to show that such information was necessary to its prosecution of the case.

In a single judge opinion in *New Jersey Department of Environmental Protection v. DEP*, 2003 EHB 220, the Board held that documents held by the NJ DEP may be protected from discovery by a deliberative process privilege. The opinion cautioned, however, that the privilege is unlikely to apply to documents held by the Pennsylvania Department of Environmental Protection.

### *Intervention*

The Board denied intervention to the United Mine Workers' of America in an appeal involving miner safety issues, *TJS Mining, Inc. v. DEP*, 2003 EHB 507. The UMWA failed to articulate its specific interest in the outcome of the litigation, other than a general interest in the precedent that might be established.

The Board made an unusual ruling by denying a petition to intervene filed at the eleventh hour by a school district in an appeal from an encroachment permit approval. The Board denied the motion, which was filed one month before the hearing in *Pennsylvania Trout v. DEP*, 2003 EHB 590, because the school district had had ample opportunity to intervene earlier in the proceedings and to permit such late intervention would cause significant prejudice to the other parties in the appeal.

### *Mootness*

In *Boggs v. DEP*, 2003 EHB 177, the Board dismissed an appeal of a letter concerning a proposal by the appellant to implement an alternative sewage disposal system on his property. The appeal was moot because the Department issued a second letter which unequivocally and completely withdrew the letter under appeal and the Board concluded that there were no other potential adverse collateral consequences from the first letter.

In *Tinicum Township v. DEP*, 2003 EHB 493, the Board dismissed the appeal of a municipality from permits which had been issued to a quarry operator when the operator surrendered the permits to the Department upon the sale of the property to another state agency. The Board noted that no other relief could be granted by the Board and that the township had an adequate forum in the court of common pleas to address claims by the mining operator that the litigation was improperly filed in the law suit filed in that tribunal.

### *Summary Judgment*

The Board granted summary judgment dismissing the appeal of a *pro se* appellant who objected to the Department's issuance of an NPDES permit for the discharge of storm water from construction activities. The Board in *Goetz v. DEP*, 2003 EHB 16, observed that the permittee's motion was well pled and supported by record evidence, yet the appellant's response was not supported by affidavits, or any citations to record evidence controverting the evidence cited in support of the motion or a challenge to the credibility of any witness. Therefore there was no evidence at all supporting any of the appellant's objections or creating any issue of material fact in dispute.

### *Standing*

The Board held in *Greenfield Good Neighbors Group Inc. v. DEP*, 2003 EHB 555, that a citizens group failed to adduce sufficient evidence at the hearing in support of their standing to appeal a water quality management permit. Specifically the Board found that they failed to prove that they would be harmed in a definite way by the activity approved in the permit, a spray irrigation field. None of their wells were in the area that would be affected by spray irrigation. Nor did any of the individual members of the group identify a harm to an aesthetic or recreational interest cause by the spray irrigation field.

### *Supersedeas*

In a consolidated matter involving three third-party appeals from a revision to a Noncoal Surface Mining permit issued by the Department, the Board denied the appellants' petitions for supersedeas because appellants failed to meet the criteria for issuance of the extraordinary remedy of superseding a presumed valid permit. The permit allowed mining of limestone and dolomite to a depth of 950 feet mean sea level at a quarry. All appellants were concerned that the pumping of ground water associated with lowering the depth of the quarry to 950 feet mean sea level would have a detrimental impact on water resources in the area, particularly Roaring Spring. Appellants failed to demonstrate by a preponderance of the evidence that they would suffer irreparable harm from the mining operation pending a final adjudication of the consolidated appeals. Further, appellants failed to meet their burden of proving a likelihood of success on the merits. *Borough of Roaring Spring v. DEP*, 2003 EHB 825.

### *Timeliness of Appeal*

The Board held that a notice in the *Pennsylvania Bulletin* was not reasonably calculated to provide notice of a Section 401 Certification for a road construction project proposed by the Pennsylvania Department of Transportation in *Solebury Township v. DEP*, 2003 EHB 208. Specifically the notice only stated that the Department of Environmental Protection had approved an environmental assessment, but did not also state that its approval also constituted approval of a Section 401 Certification. Therefore the appellants did not have adequate notice of the action for the purpose of the appeal period.

The Board held that a permittee was not on notice that a compliance order which was handed to him in a meeting with the Department was the final order which started the "appeal clock." In *Laurel Land Development v. DEP*, 2003 EHB 500, the Board held that the permittee was led to believe that he could persuade the Department to change its position and additionally, the order was later mailed to the permittee by certified mail. Therefore it was not unreasonable for him to conclude that the certified letter was the final Department action from which he was required to appeal.